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13 **IRVINE RANCH WATER DISTRICT**

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **FOR THE COUNTY OF ORANGE**

16 IRVINE RANCH WATER DISTRICT, a
17 California public agency,

18 Plaintiff and Petitioner,

19 v.

20 ORANGE COUNTY WATER DISTRICT, a
21 California public agency; ALL PERSONS
22 INTERESTED IN THE MATTER OF
23 ORANGE COUNTY WATER DISTRICT
24 RESOLUTION NO. 16-4-37; and
25 DOES 1 to 20, inclusive,

26 Defendants and Respondents.

**EXEMPT FROM FILING FEES
UNDER GOVERNMENT CODE § 6103**

ELECTRONICALLY FILED
Superior Court of California,
County of Orange

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Clerk of the Superior Court
By Trucmy Vu, Deputy Clerk

Case No.: 30-2016-00858584-CU-WM-CJC

**PETITION FOR WRIT OF
MANDATE AND COMPLAINT
FOR REVERSE VALIDATION
AND DECLARATORY RELIEF**

Judge James J. Di Cesare

1 Plaintiff and Petitioner Irvine Ranch Water District, for its Petition and Complaint
2 against Defendants and Respondents Orange County Water District, *et al.*, alleges as follows:

3 **INTRODUCTION**

4 1. Irvine Ranch Water District (“IRWD”), through its customers, has invested
5 hundreds of millions of dollars in a water recycling system intended to reduce its reliance on
6 imported water supplies. In 2015 alone, the IRWD produced over 22,000 acre feet of recycled
7 water, offsetting its demand for imported water, a recognized source of supplemental water.
8 However, as a result of acts taken by the local groundwater basin manager, Orange County
9 Water District (“OCWD”), the benefit of IRWD’s investment in its recycled water system is
10 being shifted away from IRWD’s customers. In setting one of its annual assessments, OCWD
11 does not allow IRWD (or any other groundwater producer) to account for recycled water as a
12 legitimate supplemental source of water in calculating its total water use and how much
13 groundwater it can produce from the Orange County Groundwater Basin (“Basin”) without
14 paying additional assessments – thus effectively penalizing IRWD for producing recycled
15 water. OCWD’s practice is unlawful since it: (1) is contrary to OCWD’s own authorizing
16 legislation, (2) violates state policy which strongly supports the development of recycled water
17 resources, (3) imposes substantial additional financial costs on IRWD, and (4) threatens to
18 extinguish certain vested water rights of IRWD without any compensation.

19 2. Water supply diversity is important for all water agencies, especially urban
20 agencies in drought vulnerable Southern California. To varying degrees, nearly all water
21 agencies in Orange County rely on imported water supplies to meet customer demands. Water
22 agencies in northern Orange County, including IRWD, also have access to local groundwater
23 from the aquifer that underlies this part of the County. Local groundwater is more reliable and
24 less expensive than imported water, but groundwater is still a limited resource and this
25 particular Basin has been in an “overdraft” condition for many years. To reduce its dependence
26 on less reliable and more expensive imported water, IRWD took the initiative starting in the
27 1960s to develop a third source of water – recycled water. In light of the current statewide
28 historic drought, the investment made by IRWD’s customers in a recycled water system,

1 estimated in excess of \$650 million, would seem to be a wise and prudent investment. In fact,
2 the availability of multiple water sources allows for optimizing the management of all of these
3 water sources, including groundwater in the Basin. However, OCWD's policy and practice
4 work against those resource management objectives.

5 3. IRWD's investment in a recycled water system has been, and continues to be,
6 penalized by OCWD's actions due to additional charges being assessed on the local
7 groundwater produced by IRWD. In calculating the quantity of water that each groundwater
8 producer agency is allowed to pump without paying additional assessments, OCWD applies a
9 percentage (the "Basin Production Percentage") to each agency's "Total Water Demand."
10 Unfortunately, OCWD's current policy specifically excludes recycled water demands from
11 what it considers to be an agency's Total Water Demand. This creates the illusion that
12 customer demands that are being met by recycled water have somehow disappeared, instead
13 of recognizing that these demands are actually being met by a supplemental supply of water –
14 recycled water. But for this alternative supplemental supply, IRWD would be required to
15 purchase more supplemental imported water to meet its customer demands. Contrary to sound
16 policy and logic, if IRWD purchased more imported water instead of using recycled water
17 supplies, IRWD would be allowed to pump more groundwater without paying OCWD's
18 additional assessment. That additional assessment increases IRWD's cost of using local
19 groundwater, which unfairly shifts the value of IRWD's recycled water program away from
20 IRWD's customers.

21 4. IRWD's customers have invested in the development of a recycled water system
22 knowing that water is too valuable to be used just once. IRWD's recycled water system is
23 held up by the State of California as an example of excellent environmental stewardship and
24 good resource management. OCWD's current policy and practice of excluding recycled water
25 demands from IRWD's Total Water Demand unfairly affects IRWD's ability to pump low cost
26 local groundwater and creates an arbitrary penalty on the use of recycled water, which shifts
27 the value of IRWD's recycled water program to others who did not pay for that program. This
28 OCWD policy and practice is discriminatory, contrary to State water policy and law, and

1 financially harmful to IRWD's customers.

