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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

8-11

September 1, 1992

To: Board of Directors (Legal & Claims Committee--Action)
(Water Problems Committee--Action)
From: General Manager and General Counsel
Subject: Reclaimed Water for Agricultural Purposes in the
Local Projects Program

Report

At committee meetings in August 1992, Board members pointed out that agriculture is an important part of the Southern California economy, much of it entirely dependent on imported water and that permanent high yield crops cannot be deprived of water without significant economic loss. Accordingly, staff was requested to develop information that would aid the Board in framing a policy for service of agricultural water by the Local Projects Program and, in particular, the General Counsel was requested to provide a memorandum cataloging policy alternatives for Metropolitan's participation in Local Projects serving agricultural uses with a view of permitting the Board to assess the risks attendant to involvement in such projects. This joint memorandum responds to these requests.

Background

In Metropolitan Water District Report 1018 (October 1990), annual agricultural crop value in Metropolitan's service area was estimated to be about \$2 billion. The bulk of this is in Riverside and San Diego counties. By category about 25 percent of agricultural production is in nursery crops, 25 percent in permanent tree crops, 40 percent is dairy-related and the balance is in row crops. In 1989, agriculture within Metropolitan's service area used about 400,000 acre-feet of water or ten percent of regional water use. The report also noted that agricultural water use has steadily declined from 550,000 acre-feet in 1970 and is projected to decline further as urbanization occurs to 4-5% by the year 2010.

In the past, the Board has recognized the importance and value of agriculture in Southern California. For instance, the Incremental Interruption and Conservation Program reflects the Board's (and member agencies') past intent to avoid significant economic losses resulting from the ongoing drought

by permitting each member agency to decide how to deal with the water shortage in its area, rather than mandating a curtailment of agricultural water service.

Metropolitan's Local Projects Program was established to conserve water that might otherwise be unavailable to Metropolitan's service area with the objective of augmenting the regional water resources available to serve municipal and domestic demands. Nevertheless, Metropolitan currently does permit some reclaimed water to be served for agricultural purposes under the Local Projects Program where it is important to the success of the project and is incidental to municipal and industrial uses or where there is a probability the use will convert to municipal and industrial use as the area urbanizes. Of the 140,000 acre-feet which Metropolitan is committed to purchase under the Local Project Program, 1,700 acre-feet, or 1.2 percent is expected to be used for agriculture in the year 2000.

Available Options

The following options include a range of policy alternatives from which the Board may wish to choose one as the guideline for future local projects:

1. Local Projects That May Serve Any Beneficial Purpose

One alternative is to remove any distinction between municipal and domestic purposes and other beneficial uses, such as agriculture, as a basis for Metropolitan participation in the Local Projects Program. Under this option, participation in the Local Project Program would be available to replace any long-term demand on Metropolitan on the theory that this frees up imported supply for Metropolitan's municipal and domestic service. The predicate for this policy would be that beneficial uses other than municipal and domestic are, in fact, a demand on Metropolitan; that Metropolitan has accommodated this demand even in times of shortage, particularly in the case of agriculture; and that vested rights may be claimed on behalf of users who have become dependent over the years on the availability of water for such beneficial uses.¹ The legal

¹ Additional arguments that may be useful in specific circumstances could include representations made to certain areas in connection with their annexation to Metropolitan; and that certain uses, while agricultural under traditional legal principles, are, in fact, municipal because the use takes place in or closely adjacent to a municipality so that the benefits, in

risks² attendant to this policy are a) that Metropolitan's participation might be enjoined as not authorized by Metropolitan's Enabling Act, and b) that Metropolitan might be barred from making payments either at all, or to the extent that the payments fund the development of water to serve agriculture. In addition, there is a risk that the local agency's funding for its project might be jeopardized to the extent it is based on Metropolitan's participation and that any payments made by Metropolitan might be subject to recovery from the local agency to the extent they are attributable to developing agricultural water; or that such payments might be recovered from Metropolitan's directors who authorized the participation.³

2. Local Projects That May Serve Agriculture So Long As They Also Serve Any Municipal and Domestic Demands

This is a variant of the previous alternative but avoids the requirement of the current policy (see 3 below) that the project does now, or would in the future, provide predominantly municipal and domestic service. Rather, the project could become part of the Local Projects Program so long as there is some incidental municipal and domestic use. The risks are similar to those outlined under paragraph 1 above.

terms of green space, inure to the inhabitants of that municipality.

