

APPROVED
 By the Board of Directors of
 The Metropolitan Water District
 of Southern California
 at its meeting held

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

JUL 11 1995

Barry E. Duff
 EXECUTIVE SECRETARY

8-12

June 27, 1995

To: Board of Directors (Legal and Claims--Action)
 (Water Planning and Resources--Information)

From: General Counsel

Subject: Litigation to Invalidate the State Water Resources Control Board's Bay/Delta
 Protection Plan; San Joaquin Tributaries Assn. v. SWRCB

RECOMMENDATION:

It is recommended that the General Counsel, assisted by existing outside counsel, be authorized to intervene in San Joaquin Tributaries Association v. SWRCB and to take any and all actions related thereto to protect Metropolitan's interests in its water supplies from the Bay/Delta system.

N. Gregory Taylor
 N. Gregory Taylor
 General Counsel

EXECUTIVE SUMMARY:

The Modesto, Merced, Turlock, Oakdale and South San Joaquin Irrigation Districts and others (plaintiffs) have filed an action in the Sacramento Superior Court to invalidate the Bay/Delta Plan recently adopted by the State Water Resources Control Board (SWRCB). The action, entitled San Joaquin Tributaries Association v. SWRCB, requests that the court set the Plan aside and enjoin the SWRCB from taking any steps to implement it. Plaintiffs allege, in part, that a San Joaquin River flow standard contained in the Plan will require them to provide flow which should be provided instead by the state and federal water projects because of their junior water rights. The complaint could have a negative impact on current attempts to develop a long-term program for resolution of Bay/Delta environmental and water reliability issues. For this reason, Metropolitan should seek to intervene to protect its interests in the Plan and in its water supply.

DETAILED REPORT:

An action, entitled San Joaquin Tributaries Association v. SWRCB, has been filed in the Sacramento Superior Court to invalidate the Bay/Delta Plan adopted by the SWRCB on May 22, 1995. Plaintiffs in the action include the Modesto Irrigation District, Merced Irrigation District, Turlock Irrigation District, Oakdale Irrigation District and South San Joaquin Irrigation District. Their complaint seeks an order setting aside the Plan in its entirety and enjoining the SWRCB from taking any steps to implement the Plan.

Plaintiffs are agricultural water supply districts which possess water rights on streams tributary to the San Joaquin River which have relatively early temporal priorities. Their complaint focuses on a flow standard to be met at Vernalis on the San Joaquin River for the protection of aquatic species, mainly salmon. Plaintiffs, who divert water upstream from Vernalis, claim that there is no evidence in the record which supports the need for the Vernalis standard for salmon. They assert instead that the only reason for the flow standard is to keep Delta smelt away from the state and federal export pumps. Finally, plaintiffs argue that requiring flows on the San Joaquin River, some of which could ultimately be required from them, while allowing the export projects to continue pumping, is an invalid invasion of plaintiffs' earlier water rights.

The SWRCB Plan is the first step in the current CALFED process in which Metropolitan, many other urban and agricultural water suppliers, state and federal regulatory agencies and environmental groups are attempting to develop a comprehensive plan to address Bay/Delta environmental and water supply reliability issues. If plaintiffs are successful in overturning the Plan, the interested parties may be forced back into potentially divisive hearings before the SWRCB. Without the sound foundation of Bay/Delta environmental protections provided by the Plan, state and federal fish and wildlife agencies also may feel compelled to step in with their own programs to protect aquatic species in the Bay/Delta, reviving the uncertainty that the state and federal projects were facing prior to the Bay/Delta Principles agreement and SWRCB Plan. Additionally, plaintiffs' complaint raises water rights

issues—specifically how responsibilities for contributing towards Bay/Delta environmental protection may be allocated, even though the SWRCB Plan does not make any such an allocation. Consequently, this action could have an impact on the water rights of, and water supplies available to, the state and federal projects.

For these reasons, it is recommended that Metropolitan seek to intervene in this action to protect its interest in the reliability of water supplies available from the Bay/Delta system. In seeking such intervention, it may be appropriate for Metropolitan to act in conjunction with other urban and agricultural water suppliers who share Metropolitan's views on the issues raised. It is anticipated that the General Counsel would be assisted in such litigation by Best, Best & Krieger, who have acted as outside counsel on Bay/Delta matters since 1987.