2 **THE PARTIES**

3 5. Plaintiff and Petitioner IRWD is a California water district formed and existing
4 pursuant to Section 34000 *et seq.* of the California Water Code. IRWD was formed in 1961
5 for the purpose of obtaining a water supply for municipal and irrigation uses. IRWD is a retail
6 water agency serving over 104,000 water service connections within its service area, which
7 includes all of the City of Irvine and portions of the cities of Tustin, Newport Beach, Costa
8 Mesa, Orange and Lake Forest as well as unincorporated areas of Orange County.

9 6. Defendant and Respondent OCWD is a special district of the State of California
10 created and formed under the Orange County Water District Act ("OCWD Act") (Water Code-
11 Appendix, Chap. 40; Chapter 924 of the Statutes of 1933, as amended). OCWD has the
12 statutory responsibility to take certain actions to manage, replenish and protect the quality and
13 quantity of the subterranean groundwater supplies of the portion of the Basin within the
14 boundaries of OCWD.

15 7. The true, names and capacities of the Respondents and Defendants identified as
16 DOES 1-20 are unknown to IRWD, and IRWD will amend this Complaint to insert the true
17 names and capacities of those fictitiously named Respondents and Defendants when they are
18 ascertained. IRWD is informed and believes, and on that basis alleges, that at all times relevant
19 to this action, each of the Respondents and Defendants, including those fictitiously named,
20 were the agents or employees of each of the other Respondents and Defendants, and while
21 acting within the course and scope of such employment or agency, took part in either the acts
22 or omissions alleged in this Complaint.

23 **JURISDICTION AND VENUE**

24 8. This Court has jurisdiction in this case pursuant to Code of Civil Procedure
25 Sections 860 and 1085, and Section 44 of the OCWD Act (Water Code- Appendix, Chap. 40;
26 Chapter 924 of the Statutes of 1933, as amended).

27 9. Venue is proper in this Court pursuant to Code of Civil Procedure Sections 392,
28 394, 395 and 860.

1 GENERAL ALLEGATIONS

2 10. This lawsuit challenges two different aspects of OCWD’s unlawful and
3 improper treatment of recycled water in implementing the OCWD Act. First, IRWD
4 challenges OCWD’s adoption and application of its 2016-2017 basin equity assessment
5 (“Annual Basin Assessment”) and “Basin Production Percentage.” The Annual Basin
6 Assessment is a monetary assessment levied on groundwater produced from the Basin in
7 excess of the Basin Production Percentage, which is a groundwater production limit set by
8 OCWD. In calculating the Basin Production Percentage and determining the amount of
9 Annual Basin Assessment that a producer may owe, OCWD improperly refuses to consider
10 recycled water as a “supplemental source” of water, even though OCWD considers imported
11 water from the Metropolitan Water District of Southern California (“MWD”) as a
12 supplemental source of water. By treating recycled water in this way, OCWD improperly
13 reduces the amount of groundwater that IRWD can produce within the “Basin Production
14 Percentage.” OCWD’s exclusion of recycled water from consideration as a “Supplemental
15 Source” of water violates the plain terms of the OCWD Act and arbitrarily imposes a
16 substantial penalty on the use of recycled water in contravention of state policy.

17 11. Second, OCWD has adopted an improper practice of prohibiting the “unlawful”
18 export of groundwater outside the OCWD district, which OCWD lacks the statutory authority
19 to do so under the OCWD Act. Further, OCWD’s practice relies on a methodology that
20 inaccurately determines the potential export of groundwater outside the boundaries of the
21 OCWD, which methodology also involves the calculation of each producer’s “Total Water
22 Demand.” In determining Total Water Demand, OCWD again penalizes the use of recycled
23 water by not allowing IRWD to include its recycled water as part of its Total Water Demand.
24 The inability to properly account for recycled water as part of IRWD’s Total Water Demand
25 threatens to curtail pumping of groundwater to which IRWD has a vested right, and interferes
26 with IRWD’s ability to plan for the future needs of customers within IRWD’s service area but
27 outside of the OCWD district.

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1 **The OCWD Act and Groundwater Production in the Basin**

2 12. The Basin underlies the northern and central portions of Orange County. The
3 rights of certain cities, districts and other water producers within the Basin to pump
4 groundwater have not been fully adjudicated. Since 1933, with the adoption of the Water Code
5 – Appendix 40 (hereinafter referred to as the “OCWD Act”), the Basin has been managed by
6 OCWD for the benefit of municipal, agricultural and private groundwater producers.

7 13. Pursuant to its authority under Sections 23 and 27 of the OCWD Act, OCWD
8 establishes and collects “Replenishment Assessments” as a means of purchasing imported
9 water to replenish pumped groundwater and funding capital projects for the purpose of
10 replenishing the Basin. OCWD’s Replenishment Assessments are established annually by
11 OCWD and apply to every acre foot of groundwater produced from the Basin. In this action,
12 IRWD is not challenging OCWD’s calculation or levying of Replenishment Assessments.

