



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

January 30, 1998

**To:** Board of Directors (Legal and Claims Committee--Information)

**From:** General Counsel

**Subject:** Legal Department Report for January 1998

**RECOMMENDATION(S)**

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For information only.

**EXECUTIVE SUMMARY**

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This report discusses significant matters which the Legal Department was concerned with during the month of January 1998.

**DETAILED REPORT**

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**1. Recent developments of Interest to Metropolitan**

None to report.

**2. Litigation to Which Metropolitan Is a Party**

Richard Beck, et al. v. Metropolitan Water District, et al.

On January 9, 1998, Metropolitan was sued by Richard and Stephanie Beck and Shavarash and Jacqueline Markarian, residents of the neighborhood east of the East Dam construction at the Eastside Reservoir Project. The Becks and Markarians allege property damage, diminution in property value, loss of business and personal injury caused by Metropolitan's construction activities.

MWD v. All Persons Interested (Wheeling Rates Validation Action)

Judge Laurence D. Kay issued his Tentative Decision in this case refusing to validate Metropolitan's wheeling rates on January 12, 1998. If this decision stands, it has the practical effect of invalidating the wheeling rates adopted by the Board in January, 1997. As authorized by the decision, Metropolitan has filed objections to and requests clarification of the decision. Judge Kay held that the "postage stamp" approach and inclusion of a proportionate share of system wide costs in wheeling rates, "while that position may not be unreasonable, is not in conformance with the limitations contained in the Wheeling Statutes." Instead, according to Judge Kay, the owner of a conveyance facility is entitled to recover only "for the increased costs

necessitated by a transferor's use of its facilities, and nothing more." Staff continues to review the implications of the decision and to analyze possible responses, including appeal.

Alex and Elvira Mlikotin v. Metropolitan Water District

The Mlikotins were the owners of about 45 acres of vacant land located adjacent to the San Diego Canal in the City of Hemet. The property has frontage on State Highway 74 (Florida Avenue), which is the major east-west roadway in the area. The Mlikotins have endeavored for years to develop the property without success. The property is subject to flooding, and the City of Hemet has refused to allow development until the Mlikotins complete a survey for wetlands and, if necessary, obtain a wetlands permit from the Army Corps of Engineers. In January, 1997, the Mlikotins filed inverse condemnation suits in state and federal court that named Metropolitan, among others, as a defendant. The suits alleged total loss in value of the property due to the creation of wetlands that prevented development. The Mlikotins allege that the San Diego Canal contributed to the flooding, and sought \$20 million in damages.

In May, 1997, the federal lawsuit was dismissed on Metropolitan's motion that the state court was the proper jurisdiction to hear the action. Discovery in the state action revealed that Mr. Mlikotin was aware of the flooding problem when he purchased the property in the early 1980's. Mr. Mlikotin has made several development proposals for the property including a motor home park, and a shopping center. None of the proposals received final approval. The City of Hemet has performed wetlands studies of the area which indicate a portion of the property is subject to regulation under the federal Clean Water Act. However, the Army Corps of Engineers has taken the position that the Mlikotins did not complete the required application to fill the wetlands. Metropolitan filed a motion for summary judgment on the grounds that it has no regulatory authority and cannot be liable for preventing development of the property, and that the statute of limitations has run on any damage claims arising from the physical condition of the property. On January 27, the Riverside Superior Court granted the motion and ordered judgment in Metropolitan's favor.

Associated Builders and Contractors, Inc. v. Metropolitan Water District

The California Court of Appeal in a decision filed December 15, 1997, affirmed the District's use of a Project Labor Agreement (PLA) for the Eastside Reservoir Project. Affirming the trial court decision, the court found that the PLA does not violate state competitive bidding requirements and does not exclude non-union bidders. On the constitutional questions raised the court found that the Agreement does not impinge on a bidder's right of free association and does not violate constitutional equal protection requirements. Associated Builders and Contractors, in litigation throughout the state, has attacked the use of such agreements by public agencies as violating the competitive bid requirements of California's Public Contract Code.

Southwest Center for Biological Diversity v. USBR

The Ninth Circuit Court of Appeal has scheduled oral argument on this matter for February 9, 1998. At that hearing, the Court will consider plaintiff's appeal from the District Court's decision denying plaintiff's request to require the Bureau of Reclamation to lower Lake Mead to protect habitat of the Southwestern Willow Flycatcher and to invalidate United States

Fish and Wildlife Service's Biological Opinion for the Bureau's water and power operations on the Lower Colorado River.

