

MINUTES
REGULAR MEETING OF THE
BOARD OF DIRECTORS
THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
JANUARY 14, 1997

42213 The Board of Directors of The Metropolitan Water District of Southern California met in Regular Meeting on the third floor of the building located at 350 South Grand Avenue in the City of Los Angeles, State of California, on Tuesday, January 14, 1997.

The Meeting was called to order by Chairman Foley at 12:43 p.m.

42214 The Meeting was opened with an invocation by Director Gary A. Morse.

42215 The Pledge of Allegiance to the Flag was given, led by Director Howard H. Hawkins.

42216 Secretary Murph called the roll. Those answering present were: Directors Abdo, Alario, Bannister, Barker, Blake, Brick, Fellow, Foley, Frahm, Gilbert, Grandsen, Harry, Hawkins, Herman, Hill, Ibbetson, King, Krauel, Krieger, Little, Luddy, Mason, McCauley, McMurray, Meyer, Miller, Milne, Morris, Morse, Murph, Mylne, O'Neil, Owen, Pace, Parker, Peterson, Rez, Troxel, Watton, Webster, Witt, Wright, and Wysbeek.

Those not answering were: Directors Gambrell, Green, Griffen, Huntley, Kosmont (entered 1:12 p.m.), Moret, Russell, and Wein.

The Chair declared a quorum present.

42217 Chairman Foley inquired if there were any additions to the agenda. There being none, the Chair declared only those matters listed on the agenda would be considered. The Chair announced that, having been duly posted, the matter of the request of Black and Veatch for engineering services has been added to the agenda and will be considered as Agenda Item 8-11.

42218 Chairman Foley invited members of the public to address the Board on matters within the Board's jurisdiction.

Addressing the Board were proponents of Option A on the issue of allocating the \$70 million in revenues from fiscal year 1995-96, Agenda Item 8-2, as follows:

Gordon Tinker, General Manager of Fallbrook
Public Utility District

Gary Arant, General Manager of Valley Center
Municipal Water District

Ann Peay, President of the Board of Directors
of Olivenhain Municipal Water District

Director Kosmont took his seat at 1:12 p.m.

Mr. and Mrs. Lou Pavlovich addressed the Board requesting reconsideration of the terms of the acquisition of their property located in the area of the Eastside Reservoir Project. General Counsel Taylor reviewed the chronology of events in connection with Metropolitan's acquisition of this property. Mr. Taylor stated that, as a result of these proceedings, Board involvement in this issue has been concluded.

42219 There being no objection, the Chair ordered the reading of the Minutes of the Meeting held November 19, 1996, dispensed with, a copy having been mailed to each Director.

Director Blake moved, seconded by Director Morse and carried, approving the foregoing Minutes as mailed.

42220 Chairman Foley presented a pin to Director William T. O'Neil emblematic of his completion of five years of service as a representative of Foothill Municipal Water District on January 14, 1997.

42221 Chairman Foley presented a pin to Director Dale Mason emblematic of his completion of ten years of service as a representative of San Diego County Water Authority on January 13, 1997.

42222 Vice Chairman Barker moved, seconded by Director Blake and carried, approving the appointment of Standing Committee Chairmen and Vice Chairmen, as follows;

Engineering and Operations

Director Miller, Chairman
Director Huntley, Vice Chairman

Budget and Finance

Director Blake, Chairman
Director Little, Vice Chairman

Legal and Claims

Director Wysbeek, Chairman
Director Parker, Vice Chairman

Organization and Personnel

Director Wein, Chairman
Director McMurray, Vice Chairman

Water Planning and Resources

Director Brick, Chairman
Director Ibbetson, Vice Chairman

Committee on Legislation

Director Pace, Chairman
Director Hill, Vice Chairman

42223 Vice Chairman Barker moved, seconded by Director Blake and carried, approving assignments to the Standing Committees as follows:

1. Director Owen to the Organization and Personnel Committee;
2. Resignation of Director Morris from the Committee on Legislation;
3. Directors Herman, Little, and Witt to the Committee on Legislation;
4. Director King to the Water Planning and Resources Committee; and
5. Directors Grandsen, Little, Mylne, Peterson, and Wright to the Legal and Claims Committee.

42224 Chairman Foley announced that he has appointed Director Morris as Chairman of the Special Committee on Water Quality, Desalination, and Environmental Compliance with Director Troxel to serve as Vice Chairman. The committee membership is: Directors Abdo, Alario, Brick, King, McMurray, Murph, O'Neil, Parker, Rez, and Wein.

42225 Chairman Foley advised that the Electric Industry Ad Hoc Committee is chaired by Director Wright with Director Mason to serve as Vice Chairman. The committee membership is: Directors Alario, Barker, Brick, Foley, Huntley, King, Kosmont, Luddy, McCauley, Meyer, Miller, Murph, and Mylne.

42226 Chairman Foley reported he has appointed Director Wein to the Special Committee on Real Property Management.

42227 Director Alario moved, seconded by Director Murph and carried, granting the request of Director Harry for a sixty-day leave of absence, commencing February 10, 1997.

42228 General Manager Wodraska reported that Union Station Partners (USP) is supervising the construction of the Headquarters Building, including the MBE/WBE contracts. He stated there is an incentive for USP to exceed the MBE/WBE goals, but the reports to date raise some concerns about its ability to meet these goals. As a consequence, he advised, Executive Assistant to the General Manager Ivey has been assigned the responsibility of monitoring the progress of the MBE/WBE contracts on both the Eastside Reservoir and the Headquarters Building Projects.