13 14. Groundwater is the lowest cost water for producers in Orange County. However,
14 groundwater’s low cost compared to other sources creates an inherent threat of further
15 overdrafting of the Basin, a condition in which a basin is eventually depleted due to pumping
16 above the rate of groundwater replenishment. To discourage the overuse of groundwater,
17 OCWD has certain authority under the OCWD Act to impose economic disincentives on such
18 overuse in favor of a balanced use of “supplemental” sources of water.

19 15. For most of the cities and special districts that produce groundwater from the
20 Basin to supply water to the public, groundwater is a portion, but not all, of the agency’s water
21 supply. Public water suppliers in Orange County have the ability to purchase water imported
22 from MWD to help meet their Total Water Demand. The primary water sources of MWD’s
23 imported water are the Colorado River and the State Water Project with diversions located in
24 the Sacramento-San Joaquin Delta. Some agencies have additional imported sources and other
25 contractual arrangements for additional water supplies. Recycled water is a significant water
26 source for IRWD, which produces its own recycled water. As described in greater detail
27 below, IRWD’s recycling process takes sewage wastewater, treats it to usable levels, and
28 transports it via pipelines and storage facilities for use for irrigation, toilet flushing and

1 industrial purposes.

2 **State Water Policy Strongly Supports Water Recycling**

3 16. In March 2013, State Water Resources Control updated the State of California's
4 Recycled Water Policy ("Policy"). The opening statement of the Policy notes that the state is
5 facing an unprecedented water crisis in the face of lengthy periods of drought and dry years,
6 coupled with continued population growth. The Policy highlights water recycling as a crucial
7 component of the State's overarching policy goal of achieving a sustainable water future
8 despite the daunting challenges that face California.

9 17. The Policy's central premise is that the "State Water Board and Regional Water
10 Boards will exercise the authority granted to them by the Legislature to the fullest extent
11 possible to encourage the use of recycled water." (Policy, at p. 1.) The Policy adopts a goal
12 of increasing "the use of recycled water over 2002 levels by at least one million acre-feet per
13 year (afy) by 2020 and by at least two million afy by 2030." (*Id.*) The Policy goes so far as
14 to say "The State Water Board hereby declares that, pursuant to Water Code sections 13550 *et*
15 *seq.*, it is a waste and unreasonable use of water for water agencies not to use recycled water
16 when recycled water of adequate quality is available and is not being put to beneficial use."
17 (Policy, at p. 1.)

18 18. State water policy thus strongly supports the use of recycled water. Recycled
19 water is considered a "new" water source that utilizes water that would otherwise go to waste,
20 is highly reliable because our population produces a relatively constant, consistent stream of
21 wastewater, and is drought resistant for the same reason. The importance of recycled water
22 during times of drought cannot be overstated because in extended periods of drought,
23 allocations of imported water sources such as the State Water Project are reduced, causing
24 water producers who have not developed alternative Supplemental Sources (such as recycled
25 water) to turn to using additional groundwater resources. Yet, OCWD's actions to exclude
26 recycled water as a Supplemental Source imposes a penalty on IRWD and its maximum use
27 of recycled water as a drought resistant supply.

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1 19. It is no coincidence, in fact, that when the State Water Resources Control Board
2 imposed mandatory drought restrictions on urban water suppliers to comply with the
3 Governor's April 1, 2015 Drought Emergency Executive Order calling for a total reduction of
4 25% of potable water use, *IRWD was placed in the third lowest category of individual use*
5 *reductions of only 16%*. That lower cutback in water use was directly attributable to both the
6 water use efficiency achieved by IRWD and the recycled water available from its water
7 recycling program.

8 **IRWD's Water Recycling Program**

9 20. Recycled water is a significant water source for IRWD, which has been
10 producing its own recycled water since the 1960's. IRWD began producing recycled water
11 from its sewage to make use of water resources that would have otherwise been discharged to
12 the ocean. As mandated by law for public health reasons, the sewage wastewater discharges
13 that are ultimately recycled come to IRWD through closed pipe and sewer systems designed
14 to keep the wastewater isolated from entering the natural environment within the watershed.
15 IRWD is also mandated to isolate and transport its recycled water to IRWD's customers
16 through closed pipeline systems.

17 21. IRWD recycles wastewater at its Michelson Water Recycling Plant and the Los
18 Alisos Water Recycling Plant, which have the combined capacity to produce nearly 35.5
19 million gallons of recycled water per day. During fiscal year 2015-16, IRWD produced 22,866
20 acre feet of recycled water and supplied an additional 9,275 acre feet of non-potable water to
21 IRWD's customers via its recycled water system. For the twelve month period that ended June
22 30, 2015, of the water supplied by IRWD, approximately 19% was imported water,
23 approximately 58% was groundwater and native stream flows, and approximately 23% was
24 recycled water—making IRWD one of the largest retail water supplier producers of recycled
25 water in the state.

