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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA  
EXECUTIVE SECRETARY

September 30, 1994

To: Board of Directors  
From: General Counsel  
Subject: Legal Department Report for September 1994

This report discusses significant matters with which the Legal Department was concerned during September 1994.

**I. Litigation to Which Metropolitan is a Party**

**A. Resource Matters**

**1. Bay Institute et al. v. United States Fish and Wildlife Service et al.**

The Department of Water Resources (DWR), Westlands Water District and Kern County Water Agency successfully intervened in this action in support of United States Fish and Wildlife Service (SWRCB). Metropolitan and a number of other urban state water contractors had previously intervened by stipulation in support of USFWS in order to preserve USFWS' biological opinion and incidental take statement which authorizes the state and federal water projects to continue operations, despite the fact that those operations resulted in incidental take of the listed Delta smelt. DWR and the agricultural districts also were successful in having this matter transferred from the Northern District Federal Court, based in San Francisco, to the Eastern District Federal Court, based in Sacramento and Fresno. The basis for this transfer was the fact that several Endangered Species Act (ESA) issues involved in this action were similar to ESA issues involved in an action (Westlands Water Dist. v. United States of America) currently before Judge Wenger in Fresno. It is anticipated that once the case is sent to the Eastern Division, it will be assigned to Judge Wenger. Judge Wenger may then hear the Bay Institute case separately, or may consolidate it with the Westlands Water Dist. case. Currently, none of the parties involved in these cases intend to request Judge Wenger to consolidate the cases.

## 2. Santa Margarita River Judgment

At its September 15 meeting, the Court-appointed Steering Committee for the Santa Margarita River System Judgment approved Metropolitan's application for membership on that Committee. Metropolitan filed implementing documents with the Court on September 19.

At that same meeting, the Steering Committee reviewed a revised Memorandum of Understanding on Operation of Domenigoni Valley Reservoir (MOU) which Metropolitan had prepared pursuant to comments previously received from the Steering Committee and its members. Fallbrook Public Utility District advised that it would pursue the objective stated in its comments, through Metropolitan's local projects program rather than through the MOU. The United States representative indicated that it had some remaining technical concerns regarding the method for measuring local inflow, which were resolved the following week.

The Committee suggested that the MOU should also be circulated for public review and plans to hold a special meeting in mid-November in the Temecula area to receive public comments.

## 3. San Gabriel Basin Water Rights Judgment

Miller Brewing Company filed a motion on September 7 with the Los Angeles Superior Court requesting removal of authority the Court granted three years ago to the Watermaster for the San Gabriel Valley Water Rights Judgment, to use reclaimed waste water to replace Basin overpumping. Historically, the Watermaster replaces Basin overpumping with imported water it purchases from Metropolitan's member agencies and, for areas outside of Metropolitan's service area, from the San Gabriel Valley Municipal Water District.

Metropolitan is a party to the Judgment and supported the Court's 1991 modification of the Judgment to allow the use of reclaimed water to recharge the Basin because of increasing limitations on imported water supplies and improvements in waste water reclamation capabilities. Upper San Gabriel Valley Municipal Water District is presently proposing construction of a San Gabriel Valley Water Reclamation Program to recharge the Groundwater Basin in place of imported water, and Miller is opposing that Program. Miller's Motion indicates that it uses about 2100 acre feet of groundwater annually from its two wells in the Basin.

On September 30, the Court extended the time for filing oppositions to Miller's motion to November 15 and set a hearing on the motion for December 2.

**B. Other Litigation to Which Metropolitan is a Party**

1. Domenigoni Valley Reservoir Project

Staff spent a considerable amount of time working with outside counsel in preparing for trial in the 3M, Stiles and MacMillan eminent domain cases as well as attending settlement conferences in those matters.

2. Salha v. MWD et al.

Metropolitan's demurrer to the Second Amended Complaint in this action for among other matters discrimination was granted without leave to amend and the lawsuit was dismissed on September 1, 1994.

3. R & E Business Systems, et al. v. Xerox Corporation

Metropolitan received a credit of \$14,187 against future Xerox Corporation contracts and services as a result of a claim we made in this antitrust action.

**C. Claims**

On September 26, 1993, the District received six notices of claims by persons who assert that they were injured and/or suffered property loss as a result of the Winchester Fire of October 1993, which started as a result of arcing power lines and high winds within a eucalyptus grove on District property at the site of the proposed Domenigoni Valley Reservoir. The power lines were owned by Southern California Edison Company. The full extent of plaintiffs' asserted damages is yet unknown but they assert damage to personal and real property, personal injury and for emotional distress. The General Counsel will take all steps necessary to protect the District's interest in this matter.

**D. Administrative Proceedings****1. State Water Project/Bay-Delta**

Staff continues to support the General Manager's efforts to reach a reasonable "consensus" package of operational and flow measures to present to the State Water Resources Control Board for adoption by the Board as a Bay-Delta protection package. The proposal will be discussed at SWRCB staff workshops scheduled on October 7, 13 and 14, and presented to the SWRCB board members at an October 19 workshop.