Special Committee on Real Property Management Chairman King reported on the progress of the construction of the Headquarters Building which continues on schedule and within budget.

42229 General Manager Wodraska announced that copies of Secretary of Interior Babbitt's speech delivered in Las Vegas during the Colorado River Water Users Association convention are available.

42230 By video, the Board received the following reports:

Chief Engineer Snyder reported that the seawater desalination demonstration unit developed by Metropolitan located at the Southern California Edison Power Plant in Huntington Beach underwent two weeks of specialized testing. From these results, it was possible to establish (1) detailed design criteria, (2) a schedule for the development of a marketing plan, and (3) a schedule for further testing of the unit. He then introduced Real Estate Services Branch Manager Case who reported on the leasing of some Metropolitan property for use by the telecommunications industry.

Chief of Planning and Resources Man reported water deliveries for 1996-97 is projected at 1.66 million acre-feet, citing the possible variations which could result from unusual hydrologic conditions. Assistant Chief of Planning and Resources Thomas commented on the proposed water rates and charges.

Chief Financial Officer Becker reported on Metropolitan's financial condition.

Chief of Operations Malinowski reported that it is expected the repairs to the hangar system for the oil collection drainage line in the Newhall Tunnel will be completed in a relatively short period of time thereby preventing a very serious incident. Mr. Malinowski described the flood conditions in Northern California and the extraordinary efforts being made to maintain the levees in the Delta. He reported that Metropolitan is providing assistance, both in equipment and staff, to those areas declared a disaster.

42231 General Manager Wodraska reported on his inspection tour of the flooded areas in Northern California and commended the staffs of the Department of Water Resources and the Corps of Engineers for their untiring efforts attempting to minimize some of the catastrophic effects of the floods. He advised that, in cooperation with the Red Cross, twelve of Metropolitan's employees are working at least twelve hours a day providing emergency relief. He stated a questionnaire will be distributed this week seeking input from Directors and staff on how aggressive should Metropolitan be in its business outreach efforts. He announced that as of March 1, pursuant to Deputy General Manager Horne's request based on professional and personal reasons, he will be reclassified to the position of Executive Assistant to the General Manager.

42232 General Counsel Taylor reported the Attorney General has rendered an opinion regarding meetings complying with the Brown Act, stating that since Metropolitan notices all its meetings we continue to be in compliance with the Act. He advised that the California Supreme Court refused to continue the stay, thereby allowing the release of \$36 million to the Domenigoni family.

Director Blake moved, seconded by Director Morris and carried, and the Board approved the Consent Calendar Items, M.I. 42233 through M.I. 42237, as follows:

42233 Authorized the General Manager to execute an agreement with Caltrans substantially on the terms outlined in his letter dated December 10, 1996, for relocation of approximately 70 feet, and protection of approximately 80 feet, of Metropolitan's 85-inch-inside-diameter Second Lower Feeder, subject to the agreement being in form approved by the General Counsel.

42234 Authorized (1) the General Manager to have all work performed for the assessment of the condition of Metropolitan's prestressed concrete cylinder pipe and delegate to the General Manager the authority to award a competitively bid contract, in form approved by the General Counsel, and not to exceed \$400,000 for performance of such work; and (2) Appropriation No. 15297 in the amount of \$1,900,000 from the Pay-As-You-Go Fund to finance all estimated costs to assess the condition of Metropolitan's prestressed concrete cylinder pipe, as set forth in the General Manager's letter dated December 10, 1996.

42235 Authorized the General Manager to execute a second amendment to Agreement No. 6523 with Richard S. Volpert and Leslie A. Young through the firm of Munger, Tolles & Olson, to raise the maximum amount of the contract by \$250,000 to a maximum of \$673,000 to provide for continuing legal and related consulting services for the development of the new Headquarters at Union Station, subject to the amendment being in form approved by the General Counsel, as set forth in the letter signed jointly by the General Manager and the General Counsel dated December 17, 1996.

42236 Authorized the General Manager to make payment of \$400,000 to the American Water Works Association Research Foundation (AWWARF) as Metropolitan's contribution to fund AWWARF's applied research programs for the calendar year 1997, as set forth in the General Manager's letter dated December 16, 1996.

42237 Approved the amendment of Section 10100 et seq. of the Administrative Code pertaining to the retention and disposition of records to read as shown in Attachment A to the General Manager's letter dated December 17, 1996, and, concurrently, that the Board of Directors adopt the Metropolitan Water District Records Retention Schedule referenced therein and authorize the General Manager, in concert with the other department heads, to update that Schedule periodically in the future as required or deemed necessary.

42238 Water Planning and Resources Committee Chairman Brick moved, seconded by Vice Chairman Barker, that the Board adopt (1) **Resolution 8520** to fix wheeling rates as set forth in Exhibit B attached to the General Manager's revised letter dated January 10, 1997; and (2) by a two-thirds vote, **Resolution 8521**, Amending and Restating the Definition of Operating Revenues (Fourth Supplemental Resolution) attached as Exhibit C to the General Manager's letter dated December 10, 1996, said Resolutions entitled:

RESOLUTION OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA FIXING AND ADOPTING WHEELING RATES (Resolution 8520)

RESOLUTION OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA FURTHER AMENDING AND RESTATING THE DEFINITION OF OPERATING REVENUES (FOURTH SUPPLEMENTAL RESOLUTION) (Resolution 8521)

General Counsel Taylor reported on the request from San Diego County Water Authority to have the December 6 letter and the December 9, 1996, statement from its General Counsel, Vincent F. Biondo, Jr., made part of the record. The Chair so ordered.

