

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

February 26, 1993

To: Board of Directors
From: Assistant General Counsel
Subject: Legal Department Report for February 1993

This report discusses significant matters with which the Legal Department was concerned during February 1993.

A. Proceedings in Which Metropolitan Is a Party

1. Garvey Reservoir Restoration (Monterey Park v. MWD)

On February 8, 1993, the court denied the City of Monterey Park's (City) motion to consolidate both of its suits against Metropolitan into a single suit for all purposes, including trial. Consequently, the City's initial suit under the California Environmental Quality Act (CEQA) challenging the adequacy of Metropolitan's Environmental Impact Report (EIR) for the Garvey Reservoir Project (Project) will be tried on March 1, 1993.

On March 4, 1993, the court will consider Metropolitan's motion for judgment against the City in its second suit alleging that the Division of Safety of Dams (DSOD) rather than Metropolitan, should have prepared the EIR, and that Metropolitan's September 15, 1992 approval of the Project violated the Brown Act because the City was not allowed adequate time for comments to the Board on September 15, 1992. DSOD has also asked the court for judgment in its favor with respect to the allegation that it should have prepared the EIR.

2. Bay/Delta Hearings (D-1630)

Metropolitan, in conjunction with a number of other urban state water contractors, filed its comments on the State Water Resources Control Board's (SWRCB) proposed D-1630 on February 16, 1993. The comments are more fully discussed in

the General Manager's letter to Board members dated February 18, 1993. Among the legal issues addressed in the comments are the requirement that SWRCB expeditiously prepare an environmental impact report analyzing the effects of the decision, SWRCB's obligation to insure that the impacts of the decision protect the public interest in the state's water supplies, and the duty to impose responsibility for protection of Bay/Delta resources on all users of the estuary. Metropolitan staff also joined in preparation of comments filed by the California Urban Water Agencies. SWRCB has scheduled a hearing for March 8, 1993, to consider adoption of the proposed decision.

As reported below in Item B6, the proposed decision is already the subject of litigation.

3. Golden Gate Audubon Society v. SWRCB

The California Supreme Court has denied the State Water Resources Control Board's (SWRCB) petition to review the trial court's decision in the above action allowing broad discovery from SWRCB members. In this litigation, plaintiffs are attempting to overturn the SWRCB's adoption of its May 1991 Water Quality Control Plan (Plan) for the Bay/Delta Estuary. They assert, in part, that the Plan is invalid because SWRCB members engaged in allegedly improper ex parte contacts with parties involved in the proceeding. Plaintiffs successfully obtained an order from the trial court allowing broad discovery of SWRCB members and SWRCB appealed, asserting the deliberative process privilege from discovery generally held by administrative bodies. Now that the trial court's order has been upheld, plaintiffs have notified the parties that they will soon schedule depositions of SWRCB members and others.

4. Dorri v. MWD

Acting upon a request by the plaintiff/appellant in this personal injury action, the Court of Appeal has set aside its dismissal of plaintiff/appellant's appeal. As previously reported, the Court of Appeal originally dismissed this appeal because plaintiff/appellant had failed to file the appropriate brief in a timely manner. The action was brought by a 46-year-old engineer who was seriously injured when his bicycle was struck by a Metropolitan vehicle driven by a Metropolitan employee on December 19, 1989, at the intersection of McBean Parkway and Singing Hills Drive in Valencia, California. After trial of this matter in July 1991, the court determined that Metropolitan and its employee were not negligent and rendered

judgment in favor of Metropolitan in all respects. The reinstatement of plaintiff/appellant's appeal will result in the filing of appellate briefs by the parties and oral argument later this year.

B. Proceedings of Interest to Metropolitan

1. Delta Smelt

On February 5, 1993, the California Fish and Game Commission (Commission) declined for procedural reasons to list the Delta smelt as a threatened or endangered species under California's Endangered Species Act.

In response to a June 1989 petition to list the smelt, the Commission determined on September 14, 1990, that there was insufficient scientific evidence to list the smelt at that time. It instead ordered the Departments of Fish and Game and Water Resources to monitor the smelt and develop management and recovery objectives. Earlier this year, the Commission decided to review its 1990 decision. However, as pointed out in comments submitted by the State Water Contractors, the statutory procedures for listing a species as threatened or endangered do not authorize the Commission to unilaterally revisit a prior listing decision. Instead, a new petition must be filed and the required administrative procedure followed before the Commission may review its earlier determination. Based on these procedural limitations, the Commission decided that it could not review its 1990 decision not to list the smelt in the absence of a new petition.

A petition to the United States Fish and Wildlife Service (Service) to list the smelt under the federal Endangered Species Act is still pending. As reported last month, a group of environmental organizations has sued the Service to force it to list the smelt.

