

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

May 28, 1993

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

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

A. Proceedings in Which Metropolitan Is a Party

1. Arizona v. California III

The State Parties, led by Metropolitan, filed post-trial briefs regarding the disputed claim of the Colorado River Indian Reservation to an additional 21,000 acre-feet of Colorado River water. Following closing oral arguments at the end of June, the Special Master is expected to prepare a recommended decision to the United States Supreme Court.

2. MWD v. Paul, Hastings, Janofsky and Walker, et al.

On May 5, 1993, Metropolitan, represented by the law firm of Lindley, Lazar & Scales, filed an action for professional negligence against the law firm of Paul, Hastings, Janofsky and Walker as well as certain individual members of the firm in the Los Angeles Superior Court. The action was served on May 17, 1993, and a responsive pleading from the defendants will be due on or about June 16, 1993.

3. MWD v. Beitler & Associates, Inc.

An action for declaratory relief was filed by Metropolitan, represented by the law firm of Jones, Day, Reavis & Pogue, on April 7, 1993, in the Los Angeles Superior Court. Specifically, the action seeks the court's determination that an existing brokerage letter is void as a matter of law. On May 26, 1993, Beitler & Associates filed an answer to Metropolitan's complaint as well as a cross-complaint against

Metropolitan, Chairman of the Board Michael Gage, and former General Manager Carl Boronkay. The cross-complaint seeks damages in excess of \$5 million under several legal theories including breach of contract, defamation, interference with prospective economic advantage, and unfair business practices.

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

On May 4, 1993, in Los Angeles Superior Court Case No. BS 020116 (EIR Adequacy case), the court heard Metropolitan's motion for a new trial on the court's March 1, 1993 holding that the final design for the Garvey Reservoir Restoration Project is required before an EIR can be prepared, and that the EIR improperly excluded the impact of the project itself. After hearing the argument, the court modified its March 1 ruling by deleting the requirement that there be a final design for the project.

At the May 4 hearing, the court also heard argument on the motion of the City of Monterey Park (City) for \$63,000 in attorney's fees. The court denied that motion, stating that "[a] 'blind and literal' or any other reading of CCP § 1021.5 would bar MP [City] from recovering attorney's fees in the instant action."

In the City's other lawsuit against Metropolitan concerning the restoration project (LASC Case No. BC 069605) (Brown Act), after the court had ruled that the City could not proceed to trial on its argument that the Division of Safety of Dams and not Metropolitan was the proper CEQA lead agency, the City filed an amended complaint again alleging a violation of the Brown Act. Our demurrer to that complaint was heard by the court on May 12, 1993. The court took the matter under submission and on May 21, 1993, issued its order sustaining our demurrer and ruling that the City may not proceed to trial with its Brown Act claim. Accordingly, we will follow up and have the entire lawsuit dismissed.

5. Azusa Landfill Litigation

The California Supreme Court denied, on May 15, 1993, the petition of the Azusa landfill owner for review of the Court of Appeal's January Opinion in Upper San Gabriel Basin Watermaster et al. v. SWRCB. That opinion rejects a challenge to the State Water Resources Control Board's (SWRCB) rejection

of the landfill expansion, without preparing an environmental impact report. That litigation includes a case filed by Metropolitan, Upper San Gabriel Valley MWD (Upper District), and the Environmental Defense Fund (EDF).

A companion case pending before the Los Angeles County Superior Court, Browning Ferris Industries v. SWRCB, has been stayed until June 18, 1993, to allow completion of that appeal. It challenges SWRCB's rejection of the landfill expansion on several other grounds, and is now expected to proceed expeditiously. Metropolitan has intervened in that case, together with the Watermaster, Upper District, and EDF, in support of SWRCB.

6. Domenigoni Reservoir Matters

There are presently 60 pending condemnation cases regarding properties needed for the Domenigoni Reservoir. Forty-three of those cases have been assigned to outside counsel and 17 of those cases are being prosecuted by the General Counsel's office.