26 22. As of December 31, 2015, the District had approximately 509 miles of recycled
27 water mains and a recycled water storage capacity of approximately 5,400 acre feet. Since the
28 1960s, IRWD has invested in excess of \$650 million in its recycled water system. MWD has

1 provided Local Resources Program funding for water produced from IRWD's recycled water
2 system in order to offset IRWD's dependence on supplemental import water from MWD.
3 IRWD has developed plans to continue its program to expand its recycling infrastructure,
4 diversify treatment options, and increase system reliability. However, OCWD's practice of
5 excluding recycled water as a Supplemental Source imposes a penalty on IRWD (or any
6 groundwater producer in the Basin) that plans to expand the use of recycled water.

7 **OCWD's 2016-2017 Annual Basin Assessment**

8 23. This lawsuit challenges OCWD's adoption of its Resolution No. 16-4-37, which
9 established the Basin Production Percentage and the rate per acre foot of the Annual Basin
10 Assessment (the "Basin Assessment Rate") for fiscal year 2016-2017. Resolution No. 16-4-
11 37 was adopted at a regular public meeting of OCWD's Board of Directors on April 20, 2016.

12 24. In adopting OCWD Resolution No. 16-4-37, OCWD improperly excluded
13 IRWD's recycled water from consideration as a "Supplemental Source" in calculating the
14 "Basin Production Percentage." The Basin Production Percentage is defined by the OCWD
15 Act as a ratio: the numerator is "all water to be produced from groundwater supplies within
16 the District," and the denominator is "all water to be produced by persons and operators within
17 the district from supplemental sources and from groundwater within the district during the
18 ensuing water year." (OCWD Act, § 31.5, sub. (c)(2) (emphasis added.) Thus, the product of
19 dividing total groundwater use into the aggregate use of all supplemental sources and
20 groundwater, expressed as a percentage, is the statutory Basin Production Percentage.

21 25. Supplemental Sources of water are defined broadly by the OCWD Act to be
22 "sources of water outside the watershed of the Santa Ana River....such as, but not limited to,
23 water produced from the Metropolitan Water District of Southern California," *i.e.*, not
24 groundwater. (OCWD Act, § 31.5, sub. (c)(1) (emphasis added.) Therefore, supplemental
25 source water is not limited to imported water from MWD, but also includes recycled water,
26 which is produced, treated and distributed in systems that are isolated from the watershed and
27 therefore "outside the watershed of the Santa Ana River."

28 ///

1 26. The Annual Basin Assessment disincentivizes over-pumping of groundwater by
2 adding an additional cost to every acre foot of groundwater pumped by a producer in excess
3 of the Basin Production Percentage. Each acre foot of groundwater production over the Basin
4 Production Percentage is subject to the Annual Basin Assessment (unless such production is
5 exempt from that assessment pursuant to a contract with OCWD). The Basin Assessment Rate
6 that applies to each acre foot of groundwater pumped over the Basin Production Percentage
7 should be calculated “to equalize the cost of water to all persons and operators within the
8 district.” (Refer to Section 31.5(b) of the OCWD Act.) In practice, OCWD sets the Basin
9 Assessment Rate for each producer by equalizing the cost of each acre foot of groundwater
10 production only with the higher cost of importing one acre foot at the “Full Service Tier 1
11 Treated” rate of the “MWD”.

12 27. Thus, the Annual Basin Assessment for a producer is determined according to
13 the following formula:

$$14 \qquad \text{Total Water Demand (Groundwater + Supplemental Sources)} \times \text{BPP} = Y$$

$$15 \qquad \text{Actual Groundwater Pumping} - Y = \text{Pumping over BPP}$$

$$16 \qquad \text{Pumping over BPP} \times \text{Basin Assessment Rate} = \text{Annual Basin Assessment}$$

17
18
19 28. This formula highlights the importance of identifying what water sources are
20 considered “Supplemental Sources,” which is central to the calculation of the Basin Production
21 Percentage as well as the amount of the Annual Basin Assessment owed by each producer.
22 Simply put, if recycled water is considered a Supplemental Source and therefore included in a
23 producer’s Total Water Demand (which is statutorily required under the OCWD Act), then the
24 Basin Production Percentage is applied to a higher number, which means that the amount of
25 groundwater that can be pumped without paying the Annual Basin Assessment is also higher.
26 Thus, the more water from Supplemental Sources utilized by a producer in meeting its Total
27
28

1 Water Demand, the more groundwater can be pumped free of the Annual Basin Assessment.
2 Conversely, if recycled water is not considered to be a Supplemental Source, then the producer
3 is penalized for using recycled water, a penalty that takes the form of paying the Annual Basin
4 Assessment on a lower amount of groundwater produced.

5 29. OCWD Resolution No. 16-4-37 adopted a Basin Assessment Rate of
6 \$525 per acre foot for IRWD for the 2016-2017 water year. Accordingly, a few thousand
7 acre feet of groundwater production over the Basin Production Percentage can cost IRWD
8 millions of dollars in additional assessments. To put this in context, IRWD produced over
9 22,000 acre feet of recycled water in 2015-2016. The substantial portion of that water that
10 was used in the OCWD boundary is not considered by OCWD to be a Supplemental Source
11 of water, which results in IRWD being penalized by not being able to pump an equitable
12 amount of groundwater within the Basin Production Percentage. That penalty can cost IRWD
13 millions of dollars in the Annual Basin Assessment per year. Even though the Annual Basin
14 Assessment is intended to encourage groundwater producers to utilize Supplemental Sources
15 of water for at least the portion of their Total Water Demand that exceeds the Basin
16 Production Percentage, the Annual Basin Assessment is applied so as to penalize IRWD for
17 using recycled water. Indeed, if IRWD had used Full Service Tier-1 water from MWD instead
18 of using its recycled water, it would not have incurred any Annual Basin Assessments for
19 water year 2015-2016. Yet, there is no sound policy rationale for distinguishing between
20 recycled water and imported MWD water in this manner, and the resulting penalty on recycled
21 water runs contrary to the state policy that strongly encourages the increased use of recycled
22 water.