2. Designation of Habitat for Winter Run Salmon

The State Water Contractors filed their comments on the National Marine Fisheries Services' proposal to designate critical habitat for the winter run salmon. The thrust of the comments is that the stretch of the Sacramento River through the Delta is not "critical" to the survival of the species and that the proposed rule has inadequately considered the economic impact of the proposed designation as required by the Endangered Species Act.

3. Boulder Canyon Project Rate Litigation
(Overton Power District v. Watkins)

On October 30, 1992, we reported to your Board that two customers of the Nevada Colorado River Commission (CRC) have filed an action against various federal energy officials challenging the Boulder Canyon Project (BCP) rate then in effect. Cross-motions for summary judgment have now been filed by the plaintiffs and the federal defendants. Additionally, the defendants have filed a motion to dismiss on the basis that the plaintiffs lack standing to challenge the rate, since the agency through which they receive BCP power, CRC, executed a settlement agreement with Western Area Power Administration (Western, the federal power marketing agency) wherein the former agreed it would not challenge the rate.

On February 2, 1993, Metropolitan joined the Los Angeles Department of Water and Power and Southern California Edison in filing an amicus curiae brief which supports the government's motion to dismiss on procedural grounds. The amicus brief also states that the amici can not support the government's motion for summary judgment on the merits since the amici agree with certain positions taken by plaintiffs. Accordingly, the brief urges that if the court should deny the government's motion to dismiss, it delay ruling on the cross motions for summary judgment until negotiations between the BCP contractors and the government involving the same issues as those asserted in the litigation (and additional issues) prove unsuccessful. Those negotiations are due to resume February 25, 1993. Earlier negotiations led to Western's adoption of a rate-setting methodology proposed by the contractors. Since the BCP contracts will continue until 2017, the BCP contractors prefer to pursue negotiation with the government prior to becoming involved in litigation. No hearing date has yet been established for the pretrial motions.

4. New Interim Rate Approved

A new interim rate for the Boulder Canyon Project (BCP) was approved by the Assistant Secretary of Energy to take effect on January 1, 1993. This rate must also be approved or rejected by FERC. Metropolitan plans to join with all California BCP contractors in a motion for intervention and protest to be filed with FERC on or before March 15, 1993.

5. Litigation re Construction of
Santa Margarita Pipeline (Rados v.
Northwest Pipe)

The Santa Margarita Water District (Santa Margarita) has been sued by its contractor for construction of the upsized South County Pipeline in Orange County Superior Court for additional compensation in the amount of approximately \$5 million. Although Metropolitan is not named as a party, Metropolitan is cooperating with counsel for Santa Margarita in its defense of the action since the primary focus of the litigation arises out of pipe fabrication for the project, for which Metropolitan provided inspection services. Pursuant to Metropolitan's election last year to utilize approximately 60 percent of the capacity of the upsized pipeline, Metropolitan is liable for approximately 60 percent of the cost of construction of the upsized pipeline, including related litigation costs. Santa Margarita's contractor recently settled with its pipe fabricator, Northwest Pipe and Casing Co. (Northwest), and assigned its cause of action to Northwest.

Earlier this month, Northwest submitted a settlement demand to Santa Margarita in the amount of \$900,000, which demand was rejected by Santa Margarita's Board of Directors. Northwest concedes it is not likely to recover more than \$2 million. Santa Margarita submitted a counter-offer in the amount of \$125,000 to which there has been no response. The matter is presently scheduled to go to trial in late April although it is likely to be continued.

6. Central Valley Project Water
Association/Kern County Water Agency v.
SWRCB

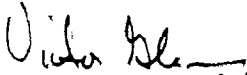
The Central Valley Project Water Association (CVPWA) and the Kern County Water Agency (KCWA) have unsuccessfully sought a writ of prohibition from the Sacramento Superior Court prohibiting the State Water Resources Control Board (SWRCB) from adopting its draft D-1630 until it holds additional evidentiary hearings on the proposal. CVPWA and KCWA argued that further hearings are necessary in order to add to the hearing record evidence on social and economic impacts specifically related to the standards proposed in the draft decision and to allow the parties to question the operations studies which underlie the decision. The court refused to issue the writ, at least not until SWRCB makes its final decision to adopt the proposed decision, with or without

hearings. SWRCB has scheduled a hearing to consider adoption of the proposed decision on March 8, 1993.

C. Other Matters

Request for Proposals for Outside Labor Counsel

Metropolitan has received eight responses to its request for proposals to act as special counsel to the General Counsel and General Manager with respect to the upcoming labor negotiations with the Metropolitan's four employee organizations. The proposals are being reviewed, and it is hoped that recommendations will be presented to the Board at its March meeting.


for Karen L. Tachiki

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