

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

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**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Dawn Chin
 for EXECUTIVE SECRETARY

9-2

March 29, 1996

To: Board of Directors (Legal and Claims Committee--Information)
From: General Counsel *N. Gregory Taylor*
Subject: Legal Department Report for March 1996

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

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

DETAILED REPORT

I. Recent Developments of Interest to Metropolitan

County of Orange, etc. v. Santa Margarita Water District

This case involves the issue of which public entity had to pay to relocate the underground facilities of the Santa Margarita Water District (SMWD), located in Santa Margarita Highway, for the construction of a toll road by the Foothill/Eastern Transportation Corridor Agency (FETCA), a joint powers agency. Pursuant to statute and permit, SMWD had to pay to relocate its facilities for improvements to the highway. On March 8, 1996, in an unpublished decision, the Court of Appeal for the Fourth Appellate District reversed the decision of the lower court and held that FETCA was responsible for these costs. This was the position supported by both Metropolitan and the Association of California Water Agencies, who both filed amicus curiae briefs in support of the SMWD before the Court of Appeals. The appellate court held that

the relocation obligation under the statute and permit required a physical improvement to the roadway, and that the construction of a new roadway did not satisfy this requirement. The Court of Appeal also clarified that the common law rule of "first in time, first in right" applied to these types of disputes between public entities. Under this rule, SMWD, whose facilities were already in the County of Orange roadway, had priority over FETCA. SMWD and Metropolitan have filed requests with the Court of Appeal that this decision be certified for publication.

II. Litigation to Which Metropolitan is a Party

Hoover Overcollection Litigation

On February 16, 1996, Metropolitan was served with an action for declaratory judgment initiated by the United States on behalf of the Western Area Power Administration (WAPA), Department of Energy and the Bureau of Reclamation, Department of the Interior. The action is filed in U.S. District Court, District of Nevada, (Las Vegas). All original contractors for Hoover power plant power are named as defendants. The United States seeks a court order essentially validating the allocation methodology utilized in 1990 when it refunded to the original contractors approximately \$22 million in overcollected revenue. Southern California Edison (Edison) and the Los Angeles Department of Water and Power (Los Angeles) previously submitted administrative claims to the WAPA Administrator contending that the overcollection distribution should have been based on a combination of firm energy and secondary (non-firm), rather than firm energy entitlement. Alternatively, the federal government seeks a court order that Edison and Los Angeles are estopped from pursuing their claim on the basis that their acceptance and use of the distributed funds constitutes an accord and satisfaction. Based upon information currently available, the maximum potential exposure to Metropolitan appears to be approximately \$2 million. Jerry Muys, Esq. will represent Metropolitan in this matter (as assisted by a member of the General Manager's staff).

Christina Bionghi dba Abacus Technical v. The Metropolitan Water District of Southern California

In 1993, Metropolitan entered into a contract with Abacus Technical (Abacus), a woman and minority-owned business enterprise to provide temporary employment services. Abacus was also utilized by Parsons Engineering as a subcontractor to provide similar services for Metropolitan's Eastside Reservoir and Oxidation Retrofit Projects. In May 1995, Metropolitan terminated the agreement under the contract's termination provision. Parsons also terminated its subcontracts with Abacus in May 1995. On March 20, 1996, Metropolitan was served with Abacus' complaint which alleges causes of action for breach of written contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, interference with contractual relations, interference with prospective business advantage, fraud/concealment, fraud in the inducement, negligent misrepresentation, conversion, unjust enrichment, intentional infliction of emotional distress and quantum meruit. The General

Counsel is taking all necessary steps to defend this action and has retained Special Counsel to assist in this matter.

Bolsa Chica

Metropolitan, as one of the ten real-parties-in-interest, was served on March 14, 1996, with a petition for a writ of mandate and declaratory relief filed by the League for Coastal Protection and American Oceans Campaign, two nonprofit corporations. The named respondent is the California Coastal Commission. Named as the other real-parties-in-interest were County of Orange; Koll Real Estate Group; Signal Bolsa Corporation; Fieldstone Properties; D. E. Goodell; Ocean View School District; Orange County Flood Control District; State of California, State Lands Commission; and the City of Huntington Beach. The petition seeks to overturn the Coastal Commission's approval of the Orange County Land Use Plan which approved a residential development and wetlands restoration plan in Bolsa Chica. Litigation of this nature has been anticipated.