23 **“Supplemental Sources” Necessarily Include Recycled Water**

24 30. The definition of Supplemental Sources under the OCWD Act as any “sources
25 of water outside the watershed of the Santa Ana River” has broad application. (OCWD Act,
26 § 31.5, sub. (c)(1).) The significance of the use of the entire Santa Ana River watershed in the
27 definition, which exceeds the boundaries of the Basin, is that the river watershed is the source
28 of all water that naturally recharges the Basin (OCWD conducts artificial or engineered

1 recharge of the Basin). Thus, under the plain meaning of this definition, any water that does
2 not come from a source in the watershed that naturally replenishes the Basin are Supplemental
3 Sources. In other words, sources that do not naturally recharge the Basin are “supplemental”
4 to the groundwater supply.

5 31. Under the OCWD Act, imported water from the MWD is listed as one example
6 of a Supplemental Source. However, the definition of “Supplemental Sources” in the OCWD
7 Act is clear that imported water is not the only Supplemental Source because it states the
8 definition includes sources “*such as, but not limited to* water produced from the Metropolitan
9 Water District of Southern California.” OCWD Act, §31(c)(1) (emphasis added).
10 Furthermore, the definition of the Basin Production Percentage includes a denominator that
11 includes all water to be produced by persons and operators within the district from
12 supplemental sources and from groundwater during the ensuing water year. (OCWD Act,
13 § 31.5(c)(2).)

14 32. A number of Supplemental Sources of water are not specifically named in the
15 statute, but OCWD still recognizes that water as Supplemental Sources because those sources
16 do not naturally replenish the Basin. For example, as stated in OCWD’s Engineer’s Report
17 dated February 2016, which is statutorily required for determining the Basin Production
18 Percentage, OCWD treats the following sources of water as Supplemental Sources: (1) water
19 produced by certain desalters (a process akin to recycling where salty water as opposed to
20 wastewater is treated for reuse), and (2) groundwater pumping from within the Santa Ana
21 River watershed in upstream basins that is delivered to OCWD for recharge at OCWD’s
22 groundwater recharge facilities. Even though those sources of water, like recycled water, are
23 outside of the watershed within the meaning of the OCWD Act, OCWD still does not consider
24 recycled water to be a Supplemental Source.

25 33. Yet, recycled water clearly fits within the plain language of the statutory
26 definition of a Supplemental Source of water. Recycled water comes from “outside the
27 watershed of the Santa Ana River,” from wastewater discharged into the sewers, collected,
28 and treated by IRWD using facilities that are isolated from the watershed. (OCWD Act, §

1 31.5, sub. (c)(1).) Untreated sewage is clearly not a source flowing into and naturally
2 recharging the Basin. In fact, beginning in the 1960's, if IRWD had not captured and treated
3 that sewage water, the water would have been discharged to the ocean.

4 34. Further, without IRWD's substantial investment in recycled water infrastructure,
5 IRWD would need to use more imported water to meet its customers' water demands. IRWD's
6 production of recycled water offsets the use of imported water from MWD, which imported
7 water is considered a Supplemental Source. Because recycled water offsets the use of that
8 other Supplemental Source of water, recycled water must also be treated as a Supplemental
9 Source.

10 35. Instead of treating recycled water as a Supplemental Source, however, OCWD
11 has manufactured a new and separate category for recycled water: "neutral" water. The
12 category of neutral water finds no support in the statutory definition of Supplemental Sources
13 or elsewhere in the OCWD Act. Indeed, the neutral category has no basis in reality. Water is
14 either from the watershed or it is not. A water source cannot, as a matter of policy, practice or
15 logic, be both from and not from the watershed, and thus taken out of existence for water
16 source accounting purposes.

17 36. Furthermore, excluding recycled water from the definition of Supplemental
18 Sources in the context of the Annual Basin Assessment is inconsistent with other provisions
19 of the OCWD Act. OCWD's "general powers," which encompass the power to impose an
20 Annual Basin Assessment and establish the Basin Production Percentage, are set forth in
21 Section 2 of the OCWD Act. Under Section 2, subsection (6)(m), OCWD is required to:

22 Determine in the manner herein provided the amount and percentage of water
23 produced from the groundwater supplies within the district to the total amount
24 of water produced within the district by all persons and operators, including the
25 total amount of water from supplemental sources. OCWD Act, § 2(6)(m).

