

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

March 31, 1993

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

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

A. Proceedings in Which Metropolitan Is a Party

1. Arizona v. California III (Indian Boundary Litigation)

In March 1993, the Special Master, appointed by the United States Supreme Court, held a trial on the merits of the boundary dispute involving the Colorado River Indian Reservation. Approximately 21,000 acre-feet of Colorado River water rights are at stake. Following the submission of closing briefs at the end of June, the Special Master would be expected to rule and prepare a report and recommended decision to the Supreme Court.

2. Garvey Reservoir Restoration (City of Monterey Park v. MWD)

On March 1, 1993, the Los Angeles Superior Court issued a Minute Order invalidating the Board's September 15, 1992 approval of the Garvey Reservoir Restoration Project on the ground that Metropolitan's Final Environmental Impact Report (FEIR) was legally inadequate because it did not contain a final design for the restoration project. The General Counsel is of the opinion that the court's ruling is directly contrary to the requirements of the California Environmental Quality Act (CEQA) and, accordingly, will move the court for a new trial.

The City's other lawsuit against Metropolitan claims that the State Division of Safety of Dams (DSOD) instead of Metropolitan should have prepared the FEIR and that

Metropolitan violated the Brown Act when it limited the time for public comment at the September 15, 1992 Board meeting. On March 4, 1993, the court granted Metropolitan's motion and dismissed the City's complaint. The court ruled that the City may not proceed with its claim that Metropolitan was the wrong agency to prepare the FEIR. The court also ruled that the City had not stated a valid claim under the Brown Act in its complaint; however, the court granted the City time to file a new complaint on the Brown Act claim only.

3. Azusa Landfill Litigation

Browning Ferris Industries (BFI), through its subsidiary Azusa Land Reclamation Company, filed a petition with the California Supreme Court on March 9, 1993, requesting review of the Court of Appeal's January 28 opinion in Metropolitan Water District et al. v. SWRCB, which rejected BFI's argument that SWRCB improperly disapproved BFI's application to expand the Azusa landfill because it failed to first prepare an environmental impact report. Metropolitan, together with the Main San Gabriel Basin Watermaster (Watermaster), Upper San Gabriel Valley MWD (Upper District) and the Environmental Defense Fund (EDF) filed a joint answer with the Supreme Court on March 29. The court has until May 8, to decide whether to review the Court of Appeal's opinion.

The Los Angeles Superior Court held a status hearing in a companion case, BFI v. SWRCB, on March 25. That court continued its stay of the case until June 18, to assure that the Court of Appeal's opinion in MWD et al. v. SWRCB described above, will be finalized before it proceeds. If the Supreme Court should reverse that opinion, the superior court case would presumably become moot. Metropolitan, along with Watermaster, Upper District, and EDF have previously intervened in the case.

4. Garvey Reservoir Claim Update

These two claims, arising out of the Garvey Reservoir leak incident of Fall 1989, have been settled for \$12,000 (Chu) and \$9,000 (Gomez). Both the Chu's and Gomez' reside on Ransom Way, a cul-de-sac to the immediate northwest of Garvey Reservoir, at an elevation nearly level with that of the bottom of the reservoir. Several homeowners on Ransom Way filed claims with Metropolitan for asserted damages to their homes, including diminution of value. Inspection of those homes has revealed damage consistent with subsidence of the kind that might be expected in the event of a saturated soil conditions.

However, evidence also suggests that most of the damage was the result of the 1988 Whittier earthquake. Based upon experts' reports, Metropolitan denied the Ransom Way claims.

Only the Chu's and Gomez' resorted to legal action against Metropolitan. Trial was scheduled in the Chu case for April 19, 1993. The Chu's retained experts assert that the Garvey Reservoir leakage water did contribute to the subsidence problems at the Chu home. While Metropolitan believes that it would be likely to prevail at the trial of these matters, at the mandatory settlement conference of March 18, 1993, given the cost of proceeding to trial and the expense of expert fees involved, settlements were negotiated as indicated.

This leaves only the Bloom et al. v. MWD litigation matter remaining of all the claims which arose from the Garvey Reservoir leakage incident. That matter is currently scheduled for trial in June 1993.

