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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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To: Board of Directors (Water Planning and Resources Committee-Information)
(Executive Committee--Information)

From: General Manager _____
General Counsel _____

Submitted by: Debra Man _____
Chief of Planning & Resources _____

Subject: Status Report on Colorado River Strategic Planning Matters

[Handwritten signatures: J. Woodruff, M. [unclear], Debra C. Man]

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

As previously reported to your Board, the California agencies with rights and entitlements to Colorado River water have been involved for the past several months in discussions to develop a California Plan for California's annual apportionment from the Colorado River. The purpose of the Plan is to provide the Secretary of the Interior and the other six basin states with California's commitment to live within its annual apportionment, which includes 4.4 maf plus one-half of the surplus. Additionally, the Secretary is authorized and has in the past provided other states' apportioned but unused water for use in California. However, it is expected that in some years, California will be restricted to 4.4 maf, and thus one of the purposes of the Plan is to address what steps California agencies will take to reduce reliance on surplus Colorado River water.

A key component of the California Plan would involve the voluntary transfer of water from agricultural to urban uses. In order to facilitate such transfers, it is necessary that defined quantities of water be established for the California agricultural agencies. Presently, those agencies collectively share up to the first 3.85 maf of water available under the California water delivery contracts. Those agencies do not have set quantities within the 3.85 maf, rather a

priority system is established whereby what is unused by the first priority, in this case the Palo Verde Irrigation District, flows to the second in line and so forth. Such an allocation scheme can hamper water transfers, since it is unclear who's water is being transferred.

While some agricultural California agencies have been engaged in discussions on the quantification matter, those discussions have not yet been successful. Director of the Department of Water Resources David Kennedy has recently taken a lead role in trying to facilitate discussions amongst the various parties, and Metropolitan is participating with Director Kennedy's efforts. This letter responds to an inquiry made at the April Executive Committee meeting and identifies the various alternatives available to achieve quantification.

DETAILED REPORT

Development of California Plan: For the past several months, the various entities with entitlements to Colorado River water from California have been engaged in discussions in an attempt to develop a California Plan, which would provide the other Colorado River Basin states and the Secretary of the Interior with California's commitment to live within California's annual apportionment from the Colorado River when necessary. California's basic apportionment from the river includes 4.4 maf plus one half of any surplus declared by the Secretary. Additionally, the Secretary is authorized to allow California to utilize other states' apportioned but unused water. It is anticipated that in some years California will be limited to 4.4 maf. The other basin states and the Secretary have expressed continuing concerns that the increasing uses in California from the Colorado River may adversely impact the long term interests of the other basin states. Indeed, representatives from the other basin states have noted that while the Imperial Irrigation District and Metropolitan entered into and are implementing conservation measures to save 106,000 af annually, (Phase 1 Conservation Agreement), the uses in IID have continued to increase. The other basin states believe that California's continued reliance on surplus water could place their long term interests at risk due to the potential drawdown from system storage to meet California's delivery requirements. At the same time, system storage on the Colorado River is substantial with approximately 50 maf in storage. As a result of this high level of system storage combined with the anticipated hydrology for the basin, Metropolitan believes that it is appropriate for the Secretary to develop operating criteria which would provide greater assurances of the declaration of surpluses for a period of time. Representatives of the other basin states as well as entities within California have expressed concerns about such criteria. However, as noted by the Secretary in his address to the Colorado River Water Users Association in December 1996:

“The six Basin states other than California have proposed discussions to develop multiple year surplus and shortage criteria that will for an interim

period meet at least part of the demand in the Lower Basin. This is a significant proposal, but it is based on California's ability to commit to an enforceable program to reduce its reliance on surplus water, without creating undue risk to other entitlement holders."

The California agencies have been engaged in discussions to develop such a plan. Progress on that Plan was discussed with the other basin states at a meeting held in April 1997. Critical to the Plan is the development of water transfers within California, with transfers from agricultural interests to urban interests a critical component. Specifically identified as part of that Plan is the already in place Phase 1 Conservation Agreement. Also identified as a component of the Plan is the proposed IID/SDCWA transfer.

Quantification: One of the foundation matters is the necessity to quantify, i.e., establish specific quantities and priority dates for, the first 3.85 maf of California's basic apportionment to Colorado River water. Without quantification, the Secretary has indicated that he will not approve water transfers. The quantification issue arises out of the nature of the contracts which the California agency hold with the Secretary. As reported to your Board at the March 1997 Water Resources and Planning Committee meeting by Jerome C. Muys, Special Counsel to Metropolitan on Colorado River matters, one of the difficulties of the 7-Party Agreement, the Agreement by which all of the California agencies recommended how California's share of the Colorado River would be allocated within California, does not contain specific quantities or priority dates for the first three priorities. Rather, the Palo Verde Irrigation District, Yuma Project, IID and Coachella Valley Water District share the first three priorities for "not to exceed" 3.85 maf. The situation was characterized by the Regional Director of the Bureau of Reclamation in a December 10, 1992 letter to the General Manager of Metropolitan as follows:

"Problems with respect to administering the existing system of entitlement priorities relate to defined water service areas without specific assignment of water within the first three priorities of the 7-Party Agreement. An added complication is the 1934 Compromise Agreement between CVWD and IID which appears to place the burden for paybacks on CVWD. These circumstances serve to frustrate the practical and timely determinations and enforcement of annual reasonable beneficial use, determinations and resolution of excess use, as well as creation of water banking programs and negotiation and execution of voluntary water transfers pursuant to cooperative water conservation and land fallowing programs." (Letter of the Regional Director, Bureau of Reclamation, December 10, 1992)

Enclosed with this letter was the Bureau's proposal to set specific quantities of water to the first three priorities. This effort by the Bureau to facilitate discussions amongst the parties did not come to fruition. Consequently, the difficulties in administering the California

entitlements has continued and was again noted by the Secretary in his December 1996 speech to the Colorado River Water Users Association when he stated that:

“Another obstacle to marketing is the unclarity of the relative rights of various agricultural agencies in California under the Seven Party Agreement of August 18, 1931, and under a subsequent 1934 agreement between the Imperial Irrigation District and the Coachella Valley Water District. Clarification of agricultural rights subject to the Seven Party Agreement, and settlement of the long-festering dispute between Coachella and IID, are also likely to be crucial to effectuating transfers in California from agricultural to urban users.

At the April meeting of the Executive Committee the General Manager indicated in response to an inquiry from a Director that there are four possible options which could be pursued in order to achieve quantification. The four which were identified were negotiations, legislation, litigation and an administrative, regulatory process. This letter discusses the four options.

Negotiations: The first option is the continuation of discussions which are underway. The parties have been engaged in negotiations for some time. Indeed, this quantification issue was identified when the California parties first began their discussions with the services of the Honorable Abraham Sofaer in January of 1996. Those discussions were not successful and the California parties have now been involved in self-guided discussions but no resolution of the matter has been reached. Most recently, IID and CVWD engaged in a series of discussions, to which Metropolitan was not a party, but those discussions, likewise did not result in an agreement. It was also discussed at a meeting of the California Agency Managers on April 30, 1997, that the Bureau of Reclamation had placed a proposal before IID and CVWD for their consideration. Metropolitan is not presently a party to those discussions, nor is Palo Verde, nor certain Indian tribes and the non-Indian farmers on the federal Yuma Project represented by the United States.

Additionally, the Director of Water Resources, both as a facilitator for the SDCWA/ Metropolitan discussions and as a member of the Colorado River Board of California participating in the discussions for the development of the California Plan has taken an active leading role in attempting to facilitate discussions amongst the parties.

One of the present difficulties with this approach has been the inability of the parties to reach agreement, despite repeated attempts to do so, even with the assistance of various facilitators. Additionally, Metropolitan is not presently at the table in the discussions between IID/CVWD and the Bureau of Reclamation. Thus concerns about whether Metropolitan's interests, as well as the interests of the other California users mentioned above, will be appropriately addressed must be evaluated.

Legislation: Option two would be to propose federal legislation which would mandate the division of the 3.85 maf. Such an approach could subject this regional issue to broader issues not necessarily related to the limited matter which requires resolution.

Litigation: Option three would involve the filing of litigation to require the Secretary of the Interior to establish the quantities to which the agencies are entitled. Such a case would most likely be brought in a federal district court, but would probably result in Metropolitan being required to first exhaust its administrative remedies before the Secretary. As with all litigation there are inherent risks, i.e. results of litigation cannot be predicted with certainty and litigation may take a long period of time.

Administrative/Regulatory: The fourth option would involve the commencement by the Secretary of the Interior of a federal administrative rulemaking process. The Secretary may commence such a process at his own initiative, or he could be requested to do so by one or more of the agencies. Generally, rulemaking, a common administrative practice utilized by the federal government in many areas, would be expected to follow the following process;

The Secretary would publish an advanced notice of proposed rulemaking in the Federal Register. Such a notice, would announce the consideration by the Secretary of the commencement of a rulemaking process which would establish quantification. The notice would probably set forth a series of issues upon which the Secretary would request comment. It is anticipated that the Secretary would provide at least 60-90 days for public comment. Generally, the Secretary would then take the public comments and determine the appropriateness of proceeding with a rulemaking. If the Secretary determines that a rulemaking is appropriate, he would then once again publish a notice in the Federal Register of proposed rulemaking and would most likely set forth in that notice his proposal for the criteria to be applied in the rulemaking and perhaps even specific reserved quantities for the agricultural agencies. The notice would also provide the opportunity for public comment and a reasonable period of time in which to file those comments. The Secretary would then consider all of the comments submitted and then make any modifications or changes to the proposed rule he deems appropriate. He might even provide further opportunity for comment on proposed changes, or issue a final rule, which would be subject to judicial review.

Such an effort would appear to be consistent with what the Secretary indicated in his December speech: “. . . I am instructing the Bureau of Reclamation to initiate a rulemaking process to develop water management regulations for the Lower Basin. As you know, the Bureau began such an effort several years ago, but deferred further work to allow a consensus to develop among the states on approaches to interstate marketing and banking. Those efforts were unsuccessful. This time, the regulations will focus on: intrastate marketing; and interstate marketing within the Lower Basin based on state-approved, willing buyer/willing seller transaction. The regulations may be expanded if the public scoping process identifies other

water management activities that could be incorporated in them, without generating significant controversy or delay.”

Staff will continue to analyze these options and will be prepared to bring forward a recommendation to your Board in the near future.

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