



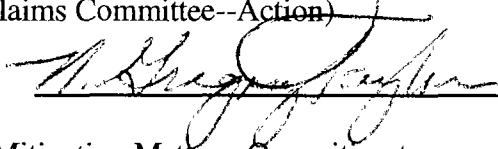
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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

8-15

April 6, 1998

To: Board of Directors (Committee on Legislation--Action)
(Legal and Claims Committee--Action)

From: General Counsel 

Subject: Eastside Reservoir Groundwater Mitigation Matters; Opposition to
Assembly Bill 1834 (Thompson) and Authorization to Take Necessary Action

RECOMMENDATION(S)

It is recommended that the Board of Directors oppose Assembly Bill 1834 and authorize staff to take necessary action to resolve these ongoing disputes.

EXECUTIVE SUMMARY

Assemblyman Bruce Thompson (Fallbrook) has proposed amendments to AB 1834 which would replace the existing bill with new language aimed at impacting Metropolitan's groundwater mitigation program for the West Dam on the Eastside Reservoir Project (Project). Two years ago, Assemblyman Thompson introduced a bill on behalf of landowners west of the West Dam which would have required Metropolitan to revise its groundwater mitigation plan. Metropolitan's Board adopted an opposition position to that bill, but the issue was resolved when Metropolitan and the landowners entered into binding written agreements on how the mitigation plan would be conducted. It was Metropolitan's hope and belief that this action resolved future conflicts among these parties because the agreements called for the groundwater disputes between Metropolitan and these landowners to be resolved by arbitration. In exchange for the arbitration rights and the withdrawal of the bill, Metropolitan expanded its existing groundwater mitigation plan and built emergency water connections with Eastern Municipal Water District for these landowners at significant cost to Metropolitan. This bill would override the existing agreements and resolve disputes in favor of the landowners avoiding the arbitration the landowners specifically agreed upon.

In addition to reneging on the existing written agreements, the bill would also grant the State Water Resources Control Board (SWRCB) authority over Metropolitan's mitigation plan and groundwater rights in this basin. This would preempt the California Environmental Quality Act (CEQA) because Metropolitan's approved project EIR already addressed these groundwater issues, as well as provide the SWRCB with groundwater authority in an area where it currently has no jurisdiction. Finally, the bill would establish a lower groundwater rights priority on the properties that Metropolitan acquired to construct the Project; this would amount to a "takings" of Metropolitan's property rights where water rights were clearly included in the acquisition. The expansion of SWRCB authority into conflict with existing federal watermaster authority, the preemption of CEQA, the avoiding of the written contracts and the taking of Metropolitan's

property rights create a precedent with far reaching impacts on Metropolitan and government projects throughout the state.

Means for the orderly resolving of these groundwater disputes already exist without the need for legislation. The agreements between Metropolitan and the property owners call for arbitration to resolve disputes which either Metropolitan or the agreement parties could initiate with regards to certain issues. A more comprehensive resolution could be achieved by adjudication of the groundwater rights in this basin which either Metropolitan or the property owners could initiate. In addition to adopting an opposition position to AB 1834, staff requests authorization to pursue a resolution of these disputes.

DETAILED REPORT

AB 1834, as amended by Assemblyman Thompson, will have significant adverse effects. The bill is unnecessary because Metropolitan has already undertaken a mitigation plan to remedy groundwater impacts caused by the Project. In compliance with CEQA, Metropolitan adopted a mitigation plan to remedy any impacts on groundwater resources caused by the Project. This plan includes injecting water into the groundwater basin immediately downstream of the Project's West Dam to replace any lost groundwater recharge from the Project area. Monitoring wells have been installed between the Project construction area and the downstream groundwater users to ensure that groundwater levels are not affected by the Project. These wells show that groundwater levels have remained steady in the area immediately downstream of the Project, and have not been affected by the Project.

The bill also interferes with existing contractual agreements between Metropolitan and the potentially affected property owners. In 1996, Assemblyman Thompson introduced a similar bill (AB 2332) to require Metropolitan to undertake specific mitigation measures. The Assemblyman agreed to withdraw the bill in exchange for Metropolitan's agreement to enter into contracts with each of the potentially affected property owners. Those contracts have been entered into and each contract includes a dispute resolution procedure calling for arbitration.

Each of the downstream owners who entered into agreements with Metropolitan are also users of groundwater. Their use affects the groundwater basin, and historic records show that they overdrafted the basin for many years prior to the Project construction. Any disputes over responsibility for changes in groundwater levels should be resolved in the manner contractually agreed upon by the parties, and not imposed by legislation.

The bill interferes with the jurisdiction of the federal court, and its appointed watermaster, over the surface waters within the Santa Margarita River watershed. The United States District Court for the Southern District of California retains jurisdiction over surface waters in the Project area which is within the Warm Springs Creek Sub-Watershed of the Santa Margarita River system. (United States of America v. Fallbrook Public Utility District, U. S. District Court Case No. 1247-SD-T.) The court has approved a Memorandum of Understanding between Metropolitan and the principal water users in the Santa Margarita River system requiring operation of the reservoir to preserve the amount of surface water received by downstream users. Sections 561 and 562(b)(3) and (c) of the bill would place the issue of surface water releases under the jurisdiction of the SWRCB, creating a conflict with the District Court. The bill would require Metropolitan to fund the SWRCB's activities in this area.