General Counsel Taylor advised that if Resolution 8520 is adopted, Metropolitan would file a validation action and, for ninety days, take no further action other than the publishing of notice and the accomplishment of service. Discussions with San Diego County Water Authority would continue during this period of time in an attempt to reach an acceptable agreement. The

Authority has agreed that it will not file a separate action during this ninety-day period, and Metropolitan will not object to the Authority, or other entities, being a party to litigation to determine if Metropolitan's wheeling rates are in conformity with State law. At the end of the ninety-day period, if an agreement is not reached, Metropolitan and the Authority would agree on a briefing schedule allowing the Authority to proceed and Metropolitan would not preclude the Authority from filing an independent action at that time. Metropolitan would not assert a statute of limitation by virtue of the Authority not filing an action within this ninety-day period:

The Chair called for a vote on the motion to adopt Resolutions 8520 and 8521.

The following is a record of the vote on the motion:

Ayes: Anaheim (Dir. Alario, 1,570 votes), Beverly Hills (Dir. Webster, 819 votes), Burbank (Dir. McCauley, 831 votes), Calleguas Municipal Water District (Dirs. Grandson and Miller, 3,268 votes), Central Basin Municipal Water District (Dirs. Ibbetson, Morse, and Pace, 5,659 votes), Chino Basin Municipal Water District (Dirs. Hill and Troxel, 3,125 votes), Coastal Municipal Water District (Dirs. McMurray and Owen, 2,623 votes), Compton (Dir. Murph, 159 votes), Eastern Municipal Water District (Dir. Gilbert, 1,805 votes), Foothill Municipal Water District (Dir. O'Neil, 531 votes), Fullerton (Dir. Blake, 639 votes), Glendale (Dir. Rez, 1,075 votes), Las Virgenes Municipal Water District (Dir. Peterson, 838 votes), Long Beach, (Dir. Meyer, 1,780 votes), Los Angeles (Ayes: Dirs. Herman, Kosmont, and Luddy. Absent: Dirs. Green, Moret, Russell, and Wein. 18,092 votes), Municipal Water District of Orange County (Ayes: Dirs. Bannister, Foley, King, and Witt. Absent: Dir. Huntley. 11,155 votes), Pasadena (Dir. Brick, 872 votes), San Fernando (Dir. Wysbeek, 72 votes), San Marino (Dir. Morris, 189 votes), Santa Ana (Dir. Harry, 1,003 votes), Santa Monica (Dir. Abdo, 935 votes), Three Valleys Municipal Water District (Dir. Milne, 2,487 votes), Torrance (Dir. Wright, 1,105 votes), Upper San Gabriel Valley Municipal Water District (Dirs. Feklow and Hawkins, 3,557 votes), West Basin Municipal Water District (Ayes: Dirs. Barker and Little. Absent: Dir. Gambrell. 6,119 votes), Western

Municipal Water District of Riverside County (Dirs. Krieger and Mylne, 2,624 votes). Total 72,932 votes.

Noes: San Diego County Water Authority (Noes: Dirs. Frahm, Krauel, Mason, Parker, and Watton. Absent: Dir. Griffen. 13,402 votes). Total 13,402 votes.

Abstains: None.

Absent: None.

The Chair declared Resolutions 8520 and 8521 adopted by more than the required two-thirds vote.

42239 Water Planning and Resources Committee Chairman Brick moved, seconded by Vice Chairman Barker and carried, approving the schedule as outlined by General Counsel Taylor (M.I. 42238).

42240 Finance and Insurance Committee Chairman Mason moved, seconded by Water Planning and Resources Committee Chairman Brick, that the Board approve Option B set forth in the General Manager's letter dated December 18, 1996, allocating \$47.5 million to the member agencies in the form of cash or flexible credit accounts, in shares proportionate to revenues paid to Metropolitan, and \$22.5 million for additional pay-as-you-go construction (PAYG) to comply with the Board's 20 percent PAYG policy during fiscal years 1996-97 and 1997-98.

Director Witt offered a substitute motion, seconded by Director Hill and carried, and the Board approved Option A set forth in the General Manager's letter dated December 18, 1996, allocating \$70 million to the member agencies in cash or flexible credit accounts, in shares proportionate to revenues paid to Metropolitan, and adopted **Resolution 8522** attached to the General Manager's revised letter dated January 10, 1997, as Exhibit G, entitled:

**RESOLUTION OF THE BOARD OF DIRECTORS OF THE METROPOLITAN
WATER DISTRICT OF SOUTHERN CALIFORNIA APPROVING USE OF
REVENUES FROM FISCAL YEAR 1995-96**

42241 Finance and Insurance Committee Chairman Mason moved, seconded by Engineering and Operations Committee Chairman Miller and carried, authorizing (1) a construction contract for the Arrowhead East Tunnel in the amount of \$88,373,316 be awarded to Shank/Balfour Beatty, a joint venture, in accordance with Specifications No. 1358, as amended; and upon execution of the contract, authorized the General Manager to reject all other bids; and (2) No. 11 to Appropriation No. 15122, an increase of \$115,500,000 to a total of \$267,260,000 from the Commercial Paper Note Construction Fund, to finance all budgeted costs for the construction of the Arrowhead East Tunnel of the Inland Feeder Project, as set forth in the General Manager's letter dated December 10, 1996.

Directors Frahm, Krauel, Mason, Parker, and Watton requested to be recorded as voting no.