Planning and Conservation League, et al. v. Department of Water Resources, et al

On January 22, 1998, the California Supreme Court ruled in favor of the Department of Water Resources, Metropolitan and various other state water contractors on the Planning and Conservation League's suit regarding the validity of the Monterey Amendment by issuing the attached opinion. The case included California Environmental Quality Act (CEQA) causes of action as well as a cause of action that would have invalidated the Monterey Amendment. The Superior Court ruled in favor of the defendants on the CEQA causes of action as well as the invalidation action. The Supreme Court only ruled on whether the plaintiffs and appellants had timely filed an appeal from a Superior Court order quashing service of summons upon various of state water contractors including Metropolitan. The Court held that plaintiffs and appellants had not timely filed their appeal. Thus, the quashing of the summons will stand as to the invalidation cause of action. Since there is very strong case law supporting the principle that various of the state water contractors had to be served in the original action, it appears that the invalidation portion of the case will be successfully concluded. This is a significant step in ultimately disposing of this litigation. The CEQA causes of action, on which DWR and the State Water Contractors prevailed, remain before the Court of Appeal for a decision.

County of San Joaquin, et al v. State Water Resources Control Board

The United States Supreme Court has dismissed plaintiffs' petition for certiorari to review a decision of the California Supreme dismissing the case. Plaintiffs' initially challenged State Water Resources Control Board (SWRCB) interim water right order 95-6, which had amended the water rights permits of the United States Bureau of Reclamation (USBR) and Department of Water Resources (DWR) in certain respect to make them consistent with the December, 1994 Bay/Delta Accord and SWRCB's 1995 Water Quality Control Plan. If plaintiffs had been successful, the projects would have been subjected to inconsistent regulatory requirements which could have had significant water supply impacts. Metropolitan and other contractors intervened in support of the SWRCB. The trial court dismissed the case, based on California Code of Civil Procedure Section 389, because USBR was an interested party who could not be joined to the actions because it had not waived its sovereign immunity. Both the California Court of Appeal and Supreme Court affirmed the trial court in all respects. Plaintiffs, alleging that this case involved an issue of federal law, petitioned the United States Supreme Court for review of California courts' decision. The denial of the petition followed.

### **3. Resource Matters**

State Water Resources Control Board Hearings

The SWRCB has issued a revised hearing notice for its proceedings to consider alternatives for implementation of the flow-related objectives contained in its May, 1995 Water Quality Control Plan. SWRCB's revised notice establishes a more structured process, setting workshops/hearing on a topical basis. The upcoming hearings are more fully described in the General Manager's letter dated January 13, 1997 regarding the SWRCB hearings.

### Electric Industry Restructuring

On January 8 and 9, 1998, FERC's Chief Administrative Law Judge presided over procedural hearings in three major categories of open dockets at FERC on California electric industry restructuring matters: the ISO and PX rate cases, including the investor-owned utilities (IOU) ISO and PX rate "pass-through" cases, where the IOUs seek FERC's approval of their "pass-through" of rates they will pay to their existing contract customers of the ISO and PX rates; the IOU transmission owner (TO) tariff cases; and the IOU must-run cases. Procedural schedules were adopted in each case, establishing dates for discovery, submittal of written testimony, and the hearing; these dates extend from the end of January through the end of December, 1998. Metropolitan is most interested in the ISO rate case, the "pass-through" cases of Southern California Edison and Pacific Gas and Electric Company, and their TO tariff cases. These proceedings will be closely monitored with appropriate Metropolitan participation. During January, Metropolitan also continued to submit motions to intervene and in some cases, protest on recently-filed matters, and attended a technical conference on the allocation of startup costs between the ISO and the PX.

#### **4. Claims**

None to report.

#### **5. Financing**

Finance and Legal Department staff worked together to complete the disclosure documents and bond documents for two series of refunding bonds. The refunding bonds will refinance outstanding water revenue and general obligation bonds with new bonds issued at a lower interest cost, to obtain savings in Metropolitan's overall financing costs. The sale of these water revenue refunding bonds and waterworks general obligation refunding bonds could occur at any time, depending on bond market conditions. Simultaneously, staff began work on the documentation for two \$50 million variable rate water revenue bond issues previously authorized by your Board to provide additional financing for the capital improvement program.

#### **6. Legislative Matters**

None to report.

#### **7. Administrative Matters**

None to report.