7. Golden Gate Audubon v. Browner

As authorized by your Board last month, Metropolitan and ten other urban state water contractors have filed their motion to intervene as parties in Golden Gate Audubon Society v. Browner. A hearing has been set for July 6, 1993, in the United States District Court in Sacramento to hear the motion. As reported last month, plaintiffs in this action are seeking a court order directing the United States Environmental Protection Agency (USEPA) to adopt its own standards for the Bay/Delta Estuary, which could result in USEPA-imposed freshwater outflow and other requirements on the State Water Project. Metropolitan, other State Water Contractors, and most other water regulation and supply entities in the state believe that USEPA does not have the authority to impose such requirements. If the court grants the motion to intervene, Metropolitan and the other urban contractors will participate in the litigation as full parties. A number of agricultural state water contractors also plan to intervene. At this time, it is not known whether the State Water Resources Control Board or Department of Water Resources will seek intervention.

B. Proceedings of Interest to Metropolitan

Ward Valley Litigation

On May 7, 1993, the California Court of Appeal granted the petitions of U.S. Ecology and others, voiding Department of Health Services (DHS) plans for additional hearings on the proposed license for a low-level radioactive waste disposal facility in Ward Valley in the Mohave desert, 20 miles west of the Colorado River. Metropolitan had filed a friend-of-the-court brief supporting the planned adjudicatory hearings as a means of providing additional public assurances that the project would not impair Metropolitan's Colorado River supplies.

The court concluded that DHS adopted plans for additional hearings as the result of unlawful coercion by the Senate Rules Committee in violation of constitutional separation of powers requirements; that the issue was one of state, rather than federal law; and that California law does not require a formal adjudicatory hearing in this type of licensing procedure.

The Senate Rules Committee filed a petition for rehearing last week. Although DHS could issue the license shortly after the ruling becomes final, actual construction and operation would still require transfer of the land from the federal government to the state. That transfer is currently under review by the U.S. Secretary of the Interior pursuant to rulings by the federal district court in San Francisco.

C. Other Matters

1. Skinner Reservoir Water Rights

An individual owning land on a tributary of the Santa Margarita River, a short distance downstream from Skinner Reservoir, filed a complaint with the State Water Resources Control Board (SWRCB) earlier this month challenging Metropolitan's release of local flows that inherently accumulate in the reservoir. More specifically, the complaint seeks modification of Metropolitan's release of local stream flows as if those flows were made pursuant to an SWRCB water diversion permit.

Metropolitan, however, is not appropriating local stream flows and consequently does not have an SWRCB permit. It merely releases local flows as they accrue within the reservoir. However, during storm periods such as those experienced this past year, storm flows accumulate faster than they can be safely released. Metropolitan releases those flows as provided by the federal court judgment which has reserved jurisdiction over the Santa Margarita River stream system.

Metropolitan staff has been working with the Santa Margarita River Watermaster for some time to improve reservoir storm flow release criteria. The court's judgment specifically recognizes that Skinner Reservoir has no explicit flood control function and that Skinner flood flow releases must be made in a manner that would neither impair Metropolitan's use of the reservoir nor expose Metropolitan to public liability. An answer to the complaint will be filed with SWRCB, pursuant to SWRCB procedures.

2. H.R. 429 (Central Valley Improvement Act)

The United States Bureau of Reclamation (USBR) has released draft temporary guidelines interpreting the water transfer provisions of H.R. 429. These guidelines would apply until USBR can formally promulgate rules. Metropolitan has sent informal comments to USBR raising our concerns. USBR is also working on guidelines interpreting the Restoration Fund language. This will impact the amount of mitigation costs on water transfers under the Central Valley Improvement Act.

3. Water Transfers

The agreement with Semitropic has been finalized and some 30,000 acre-feet has been stored under the agreement.

4. Inland Feeder Project

With the assistance of a member of the Legal Department, a final agreement was reached on a Memorandum of Understanding with the Moreno Highlands (Highlands) development project. The Highlands is a planned community development located in the City of Moreno Valley. The Inland Feeder alignment crossed the development and the developer raised concerns about potential impacts of the pipeline on the development. After lengthy negotiations, an agreement was reached in which the developer waived its challenge to the

Environmental Impact Report based on an alternate agreed alignment for the pipeline and other mitigation measures.

5. State Water Project

Members of the Legal Department participated and provided legal support to the General Manager in discussions initiated by the Kern County Water Agency regarding the shortage provisions (Article 18) of the State Water contract. These discussions will be ongoing with the potential for litigation arising over this issue.


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