42242 Finance and Insurance Committee Chairman Mason moved, seconded by Engineering and Operations Committee Chairman Miller and carried, authorizing (1) a construction contract for a portion of the Mentone Pipeline in the amount of \$3,288,750 be awarded to Kenko Inc., in accordance with Specifications No. 1382, as amended; and upon execution of the contract, authorized the General Manager to reject all other bids; and (2) No. 12 to Appropriation No. 15122, an increase of \$4,700,000 to a total of \$271,960,000 from the Commercial Paper Note Construction Fund, to finance all budgeted costs for the installation of a portion of the Mentone Pipeline of the Inland Feeder Project, as set forth in the General Manager's letter dated December 10, 1996.

Directors Frahm, Hill, Krauel, Luddy, Mason, Parker, Troxel, and Watton requested to be recorded as voting no.

42243 Finance and Insurance Committee Chairman Mason moved, seconded by Engineering and Operations Committee Chairman Miller and carried, authorizing (1) award of a construction contract for the Inlet/Outlet Tower of the Eastside Reservoir Project in the amount of \$40,598,600 to Atkinson-Washington-Zachry, A Joint Venture, in accordance with Specifications No. 1343, as amended; and upon execution of the contract, authorized the General

Manager to reject all other bids; and (2) No. 37 to Appropriation No. 15123, an increase of \$48,800,000 to a total of \$1,681,852,000, utilizing funds from the Commercial Paper Note Construction Fund, to finance all budgeted costs for construction, contingency, and construction management for the Inlet/Outlet Tower of the Eastside Reservoir Project, as set forth in the General Manager's letter dated December 17, 1996.

Directors Frahm, Krauel, Mason, Parker, and Watton requested to be recorded as voting no.

42244 Chairman Foley reported that Agenda Item 8-6, the letter of the General Manager dated December 10, 1996, regarding the Record Drawing Restoration Program, has been withdrawn.

42245 Legal and Claims Committee Chairman Krauel moved, seconded by Director Blake, that, by a two-thirds vote, the Board adopt **Resolution 8523** attached to the General Counsel's letter dated December 12, 1996, declaring the necessity for the Inland Feeder Project and for the interest in the property described in Exhibits A and B attached to the foregoing letter, and directing the General Counsel to commence condemnation proceedings in San Bernardino County to acquire the property, said Resolution entitled:

A RESOLUTION OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA DIRECTING THE CONDEMNATION OF CERTAIN PROPERTY SITUATED IN SAN BERNARDINO COUNTY (INLAND FEEDER PROJECT)

Directors Frahm, Krauel, Mason, Parker, and Watton requested to be recorded as voting no.

42246 Vice Chairman Barker moved, seconded by Finance and Insurance Committee Chairman Mason and carried, authorizing the General Manager to approve and make all payments he determines to be due and payable under the terms of the State Water Service and Devil Canyon-Castaic contracts for the 1997 calendar year, as set forth in the General Manager's letter dated January 6, 1997.

42247 Water Planning and Resources Committee Chairman Brick moved, seconded by Vice Chairman Barker and carried, that the Board:

1. Set a time for a hearing of the Water Planning and Resources Committee at which interested parties may present their views regarding the General Manager's recommendation. The water rates and charges for the first six months of fiscal year 1997-98 will remain unchanged; and that the rates and charges effective January 1, 1998, be set by the Board as follows:

Effective January 1, 1998

<u>Class of Service</u>	<u>Rate or Charge</u>
Noninterruptible--Untreated	\$349 per AF
Noninterruptible--Treated	\$431 per AF
Agricultural--Untreated	\$236 per AF
Agricultural--Treated	\$294 per AF
Seasonal Storage, Long-Term--Untreated	\$233 per AF
Seasonal Storage, Long-Term--Treated	\$290 per AF
Seasonal Storage, Shift--Untreated	\$244 per AF
Seasonal Storage, Shift--Treated	\$301 per AF
Reclaimed	\$113 per AF
Wheeling--Firm (Member Agency only)	\$262 per AF
Wheeling--Non-firm (Member Agency only)	\$141 per AF
Connection Maintenance Charge	\$50 per cubic feet per second of capacity per month, not to exceed a maximum charge per connection of \$5,000 per month

2. Approve the following resolutions:

a. Resolution of intention (**Resolution 8524**) to impose the readiness-to-serve (RTS) charge in the form shown as Exhibit A to the General Manager's letter dated December 17, 1996, declaring the Board's intention (i) at its March 11, 1997, meeting to consider and act upon the General Manager's recommendation to impose an RTS charge at the current level, with an increase on January 1, 1998, and (ii) at its May 13, 1997 meeting to consider and act upon the General Manager's recommendation to impose standby charges within the territories of member agencies that have requested that charge as a means of collecting all or a portion of their RTS charge, said Resolution entitled:

RESOLUTION OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA GIVING NOTICE OF INTENTION TO IMPOSE READINESS-TO-SERVE CHARGE

b. Resolution of intention (**Resolution 8525**) to impose a new demand charge (NDC) at the current level and suspend collection of the charge for fiscal year 1997-98 in the form shown as Exhibit B to the foregoing letter, entitled:

RESOLUTION OF THE BOARD OF DIRECTORS OF THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA GIVING NOTICE OF INTENTION TO IMPOSE AND SUSPEND COLLECTION OF NEW DEMAND CHARGE

3. Find that the setting of rates and charges recommended in the General Manager's letter dated December 17, 1996, is exempt from the California Environmental Quality Act (CEQA) by Public Resources Code Section 21080(b)(8) since it is for the purposes of: (a) meeting operating expenses, (b) purchasing or leasing supplies, equipment or materials, (c) meeting financial reserve needs and requirements, and (d) obtaining funds for capital projects necessary to maintain service within existing service areas; and, additionally, it is exempt from CEQA under State CEQA Guidelines 15378 (b)(5) since it constitutes the creation of government funding mechanisms which does not involve commitment to any specific project which may result in a

potentially significant physical impact on the environment or which will be used to fund projects which have CEQA documentation or which will have CEQA documentation in place prior to construction of any facility or facilities.