26 This requirement contains no suggestion that "total" means anything other than "all"
27 sources of water supply – including recycled water. The Basin Production Percentage
28 definition reads similarly and requires the consideration of "all" water that is a "supplemental

1 source.” (OCWD Act, § 31.5(c)(2).) Yet OCWD improperly excludes recycled water as a
2 Supplemental Source.

3 37. By failing to properly include recycled water as a Supplemental Source and
4 instead manufacturing the false category of “neutral” water, OCWD imposes a recycled water
5 penalty on producers such as IRWD in the form of higher payments of the Annual Basin
6 Assessment than should be required. This practice has the effect of shifting the benefits of
7 IRWD’s recycled water program away from IRWD’s customers and toward other groundwater
8 producers who have not dedicated the considerable resources required to develop recycled
9 water as a useable resource. IRWD, in fact, is one of the few public water suppliers in Orange
10 County to produce recycled water. IRWD is the second largest recycled water producer behind
11 only OCWD, which developed its recycled water program to also offset the use of imported
12 water to replenish the Basin. (OCWD does not pay its own Annual Basin Assessment, nor
13 does it impose a penalty on the recycled water it produces for recharge or injection into the
14 Basin.)

15 **OCWD’s Treatment of Recycled Water Impairs IRWD’s Use of Credits Earned for**
16 **Other Water Treatment Efforts**

17 38. Beyond drastically raising the Annual Basin Assessment owed by IRWD,
18 OCWD’s exclusion of recycled water from the definition of Supplemental Sources has
19 additional negative fiscal impacts on IRWD. IRWD has developed certain projects that
20 produce and treat impaired groundwater, which, by contract with OCWD, entitles IRWD to a
21 credit against the Annual Basin Assessment. Because the impaired groundwater produced by
22 IRWD from these projects requires extensive treatment, IRWD is allowed a credit against the
23 Annual Basin Assessment based on a portion of the project’s capital and operating costs.
24 However, IRWD has been forced to apply some of those credits to avoid the payment of the
25 Annual Basin Assessment that was improperly inflated as a result of the improper exclusion
26 of recycled water from IRWD’s Total Water Demand. Thus, IRWD has been improperly
27 deprived of the intended benefit of credits, which were awarded because of IRWD’s treatment
28 and beneficial use of otherwise unusable groundwater.

1 **OCWD’s Unlawful And Flawed Attempt To Regulate Groundwater “Export”**

2 39. OCWD’s improper refusal to allow recycled water to be counted as a
3 Supplemental Source in calculating Total Water Demand creates an additional problem for
4 IRWD, which relates to OCWD’s unlawful attempt to regulate the export of groundwater
5 outside the OCWD district.

6 40. Section 2(9) of the OCWD Act, states that OCWD may “commence, maintain,
7 intervene in, defend, and compromise, in the name of the district, or otherwise, and to assume
8 the costs and expenses of any and all actions and proceedings now or hereafter begun” to
9 “prevent unlawful exportation of water from the district.” (OCWD Act, § 2(9).) No other
10 provision of the OCWD Act addresses unlawful exports of Basin groundwater, and the statute
11 does not define the term “unlawful exportation.” Moreover, the OCWD Board does not appear
12 to have a formal policy associated with preventing the exportation of groundwater.

13 41. Thus, the OCWD Act neither grants nor recognizes any authority on the part of
14 OCWD to unilaterally impose any restrictions or prohibitions on the exportation of
15 groundwater to locations outside the OCWD district. Rather, under the clear terms of its
16 enabling statute, OCWD must rely on the established jurisdiction of the Superior Court to
17 prohibit or limit such activity based on law other than the OCWD Act.

18 42. Despite lacking the legal authority to do so under the OCWD Act, OCWD has
19 adopted a practice of attempting, unilaterally and without a court order, to prohibit producers
20 within the OCWD district from “unlawfully exporting” groundwater. OCWD has informed
21 IRWD of its position that any such alleged exportation of groundwater outside the OCWD
22 district is prohibited.

23 43. OCWD has also adopted a flawed method of determining when an “exportation”
24 occurs. OCWD automatically concludes that a producer has “unlawfully exported” water
25 outside the OCWD district any time pumping groundwater inside the OCWD boundary
26 exceeds the producer’s stated Total Water Demand within the OCWD district. However,
27 OCWD’s method of determining unlawful exports takes into account imported water as a part
28 of Total Water Demand but not recycled water. Because not counting recycled water creates

1 the fiction of removing recycled water from IRWD’s Total Water Demand despite its actual
2 use by IRWD, OCWD’s flawed export methodology results in a determination that IRWD has
3 “exported” groundwater. Under OCWD’s methodology, the opposite conclusion would be
4 reached, namely no export of groundwater, if IRWD used imported water instead of recycled
5 water since OCWD includes imported water in the calculation of Total Water Demand for
6 purposes of determining a groundwater export.

7 44. IRWD has thus been put in the position that it must choose between seeking a
8 judicial determination that its use of groundwater resources is legal or to curtail groundwater
9 pumping to which it has a vested right. Notably, a portion of the IRWD’s service area is
10 located outside of OCWD’s boundaries. The OCWD district does not cover the entire
11 hydrological groundwater Basin, as determined by the California Department of Water
12 Resources. Based on those facts, a 1998 judicial decision determined that IRWD has the right
13 to pump groundwater and serve that water to its customers outside of the OCWD boundaries.
14 (*Irvine Ranch Water District v. Orange County*, OCSC Case No. 79-58-27, Sept. 29, 1998).