² The reference to "legal risk" in this memorandum refers solely to the risk arising from the participation in a Local Project with the intent to serve agriculture. It does not address other risks attendant to such participation, which would include such risks as those arising from other terms and provisions of any contract and risks attendant to project financing.

³ Under certain circumstances public officials can be held personally liable for ultra vires expenditures. (Stanton v. Mott (1976) 17 Cal.3d 206 [130 Cal.Rptr. 697].) It is unlikely that a public official could be indemnified by the public agency for an illegal expenditure. (Murphy, *Liability of Public Officials for the Improper Expenditure of Public Funds* (1977) 65 Cal.L.Rev. 482.)

3. Local Projects That Will Further Metropolitan's Purpose of Obtaining Water to Serve Municipal and Domestic Demands

Under this policy, which is the existing policy, agricultural water demand can be served by a local project if it can be shown that Metropolitan's participation in the project will significantly further Metropolitan's purpose of obtaining a supply of water for municipal and domestic uses. Historically, this has meant that Metropolitan has been willing to participate in facilities which serve incidental or interim agricultural purposes when the project in the long term will meet significant municipal and domestic demands. A rule of thumb requiring that no more than 25 percent of the initial project demand be for agricultural purposes has been followed, with projects expecting to use above 25 percent for agricultural demands evaluated on a project-by-project basis. Projects with anticipated agricultural demands as high as 41 percent and as low as one percent have been approved for participation in Metropolitan's Local Projects Program. Continued implementation of the Local Projects Program under the current policy entails minimal legal risk.

4. Local Projects to Serve Municipal and Domestic Purposes Exclusively

One other alternative would be to limit the Local Projects Program to facilities which serve municipal and domestic water exclusively. Under that scenario, no water would be served from the Local Projects for agricultural purposes in either the long or short run. This alternative, insofar as we can discern, carries no legal risk.

Summary

High value agriculture is important to the Southern California economy and cannot be deprived of water without significant economic loss. In the light of past opinions of the District's General Counsel, definitive assurance that the use of reclaimed water for agricultural purposes will carry no legal risk can only be secured through legislation. Clearly, therefore, any change in the District's policy for serving agriculture through the Local Project Program should take the risks discussed in this memorandum into account. In addition, of course, the Board should also assess any political risks resulting from proceeding without first obtaining clarifying or enabling legislation.

Board Committee Assignments

This letter is referred for action to:

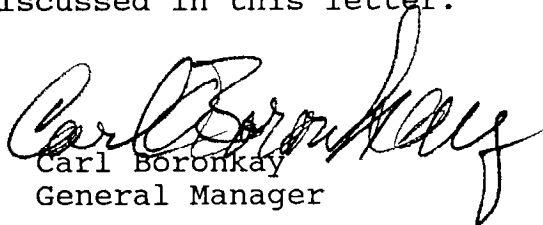
The Legal and Claims Committee because of its interest in the Metropolitan Water District Act, pursuant to Administrative Code Section 2461(f); and

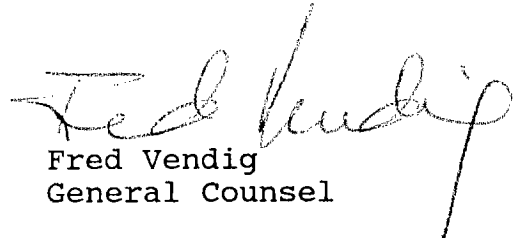
The Water Problems Committee because of its duty to study, advise and make recommendations with regard to conditions governing sale of Metropolitan's water, pursuant to Administrative Code Section 2481(c).

Recommendation

WATER PROBLEMS COMMITTEE AND LEGAL AND CLAIMS COMMITTEE FOR ACTION.

It is recommended that the Board reevaluate the policy under which Metropolitan's Local Projects Program will be implemented in the future in the light of the options and issues discussed in this letter.


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General Counsel