Directors Frahm, Krauel, Mason, Parker, and Watton requested to be recorded as voting no.

Director Hill pointed out that reference is still being made to "noninterruptible" water, which is nonexistent. Assistant Chief of Planning and Resources Thomas stated, to conform to existing conditions, the language in the Administrative Code is being modified.

Directors Hawkins and Owen withdrew from the Meeting at 2:20 p.m.

42248 Director Blake moved, seconded by Vice Chairman Barker and carried, authorizing the General Manager to provide limited engineering services to Black and Veatch pursuant to a contract approved by the General Counsel, and authorized all ancillary activities necessary to implement the contract, as recommended in the General Manager's letter December 30, 1996.

42249 The following listed communications were submitted for the information of the Board:

- a. Report of the General Manager on the operating data for the month of November, dated December 10, 1996.
- b. Report of the General Counsel on the activities of the Legal Department for the month of December, dated December 30, 1996.
- c. Report of the Auditor on the activities of the Audit Department for the month of December, dated December 18, 1996.
- d. Letter of the General Manager dated December 13, 1996, transmitting the Executive Financial Summary for the month of November.

- e. Letter of the Auditor dated December 17, 1996, transmitting the Audited Cash Basis Financial Statements as of September 30, 1996.
- f. Letter of the General Manager dated December 17, 1996, submitting the Fiscal Year 1996-97 Second Quarter Status Report on the Local Projects and Groundwater Recovery Programs.
- g. Letter of the General Manager dated December 6, 1996, transmitting the Monthly Water Sales by Member Agency Report for Fiscal Year 1995-96.
- h. Letter of the General Manager dated December 10, 1996, transmitting the Statement of Metropolitan's Boundary Changes.
- i. Letter of the General Manager dated December 17, 1996, reporting on Metropolitan's temporary, consultant, and regular employee trends.
- j. Letter of the General Manager dated December 17, 1996, submitting his work plan for fiscal year 1996-97.

42250 At 2:25 p.m., there being no objection, the Chair declared the Meeting recessed for ten minutes.

At 2:40 p.m., the Chair reconvened the Meeting.

42251 At 2:43 p.m., pursuant to Government Code Section 54956.9(a), the Chair called the Meeting into closed session to receive a report on the litigation regarding the Monterey Amendment revising the State Water Contract and a report on the status of eminent domain action entitled Metropolitan Water District v. Domenigoni.

Director McMurray requested the record show Director Owen had withdrawn from the Meeting.

At 3:07 p.m., the Chair called the Meeting into open session, declaring the Board received a report on the litigation

regarding the Monterey Amendment, but took no action. On the issue of the eminent domain action entitled Metropolitan Water District v. Domenigoni, the Board authorized the General Counsel to offer a settlement as discussed.

42252 There being no objection, Chairman Foley adjourned the Meeting at 3:10 p.m.



SECRETARY



CHAIRMAN



San Diego County Water Authority

A Public Agency

3211 Fifth Avenue • San Diego, California 92103-5718
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December 6, 1996

John Foley
Chairman of the Board
Metropolitan Water District
P.O. Box 54153
Los Angeles, CA 90054-0153

RE: Wheeling
SUBJ: Proposed Resolution Establishing Short Term Wheeling Rates

Dear Chairman Foley:

A. INTRODUCTION

This letter and its enclosures are provided on behalf of the San Diego County Water Authority (Authority) and concern Metropolitan's Proposed Resolution giving notice of its intention to adopt "wheeling rates for firm and non-firm wheeling service" (Exhibit A). Nothing in the notice or the Proposed Resolution is specifically responsive to the Authority's request to use excess capacity in the Colorado River Aqueduct, and we have been informed by your General Counsel Mr. Taylor that the "wheeling rate" to be adopted by Metropolitan in January is a "separate matter from the SDCWA/Metropolitan negotiations¹.

In addition, we note that the published agenda for the December 9, 1996 public hearing and the Proposed Resolution expressly state that the matter under review by Metropolitan is the establishment of short-term wheeling rates for transactions of less than one year.² Nevertheless, because the Staff Report and enclosures transmitted with the Proposed Resolution express the view that the wheeling principles contained therein may serve as guidelines for future transactions of any duration, the Authority is compelled to restate its objections to the Resolution, its findings and the proposed wheeling rates.

The Authority has previously communicated its concerns and objections to the proposed wheeling principles and the companion wheeling rates which are derived from the "postage stamp" system-

¹ Correspondence from N. Gregory Taylor to Vincent F. Biondo, Jr. dated December 5, 1996 (Exhibit B.).

² Section 1 of the Proposed Resolution states that "Any wheeling transactions entered into by Metropolitan under this Resolution shall be for a period of up to one year."

wide approach.³ For the collective reasons stated in the enclosures attached hereto (and incorporated herein by this reference⁴), the Authority wishes to renew its strong opposition to the proposal because it does not reflect the differences in individual transfers and it includes costs completely unrelated to the use of the conveyance facility.