**2. Human Resource Issues**

Appeals of discharges of two Metropolitan employees were heard by hearing officers, pursuant to the process established in the agreement with the Employees' Association. Staff represented Metropolitan at each hearing. Additionally, a favorable decision was received during the month upholding the demotion of an Associate Engineer to an Assistant Engineer.

**E. Proceedings of Interest to Metropolitan****1. Mono Basin Water Rights Proceedings**

On September 28 the State Water Resources Control Board (SWRCB) adopted a 215 page water right Decision that severely limits the City of Los Angeles' Mono Basin water export licenses and imposes substantial obligations on it for restoring Mono Basin streams. The Decision requires raising the level of Mono Lake several feet before Los Angeles, which has not been able to export water from Mono Basin for the past five years, can export significant amounts of water. The Decision indicates it will take twenty years to reach that Lake level.

The Decision recognizes that Los Angeles will need to increase its water supply demands on Metropolitan to some extent to compensate for the loss of Mono Basin imports which averaged about 90,000 acre-feet a year. However, it concludes that much of the replacement water will be provided by water reclamation and conservation; and that Metropolitan will very likely continue to have sufficient water available to meet Los Angeles' demands on it for the future. The Decision also refers to Metropolitan's testimony that the availability of water to Metropolitan from the State Water Project will depend in part upon future restrictions on water diversions from the

Sacramento-San Joaquin Delta area and that sufficient regulatory flexibility in those restrictions will be critical.

The Decision is being filed with the El Dorado County Superior Court for review pursuant to that Court's October 23, 1989 order. That order had stayed proceedings in the Mono Basin water rights cases, which that Court is hearing, until SWRCB revised Los Angeles' Mono Basin water right licenses.

In a related matter, the Governor signed AB 3096 on September 20. That bill, sponsored by Assemblyman Katz of Panorama City, provides \$9 million for waste water reclamation and conservation to reduce Los Angeles' need to increase its demands on Metropolitan to replace Mono Basin exports.

2. James City County, Va. v. Environmental Protection Agency

Plaintiff James River County, Virginia has petitioned the United States Supreme Court to review the decision of the Federal Fourth Circuit Appellate Court in the above entitled case (also known as the "Ware Creek case"). That decision appears to authorize the United States Environmental Protection Agency (EPA) to veto a "section 404 permit" where EPA identifies potential environmental impacts, without balancing impacts on water supply, and even where there is no alternative to the proposed project. In the James City County case, EPA vetoed the Corps of Engineers' issuance of a permit to the County under section 404 of the Clean Water Act allowing the County to carry out dredge and fill activities in connection with building a dam and water supply reservoir. There was no dispute that water supplies in the County were becoming inadequate, and the County asserted that there was no alternative to the proposed project. EPA's veto was based solely on its determination that the project would have substantial negative environmental impacts, without considering the County's water supply needs. The County sued to challenge the veto and the trial court overruled EPA, deciding that EPA lacked authority to base its veto solely on the grounds of adverse impacts to the environment, but must also consider the County's need for water.

However, the Fourth Circuit Court of Appeal reversed the trial court. The Appellate Court reviewed the language of section 404 and EPA's implementing regulations and found that under that language EPA's "authority to veto to protect the environment is practically unadorned" and required no consideration of countervailing needs such as water supply. Consequently it held that EPA did have the authority to veto

projects requiring section 404 permits "solely on the basis that it would cause unacceptable adverse effects on the environment." The County has asked the Supreme Court to review the Fourth Circuit's decision; however, the Supreme Court has the discretion to refuse. A number of agencies, including the State of California, have filed amici curiae briefs in support of the County's petition. The Supreme Court has not yet acted on the petition.

## **II. Resource/Environmental Issues**

### **A. Resource Issues**

#### **1. State Water Project**

As outlined in greater detail in a separate Board letter this month, a facilitator/mediator was selected to help to resolve the Article 18 controversy and it is expected that a considerable amount of staff time will be devoted to supporting this effort in the months of October and November.

#### **2. Semitropic Water Transfer Agreement**

Staff spent a considerable amount of time drafting the language for the agreement with regard to this water transfer which was previously approved by your Board.

#### **3. Cooling Water Agreements**

A considerable amount of staff time was devoted to drafting a series of documents relating to the terms and conditions by which Metropolitan will supply water for a proposed power plant to be located in the vicinity of Blythe, California. The principles supporting the documents were approved by your Board in September.

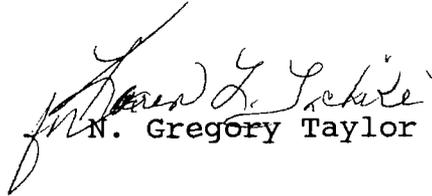
## **III. Contracts**

### **1. Allen-McColloch Pipeline**

Staff spent time during the month preparing documentation to define the remaining open issues in this previously approved transaction and preparing comments on the proposed draft agreement.

**2. South County Pipeline**

The agreement fixing the capacity fee pursuant to Board authorization was executed by the parties and the fee paid.

  
N. Gregory Taylor

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