III. Resource Matters

Proposal to List Spring-Run Salmon as Endangered Species

The California Fish and Game Commission (Commission) deferred a request (submitted by State Senator Tom Hayden) to list the Sacramento Spring-run salmon as an endangered species under the California Endangered Species Act (CESA) at its March 7, 1996 meeting. At that meeting, the Commission considered whether the request merited analysis by the Department of Fish and Game, which would then have had up to one year to determine whether to formally propose listing. Additional proceedings before the Commission would be required on a formal proposal prior to a final determination whether to list the species. However, pending that final determination, the Spring-run salmon would be protected from "take" as a candidate species under CESA, which could have a negative impact on State Water Project operations. The State Water Contractors, Department of Water Resources and several others presented evidence and reasons in opposition to the listing. The Commission will reconsider the proposed listing at its April hearing.

State Water Resources Control Board Workshops

On March 12, 1996, the State Water Resources Control Board (SWRCB) held its third and final scheduled workshop on its Notice of Preparation of an Environmental Impact Report on a water rights decision regarding implementation of the flow requirements in its May 1995 Bay/Delta Plan. The Joint Water Users--including Metropolitan, other State Water Contractors and CUWA members, and the Westlands Water District--continued to provide joint comments. The main topic was alternatives for meeting various requirements on the San Joaquin River. The Joint Water Users, together with upstream San Joaquin River water users, also

reported progress on a proposed agreement among those parties intended to work towards implementation of the flow requirement at Vernalis on the San Joaquin River. (A member of the Legal Department staff continues to work with General Manager's staff on that proposed agreement.) It is anticipated that the SWRCB will schedule additional workshops prior to commencing the formal water rights hearings. It is possible that those hearings will not begin in August 1996, as originally expected.

Colorado River Threatened and Endangered Species

The Legal Department continued to work with General Manager's staff on the development of a Lower Colorado River Basin Management Plan for threatened, endangered and other sensitive species in the Lower Basin, which will also accommodate water and power needs. Staff from Metropolitan and other Lower Basin representatives met with Department of the Interior staff and environmental organizations on March 4, 1996, to discuss differences on the approach to development of the Management Plan which the environmental organizations had identified in their 60-day notices of intent to sue under the Endangered Species Act. In addition, Lower Basin state representatives (including the General Counsel and other Metropolitan staff) met with Department of Justice and Department of the Interior representatives in Washington, D.C., on March 20, 1996, to discuss development of the program and the legal issues involved.

Planning and Conservation League et al. v. Department of Water Resources and Central Coast Water Authority

Legal Department staff continues to actively work with counsel for both the Department and Central Coast Water Authority in preparing for the scheduled May 17, 1996 Superior Court hearing challenging the Monterey Agreement compliance with the California Environmental Quality Act. This hearing will also include a procedural motion to dismiss the portion of the lawsuit challenging the legality of the portion of the Monterey Agreement providing for the transfer of the Kern Water Bank to the Kern County Water Agency.

Water Rights Negotiations

A member of the Legal Department continues to work with the General Manager's staff on separate negotiations with upstream water users on the Sacramento and San Joaquin River systems. The intention of the negotiators is to reach a consensus allocation of responsibility for meeting the flow requirements of the SWRCB's Bay/Delta Plan which can be presented to SWRCB for its consideration and adoption.

IV. Claims

Nothing to report.

V. Financing

On March 28 Metropolitan, with the involvement of Legal Department representatives, closed the issuance of \$108,375,000 Water Revenue Refunding Bonds, 1996 Series A. These bonds refunded all of the Water Revenue Refunding Bonds, Issue of 1986, maturing on or after June 1, 1999, still outstanding. Your Board authorized the issuance and sale of the 1996 Series A Bonds in January 1994 pursuant to an innovative transaction fixing Metropolitan's interest rate on the 1996 Series A Bonds at 4.99 percent.

VI. Legislative Matters

Nothing to report.