In short summary, the Authority objects to Metropolitan's imposition of costs upon a party requesting the use of excess capacity because the costs bear no relationship to the actual incremental cost of wheeling the water through the conveyance facility/system.

For example, Metropolitan would include stranded costs that arise from a reduction in water purchases within its wheeling rate. It would include costs of future facilities. Moreover, it would include the costs of storage and reclamation projects that bear no relationship whatsoever to the cost of conveying water through an existing aqueduct. Metropolitan's approach is tantamount to forcing a party to *purchase* excess conveyance capacity rather than paying the increased cost to wheel water through it. We think the law, common sense and public policy compel a different conclusion.

The Authority believes the intended result of Metropolitan's pricing approach is to remove any incentive for its customers or member agencies to request the use of excess capacity. In turn, this will allow Metropolitan to sustain its monopoly on imported water supplies within its boundaries. As such, the Proposed Resolution is contrary to the policy behind the wheeling statute and raises state and federal anti-trust issues in the process.

B. THE PROPOSED RESOLUTION

Water Code Section 1810 et seq. sets forth a process whereby a bona fide transferor of water may request a public entity that owns a water conveyance facility to make unused excess capacity available for the purpose of transferring water. The Statute mandates that the entity make any excess capacity available for use if the transfer will not injure existing users and the transferring party provides "fair compensation" for use of the facility.

Water Code Section 1812 obligates the agency owning the conveyance facility to determine whether capacity is available and the terms and conditions of use, including the amount of compensation. The agency must make its determinations "in a reasonable manner consistent with the requirements of law

³ Correspondence to Mr. Foley from Mark Watton dated November 15, 1996 and enclosures (Exhibit C).

⁴ All of the letters, memorandum and enclosures submitted herewith, including the supplemental letters following Exhibit I.

to facilitate the voluntary sale, lease or exchange of water..."⁵ Finally, the Agency must adopt written findings supporting the determination.

Metropolitan's decision to adopt a system-wide wheeling rate separately from the case by case determination of available capacity is an apparent attempt to bifurcate its review of bona fide transfers in the future. While Section 1813 does not prohibit this approach, the Proposed Resolution appears to be strategically crafted in an effort to foreclose a meaningful legal review of Metropolitan's determination of "fair compensation". Irrespective of whether the bifurcation of the required findings is technically permissible, we think the approach is contrary to the purpose of facilitating transfers, the policy of the Statute and will not withstand judicial scrutiny.

C. THE PROPOSED FINDING THAT THE CHARGES INCLUDED WITHIN THE PROPOSED WHEELING RATE ARE "REASONABLE AND CONSISTENT WITH THE REQUIREMENTS OF LAW," AND CONSTITUTE "FAIR COMPENSATION" FOR THE USE OF THE METROPOLITAN CONVEYANCE SYSTEM IS CONTRARY TO LAW AND NOT SUPPORTED BY THE EVIDENCE.

In accordance with Metropolitan's intention to adopt a wheeling rate and determine "fair compensation" on a system-wide basis, Section 14 of the Proposed Resolution states as follows:

"That the Board finds that such charges are reasonable and consistent with the requirements of law to facilitate the voluntary sale, lease or exchange of water, while ensuring that the use of Metropolitan's conveyance system is fairly compensated and does not injure any legal user of Metropolitan's water and conveyance system."

The finding is contrary to law, public policy and is not supported by the evidence.

1. State Policy is in Favor of the Unencumbered Free Transfer of Water.

Any administrative regulations adopted by Metropolitan concerning the transfer of water must be evaluated in the context of the overriding State policy in favor of the free transfer of water. Almost seventy years ago the people of California first recognized the need to overcome legal limitations on where water could be used by mandating the maximum reasonable and beneficial use of water in the form of a Constitutional Amendment.⁶ The Amendment removed legal obstacles to the free movement of water for distant beneficial uses. Simply, ancient legal barriers were required to give way so that the efficient use of water could be maximized.

⁵ Water Code § 1813

⁶ California Constitution Article X, Section 2; see *California Water & Telephone Co.* (1946) 29 Cal.2d 466, 483-484 [176 P.2d 9].

Over the last several decades, there has been a persistent legislative effort to eliminate institutional barriers and legal impediments to the transfer of water. The Legislature has codified its view that public policy requires the transfer of water to alleviate water shortages, *save capital outlay development costs* and conserve water and energy.⁷

In furtherance of the policy in favor of free transfers, the Legislature has previously discarded legal barriers on the free transfer of surplus water beyond the boundaries of a public water supplier.⁸ It has expedited the process for the lease of water rights⁹ and provided mechanisms for the transfer of conserved water.¹⁰

Of direct relevance to the Proposed Resolution now under consideration by Metropolitan is the legislative recognition that transfers were being obstructed by local agency refusals to allow access to existing water conveyance facilities. To alleviate this problem, the Legislature sought to provide access to existing publicly owned facilities for the purpose of efficiently and economically moving water from point to point without necessitating the construction of duplicate facilities. Enacted in 1986, Water Code Section 1810 et seq. provides a legislative mandate creating access to excess capacity in existing conveyance facilities.