15 45. OCWD’s flawed method of determining exports and its practice of asserting the
16 authority to prohibit allegedly unlawful imports threatens IRWD’s recognized and vested right
17 to produce groundwater from the Basin and serve that water to its customers outside of
18 OCWD’s boundaries in accordance with applicable law. Under the OCWD Act, OCWD lacks
19 the ability to limit established water rights or curtail parties’ production of groundwater from
20 the Basin without paying just compensation. Indeed, Section 77 of the OCWD Act provides
21 that no provision in the Act “shall be so construed as to affect or impair the vested right of any
22 person... to the use of water.”

23 46. In fact, but for IRWD’s voluntary use of conservation credits, such an outcome
24 would have occurred. In water year 2013/2014, OCWD determined that IRWD would
25 “unlawfully” export groundwater outside of OCWD. However, if OCWD had counted
26 recycled water as Supplemental Water, or if IRWD had used imported water instead of
27 recycled water for the same use, no “export” would have been determined under OCWD’s
28 improper methodology.

1 47. In order to resolve the issue, IRWD had to use conservation credits from the
2 following year, which are treated as Supplemental Source water by OCWD. IRWD's
3 conservation credits were earned due to IRWD's water conservation efforts. Yet, IRWD
4 should not have to use its conservation credits to compensate for OCWD's arbitrary and
5 unlawful refusal to consider recycled water as a Supplemental Source. OCWD's action
6 resulted in a premature and unlawful loss of IRWD's conservation credits.

7 48. OCWD's practice of calculating exported groundwater by unlawfully refusing
8 to account for recycled water, coupled with threats to curtail vested groundwater rights based
9 on its flawed method of determining exports is arbitrary, capricious and contrary to the
10 requirements of law.

11 **FIRST CAUSE OF ACTION**

12 **(Reverse Validation Action – CCP § 863)**

13 **(Against All Defendants)**

14 49. IRWD hereby incorporates by this reference the allegations contained in
15 paragraphs 1 through 48, inclusive.

16 50. Section 44 of the OCWD Act authorizes an action to test the validity of any
17 assessment imposed by OCWD under Chapter 9 of (commencing with Section 860) of Title
18 10 of Part 2 of the CCP (the "Validation Statutes"). The Validation Statutes, commencing with
19 CCP § 860, outline the various rights and procedures associated with a validation action. CCP
20 § 860 states: "A public agency may upon the existence of any matter which under any other
21 law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring
22 an action in the superior court of the county in which the principal office of the public agency
23 is located to determine the validity of such matter. The action shall be in the nature of a
24 proceeding in rem."

25 51. If the relevant agency does not file such an action, any interested person may
26 file an action to determine the validity of the agency's conduct. (CCP § 863.) IRWD qualifies
27 as an interested person under the Validation Statutes and is thus authorized to bring this action
28 to determine the validity of the Basin Assessment and its application, and is furthermore

1 directly impacted and prejudiced by the determinations of OCWD alleged above. IRWD is
2 informed and believes and on that basis alleges that OCWD has not filed a validation action
3 to determine the validity OCWD Resolution No. 16-4-37.

4 52. IRWD brings this reverse validation action under CCP § 863 to challenge the
5 validity of OCWD Resolution No. 16-4-37, “Establishing the Basin Production Percentage,
6 Production Limitation, and Determining the Need and Desirability to Levy Basin Assessments
7 and Amount Thereof, which determined the Basin Assessment,” adopted by OCWD’s Board
8 of Directors at its meeting on April 20, 2016.

9 53. OCWD Resolution No. 16-4-37 is unlawful and should be invalidated for the
10 reasons set forth in paragraphs 1 through 48 above, including OCWD’s failure to treat recycled
11 water as “Supplemental Source” water in calculating the Basin Production Percentage,
12 IRWD’s Total Water Demand, and the amount of Annual Basin Assessment owed by IRWD,
13 all in clear contravention of the terms of OCWD Act and state policy.

14 54. IRWD has exhausted all applicable non-judicial remedies through, among other
15 actions, the submittal of a comment letter to OCWD prior to the hearing on the adoption of
16 OCWD Resolution No. 16-4-37. This reverse validation action is timely pursuant to CCP §§
17 860 and 863.

18 **SECOND CAUSE OF ACTION**

19 **For CCP § 1085 Writ of Mandate**

20 **(Against OCWD)**

21 55. IRWD hereby incorporates by this reference the allegations contained in
22 paragraphs 1 through 48 inclusive.

23 56. CCP § 1085, subdivision (a), authorizes this Court to issue a writ of mandate “to
24 compel the performance of an act which the law specifically enjoins.”

25 57. Under CCP § 1085, mandamus can compel public officials to perform an official
26 act required by law. Mandamus may issue to compel an official both to exercise his discretion
27 (if he is required by law to do so) and to exercise it under a proper interpretation of applicable
28 law.