5. Bay/Delta Hearings

Staff attended a State Water Resources Control Board (SWRCB) hearing held on March 8 and 9, 1993, to receive comments on SWRCB's draft D-1630. At the hearing, SWRCB announced revisions to the draft which would reduce its impacts on water supply somewhat. Staff was in the process of analyzing the revisions to determine whether they satisfactorily responded to the issues raised by Metropolitan and other urban state water contractors. However, Governor Wilson instructed SWRCB to cease work on the D-1630 interim standards and to commence work on a new set of permanent standards. The governor's announcement stated that federally imposed requirements under the Endangered Species Act are, in effect, interim standards, making D-1630 moot.

6. Eagle Mountain FERC Proceedings

Mine Reclamation Company (MRC) filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit on March 22, 1993, seeking to cancel the Federal Energy Regulatory Commission (FERC) preliminary permit issued to Eagle Mountain Energy Company (EMEC) two years ago, for determining the feasibility of using abandoned mining pits for a very large pumped storage hydroelectric generating project. Metropolitan is a party to the FERC proceedings because of its Colorado River Aqueduct interests.

MRC and others have proposed for several years that the pits be used for a regional solid waste disposal facility. The County of Riverside has approved the landfill proposal, and EMEC and others are challenging that approval in three cases pending before the Riverside Superior Court. MRC has entered into a memorandum of understanding to protect Metropolitan's Eagle Mountain interests should the landfill proposal proceed.

MRC's challenge of the validity of EMEC's permit has focused primarily on the interrelationship of Bureau of Land Management jurisdiction under the Federal Land Policy and Management Act, and FERC jurisdiction under the Federal Power Act. MRC has also challenged FERC's authority to issue a preliminary permit where the applicant has not identified a specific viable water source.

Metropolitan protested EMEC's permit application prior to issuance of the permit, because EMEC's application proposed to use Metropolitan's Colorado River Aqueduct as the source of water for the proposed pumped storage project. EMEC has since indicated various alternative water sources but has not resolved Metropolitan's concerns. FERC has ruled that precise identification of a water source is not critical in studying a pumped storage project, and that Metropolitan's protest is premature and will be considered only if EMEC files an application for a license to build and operate its proposed pumped storage project.

B. Proceedings of Interest to Metropolitan

1. Winter Run Salmon

The Westlands Water District has sent a 60-day notice of its intent to sue the National Marine Fisheries Service (NMFS) for purported violations of the Endangered Species Act (ESA). A 60-day notice is required by the ESA before litigation can be commenced against NMFS.

Under the section 7 of the ESA, NMFS is required to consult with the operators of the State Water Project and Central Valley Project and suggest "reasonable and prudent" alternative operations for those projects to protect the threatened winter run salmon. The alternatives which NMFS proposed will significantly limit the amount of water the projects will be able to export in most years. While NMFS can not itself impose these alternatives on the projects, as a practical matter, the projects are forced to adopt them or run the risk of being sued for illegally "taking" salmon. The

60-day notice alleges that NMFS (1) violated the ESA because it failed to perform studies and make findings necessary to determine that the proposed alternatives were in fact "reasonable and prudent" and (2) should have performed the environmental review generally required under the National Environmental Policy Act for federal actions.

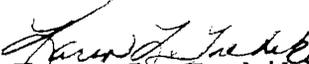
2. Delta Smelt Listing

The United States Fish and Wildlife Service (USFWS) has listed the Delta smelt as a threatened species under the federal Endangered Species Act. This is expected to have a major impact on the operations of the State Water Project and Central Valley Project because the smelt spends its entire life in the Delta area. Those projects are now prohibited from "taking" the smelt in their operations and must consult with USFWS to determine "reasonable and prudent alternatives" to normal operations the projects can take to minimize their impacts on the smelt. At a State Water Resources Control Board workshop held to discuss the impact of threatened and endangered species listings in the Bay/Delta estuary, USFWS indicated that the reasonable and prudent alternatives being considered for the smelt could reduce exports by at least 1.5 million acre-feet per year above the reductions which will occur as a result of D-1630.

C. Other Matters

State Water Project

A member of the Legal Department participated with members of the General Manager's staff in discussions with the Department of Water Resources and other State Water Contractors regarding amendments to the water shortage provisions of the State Water Contract.


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