For decades the Legislature and the courts have recognized and upheld the right of a party wishing to transfer water within the capacity of a *natural* conveyance system so long as the quantity or quality of the water taken by others was not impaired.¹¹ The legislative policy in favor of efficient transfer was deemed to be so compelling by the courts, it was made applicable to groundwater basins even though the Statute authorizing the use of natural conveyance systems was limited to surface systems.¹² Modernly, the only limit on the use of a natural conveyance system is the requirement that the transferror protect the quality and quantity of water available to vested rights. Water Code Section 1810 et seq. simply expands the application of this basic public policy to *man-made* conveyance facilities and we urge Metropolitan to

⁷ Water Code § 475; see *Governor's Commission to Review California Water Rights Law, Final Report* (1978) at p. 62.

⁸ See Water Code § 382.

⁹ See Water Code § 1020 et seq.

¹⁰ See Water Code § 1011.

¹¹ See Water Code § 7043; *Fell v. M & T. Inc.* (1946) 73 Cal.App.2d 692, 694-695 [166 P.2d 642]; see also *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-78 [142 P.2d 289].

¹² See *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-78 [142 P.2d 289]

take these policy directives into consideration when it evaluates the propriety of the Proposed Resolution and the principles it employs to establish the "wheeling rate".

2. *The Specific Requirements of Water Code Section 1810 et seq. Are Not Satisfied by the Proposed Resolution or the Finding in Section 14.*

The Legislative Counsel's digest for Water Code Section 1810 described the purpose for the new law as a legislative prohibition on the denial of unused capacity in any water conveyance facility if "fair compensation is paid for that use."¹³ The text of the law is true to this intention and to the same statutory and common law protection that have been traditionally accorded the users of a natural conveyance facility; i.e., the protection of the quality and quantity of water used by existing customers.

In addition, Water Code Section 1810 recognizes that the owner of the conveyance facility should not be injured financially by virtue of its decision to accommodate a transfer. Accordingly, the owner is to be fairly compensated for the use of the conveyance system.

"Fair compensation" is defined as:

" . . . the reasonable charges *incurred* by the owner of the conveyance system, including capital, operation, maintenance, and replacement costs, increased costs from any necessitated purchase of supplemental power, and including reasonable credit for any offsetting benefits *for the use of the conveyance system.*" (Water Code § 1811(c), emphasis added.)

The plain meaning of "fair compensation", whether viewed in isolation or in context with its companion statutory provisions and general State policy, is that the transferring party is obliged to hold the owner of the conveyance facility/system harmless for the costs incurred in the transfer. In other words, the transferring party must maintain the quantity and quality of flows otherwise available to existing Metropolitan customers and agree to provide reimbursement for any *incremental* increases caused by Metropolitan's accommodation of the transfer.

Indeed, this view appears to have been shared by Metropolitan at one time. In providing a letter of support for the then pending legislation, Ray Corley, Jr. wrote on behalf of Metropolitan that the new law would:

[M]andate that a public agency must allow a transferor of water the use of an *aqueduct* which has unused capacity, if fair compensation is paid for that use. The compromise

¹³ Exhibit D.

reached is fair to both the transferor of water and the owner of the *aqueduct*.
(Correspondence from Ray Corley, Jr. June 26, 1986.) (Emphasis added.¹⁴)

Since that time Metropolitan has forwarded a new interpretation of the Statute which is not supported by its legislative history or public policy. Metropolitan seeks to adopt general principles to support a wheeling rate that fails to give effect to the plain meaning of Section 1810 et seq, the supporting statutory scheme and the State Policy in favor of transfer by including system-wide costs that have no nexus to the wheeling activity.

Instead, the Proposed Resolution adopts a system-wide, postage stamp approach which is more relevant to setting a price for an incremental *purchase* of permanent capacity in Metropolitan's conveyance facilities/system rather than a charge for costs incurred. In fact, the staff report and supporting information clearly state that the vast majority of costs which Metropolitan seeks to recover will be incurred irrespective of whether it wheels water. Thus, the wheeling rate is neither specific to differences in each proposed transfer nor reflective of actual costs incurred by wheeling.

As noted in several letters to Metropolitan by the author of Section 1810, a charge for facilities unrelated to those incurred to accommodate the transfer are contrary to the express intention of the Legislature. In three separate letters, Assemblyman Richard Katz has consistently voiced his opposition to the general principles that form the back-bone for the Metropolitan wheeling rate and that are embodied in the Proposed Resolution.

"Contrary to my wheeling law, you are suggesting MWD proposes to load up their wheeling rates by adding a multitude of charges and expenses, including capital project costs not associated with the conveyance facility and other projects --such as conservation and recycling projects. To suggest that wheeling costs should also reflect the cost of conservation and recycling projects outside the boundaries of the buyer and the seller's district and counties is mind-boggling As I said very clearly in our meeting, my wheeling law provides for wheeling costs which are solely attributable to the facility in question, and solely attributable to the use of the facility (including capital, operation and maintenance and replacement costs attributable to the proposed use." (Correspondence to Mr. Wodraska November 17, 1995.¹⁵)

"No interpretation of this language allows for the wheeling charge to include system wide capital outlay or other programs unrelated to the physical transfer of water through a specific conveyance facility. MWD's efforts to include reclamation, conservation or any other

¹⁴ Exhibit E.

¹⁵ Exhibit F.

capital outlay program in your wheeling charges are outrageous and outside the law." (Correspondence to Mr. Foley, November 1, 1996.¹⁶) (Emphasis in original.)