1 58. An abuse of discretion within the meaning of CCP § 1085 occurs when, among
2 other actions, an agency improperly interprets and enforces a statute. OCWD's approval and
3 application of OCWD Resolution No. 16-4-37 based on a definition of "Supplemental Source"
4 that excludes recycled water is contrary to the statutory definition of Supplemental Source in
5 Section 31.5 of the OCWD Act. Therefore, OCWD's exclusion of recycled water from the
6 definition of Supplemental Source is an improper interpretation of an applicable law.

7 59. IRWD petitions the court for a writ of mandate or preemptory writ to rescind
8 OCWD Resolution No. 16-4-37 and conform its activities to the court's ruling relating to the
9 proper interpretation of the OCWD Act.

10 **THIRD CAUSE OF ACTION**

11 **(For Declaratory Relief)**

12 **(Against All Defendants)**

13 60. IRWD hereby incorporates by this reference the allegations contained in
14 paragraphs 1 through 48 inclusive.

15 61. An actual controversy exists between IRWD and OCWD regarding substantial
16 questions pertaining to OCWD's authority to unilaterally, and without the intervention of a
17 court, impose a restriction on "exports" of groundwater from the Basin under the OCWD Act.
18 IRWD asserts that the OCWD Act does not give OCWD the authority to take such action. An
19 actual controversy also exists between IRWD and OCWD regarding substantial questions
20 pertaining to what constitutes an "unlawful export" under the OCWD Act. IRWD contends
21 "unlawful exports" lack a statutory definition under the OCWD Act and can only be
22 interpreted in accordance with some other statute or common law. IRWD is informed and
23 believes and based thereon contends that OCWD disputes IRWD's contentions as to both
24 issues above.

25 62. A judicial declaration of the parties' rights and obligations in connection with
26 OCWD's legal authority to impose an unlawful export restriction is necessary and appropriate
27 at this time so that the parties may ascertain their respective rights and obligations as to each
28 other, which would allow IRWD to conduct appropriate planning to serve its customers.

1 63. A judicial declaration of the parties’ rights and obligations in connection with
2 the legal definition of an “unlawful export” under the OCWD Act is necessary and appropriate
3 at this time so that the parties may ascertain their respective rights and obligations as to each
4 other and allow IRWD to conduct appropriate planning to serve its customers.

5 **FOURTH CAUSE OF ACTION**

6 **(For Declaratory Relief)**

7 **(Against OCWD)**

8 64. IRWD hereby incorporates by this reference the allegations contained in
9 paragraphs 1 through 48 inclusive.

10 65. An actual controversy exists between IRWD and OCWD regarding substantial
11 questions pertaining to the methodology adopted by OCWD to determine what constitutes an
12 “export” of groundwater from the OCWD district (which controversy exists because OCWD
13 improperly asserts that it has the authority to prohibit groundwater exports in the first place).
14 IRWD asserts that the OCWD’s method of determining what portion of a Basin producer’s
15 Total Water Demand is “exported” from the Basin lacks merit and is legally invalid. In the
16 alternative, IRWD contends that OCWD’s method of determining exports must include
17 recycled water as a component of Total Water Demand. IRWD is informed and believes and
18 thereon alleges that OCWD disputes these contentions.

19 66. A judicial declaration of the parties’ rights and obligations in connection with
20 the legality of OCWD’s method of determining what constitutes an “export” from the Basin
21 is necessary and appropriate at this time so that the parties may ascertain their respective rights
22 and obligations as to each other.

23 67. A judicial declaration of the parties’ rights and obligations in connection with
24 OCWD’s method of determining what constitutes a producer’s “exports” of groundwater from
25 the Basin is necessary and appropriate at this time so that the parties may ascertain their
26 respective rights and obligations as to each other.

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28 ///
29

1 **PRAYER FOR RELIEF**

2 WHEREFORE, IRWD prays for judgment in favor of IRWD and against Defendants
3 as follows:

4 **On the First Cause of Action**

5 1. For this Court to enter a judgment determining that the acts, actions, findings,
6 determinations of OCWD in adopting and applying OCWD Resolution No. 16-4-37 so as to
7 exclude recycled water from "Supplemental Sources" violates the terms of the OCWD Act,
8 and, therefore, OCWD Resolution No. 16-4-37 is void, invalid and must be set aside.

9 **On the Second Cause of Action**

10 2. That this Court issue a writ of mandate or peremptory writ directing OCWD and
11 its Board of Directors to set aside and void any approvals related to the implementation of
12 Resolution No. 16-4-27, and to henceforth conform its activities to the order of the Court by
13 treating recycled water as a Supplemental Source of water within the meaning of Section 31.5,
14 sub. (c)(1) of the OCWD Act.

15 **On the Third Cause of Action**

16 3. For a judicial declaration as requested in the third cause of action.

17 **On the Fourth Cause of Action**

18 4. For a judicial declaration as requested in the fourth cause of action.

19 **On All Causes of Action**

20 5. For costs of suit and attorneys' fees under CCP § 1021.5 or any other applicable
21 statute;

22 6. For such other and further relief as the Court deems just and equitable.

23
24 DATED: June 17, 2016

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25
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