Finally, on November 26, 1996 Assemblyman Katz wrote Metropolitan's General Counsel N. Gregory Taylor stating that:

"[W]heeling rights would be meaningless if water agencies like MWD were permitted to effectively block of [the] use of their conveyance systems by charging astronomical fees unrelated to the direct costs incurred in wheeling transferred water. The law therefore makes it exceptionally clear that water agencies can charge only for those facilities within a conveyance system that are actually used to transport water for a bona fide transferor."¹⁷

Therefore, the Authority objects to each and every charge which is contained within the proposed wheeling rate that is not directly attributable to the incremental cost of providing the excess capacity to the bona fide transferor. The proposed finding in Section 14 of the Proposed Resolution is not supported by the evidence and is contrary to law.

3. *A More Appropriate Basis for Determination of Fair Compensation Is a Point to Point Wheeling Charge.*

As an alternative to the postage stamp approach advocated by Metropolitan staff, the Authority strongly recommends that Metropolitan consider a methodology which is based upon actual use of the conveyance system/facility and the incremental cost of accommodating the bona fide transferor. Preliminary technical information on this alternative methodology is enclosed herein as Exhibit I.

D. *CONCLUSION.*

Although the Proposed Resolution, principles, findings and wheeling rate are not directly applicable to any specific request that has been made by the Authority, we remain concerned that they would establish a negative precedent on the issue of "fair compensation" within the meaning of Water Code Section 1810 et seq. Because the proposed methodology incorporates system-wide costs which have no relationship to the actual cost of using the conveyance system/ facility and which do not reflect the specifics of the transfer," the Proposed Resolution and the wheeling rate are contrary to law. Similarly, the proposed finding that the system-wide costs are appropriate and reasonable is completely unsupported.

¹⁶ Exhibit G.

¹⁷ Exhibit H.

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In closing we note that the submittal of this letter was made necessary by Metropolitan's decision not to grant the Authority a tolling agreement to preserve the parties' respective rights and remedies while they pursued their separate negotiations. The Authority remains committed to the success of the negotiations but has no choice but to file its objections at this time.

Very truly yours,

VINCENT F. BIONDO, JR.
General Counsel

cc: Maureen A. Stapleton
N. Gregory Taylor

REMARKS MWD - DECEMBER 9, 1996

For your record, I am Vincent F. Biondo, Jr., General Counsel for the San Diego County Water Authority. Good Afternoon.

The Authority thinks the proposed SDCWA-IID transfer is a win-win for Metropolitan and *all* its member agencies. The Authority Board unanimously expressed its appreciation to Chairman Foley for his leadership and to this Board for its action in agreeing to talk with us about moving the water on fair and mutually beneficial terms.

However, you must know from the Authority's previous communications that we have concerns about the legality of the actions in regard to wheeling. We know from discussions with your staff that they may claim the Authority has to sue within 90 days or waive all of its rights to contest the wheeling charge. That just doesn't give peace a chance.

So, I asked Mr. Taylor for a tolling agreement. That's a legal "time-out" while we continue to talk in a good faith effort to reach agreement. Either side can "pull the plug" and set the 90-day clock running at any time on 30-days notice. If there is an agreement, the problems go away, and we both would have saved a lot of time and effort by postponing the need to put our concerns before you and avoiding taking the other steps necessary to protect and preserve our options if the talks are not successful.

Such agreements are commonly used to facilitate settlement discussions, especially in situations like this where MWD's attorneys can argue for a short statute of limitations. I have been practicing law for 29 years, have signed hundreds of such agreements, and never had a governmental agency first indicate a willingness to discuss a solution to a problem and then refuse a tolling agreement while those discussions were taking place.

Much to my regret, Mr. Taylor, refused such an agreement. I also asked as an alternative for an agreement that MWD would not assert that the 90-day requirement to file litigation applied. That was also refused. These two refusals have forced us to state our position on wheeling to protect against claims by MWD's attorneys that the Authority has failed to exhaust its administrative remedies. Additionally, because of the short-time limit your staff seeks to impose I have no choice but to recommend spending the money on attorneys necessary to protect the Authority's position. This may require litigation before the talks have been given a fair chance to succeed. Staff did offer to give us until your next meeting to make our written comments - to no good purpose.

1. With holidays, talks won't be complete.
2. The Board needs time to receive and consider our position.
3. Doesn't address the problem.

If you are not persuaded by our materials, there is no reason MWD cannot act in January - if you feel you must - and at the same time approve a tolling agreement to preserve MWD's and the Authority's options while we talk. That wouldn't prejudice MWD in any way. Forcing us to litigation now could harm both MWD and the Authority, cast a cloud over our discussions, and result in depriving this Board of the unfettered opportunity to make the decisions which could solve the problem.

I, therefore, ask that at the conclusion of this hearing, a motion be made and voted upon to direct staff to put a tolling agreement on the agenda for the January 9 meeting, so it can be considered as a part of your action on the wheeling resolution.

It is the Authority's understanding that the proposed resolution, including wheeling principles and short-term transfer rates, is not applicable to any proposed water transfer now under consideration by the Authority. Nevertheless, it is my opinion that the recommended action is not consistent with state law and could be used as a "precedent" for consideration of future long-term transfers. Please be sure that my

remarks and this letter dated December 6, 1996, and its attachments, which set out the Authority's position in opposition to the resolution are given to each Director before the January 1997 meeting and are included as part of the official record of this hearing.

The Authority remains hopeful that we can successfully conclude the negotiations. However, approval of the recommended actions, together with the denial of the tolling agreement, will make time of the essence and may force the Authority to take steps, but for the refusal of that agreement, that either could have been avoided altogether or at least deferred. Nevertheless, the Authority intends to continue to do its best to work cooperatively with MWD to reach a mutually beneficial agreement for a long-term transfer.

Any questions? Thank you for your attention.