The bill contains several undefined terms and open-ended requirements that subject Metropolitan to great public expense without justification. Metropolitan would be required to determine the recharge necessary to supply well owners' current and future water demands within the groundwater basin (Section 562(b)(2) and 563(a)(1)(C)). However, the boundaries of the basin are not defined, and the future water demands of other users cannot be determined by Metropolitan without their participation or cooperation. Metropolitan would have to report on the "estimated allocation of the average annual precipitation" as determined by the Legislature, but with no control over the usage by others, or means to obtain that information (Section 562(a)). Furthermore, the bill does not condition Metropolitan's mitigation requirements on any finding that the Project has adversely impacted the allocation of available water. The mitigation is triggered by a specific groundwater level without any necessity of a determination that failure to reach that level is caused by the Project rather than the well owners' excessive pumping. Because the bill predetermines that Metropolitan is at fault, the ongoing reporting and monitoring serves no real purpose.

The bill contains no restrictions on the use of groundwater, or the required "substitute" water to be provided by Metropolitan to the benefited well owners. There is nothing in the legislation which restricts the private owners from exporting the groundwater in amounts causing the levels to drop to the extent that Metropolitan must provide additional free water for their own use or re-sale. In fact, the bill anticipates that the well owners will establish some type of water use business by requiring Metropolitan to provide water to cover "future water demands" rather than protecting the owners' existing water consumption (Section 563(a)(1)(C)).

The bill also amounts to a "taking" of Metropolitan's water rights. In purchasing the fee interest in the lands acquired for the Project, Metropolitan also paid for and acquired the water rights appurtenant to those lands. The bill would prohibit Metropolitan from using those water rights without a permit from the SWRCB, and prevent any permit from being issued without meeting legislatively established mitigation standards. Since those standards do not take into account the groundwater impacts of the private well owners, Metropolitan would be required to forego its water rights to remedy impacts created by other parties. The bill also provides that Metropolitan's water rights have lower priority than the private owners current and future water uses. These provisions constitute an uncompensated taking of Metropolitan's water rights.

By requiring that Metropolitan subordinate its uses of "local water" to the uses of private owners, the bill transfers valuable property rights to the private owners without any consideration. The bill's mitigation requirements are not based on any showing of Project impacts, but require Metropolitan to provide free water whenever specified groundwater levels are not met (Section 563(a)(6)). This requirement applies regardless of how much precipitation falls in the basin or how much water is removed and used by the private owners.

The value of these water rights is reflected in the evidence presented in an eminent domain action brought by Metropolitan to acquire land from the Domenigoni family. The Domenigonis originally owned about 3,100 acres of land, of which Metropolitan sought to acquire 510 acres. The Domenigoni family presented evidence that the water on the property being acquired had a value of \$12.5 million. (Metropolitan Water District v. Francis Domenigoni, et al., Riverside County Superior Court Case No. 229049.) The jury awarded the full amount sought by the

Domenigonis, including the value of the water. The case was settled on appeal, but no reservation of the water rights was agreed upon. Therefore, Metropolitan paid a substantial sum for the groundwater rights on the acquired property. The Domenigoni family continues to own lands adjacent to the Project, and are among the private well owners as defined in Section 560(g) of the bill. The provisions of the bill would allow the Domenigonis to pump groundwater without restriction on their remainder property, and require Metropolitan to limit its use to allow such pumping as well as provide additional free water. This constitutes a gift of public funds to the Domenigoni family of water rights in the basin for which they have already been paid a substantial sum.

Conclusion. It is recommended that the Board adopt a position opposing AB 1834 and authorize staff to take necessary action to resolve these ongoing groundwater disputes for the reasons stated above.

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THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Part 9 (commencing with Section 560) is added to the Metropolitan Water District Act (Chapter 209 of the Statutes of 1969), to read:

PART 9. GROUNDWATER

CHAPTER 1. EASTSIDE RESERVOIR PROJECT

560. Unless the context otherwise requires, the following definitions govern the construction of this chapter:

(a) "Control wells" means those existing monitoring wells in the Domenigoni Basin identified by the district as Wells WM-A through WM-F.

(b) "District" means the Metropolitan Water District of Southern California.

(c) "Eastside Reservoir Project" or "project" means the district's Eastside Reservoir Project located in the Domenigoni Valley of Riverside County, including all dams and other related facilities.

(d) "Local agency" means the Eastern Municipal Water District in Riverside County.

(e) "Local water" means all water within the boundary of the Eastside Reservoir Project, excluding water imported to the project from other watersheds by the Metropolitan Water

District of Southern California.

(f) "State board" means the State Water Resources Control Board.

(g) "Well owners" means private groundwater users producing water from wells in Section 3, 4, 9, or 10 of Township 6 South, Range 2 West, San Bernardino Base and Meridian, and their successors-in-interest.

(h) "West dam" means the embankment dam that forms the western boundary of the Eastside Reservoir Project.

561. (a) The legislature hereby finds and declares as follows. The district's construction of the west dam has permanently impaired groundwater recharge to private wells in the Domenigoni groundwater basin, threatening the livelihoods of the affected well owners. The legislature intends to require that the district mitigate the adverse impacts of the project to groundwater supplies by implementing a groundwater mitigation program to permanently restore water availability to well owners while enabling the district to proceed with the construction and implementation of the Eastside Reservoir Project.

(b) The district, in accordance with this part, shall provide at its own expense: (1) groundwater recharge to the Domenigoni groundwater basin; and (2) a permanent local agency water supply to the well owners adequate to supply all present and future beneficial uses. This part will not be interpreted to invalidate the district's obligations under the existing groundwater mitigation agreements with well owners.

(c) The state board shall exercise jurisdiction over the district's compliance with this part. No local water shall be stored or otherwise used for project purposes during any period that the district is not in compliance with this part.

562. (a) Within 14 days after the effective date of this section, the district shall submit to the state board a report on the estimated allocation of the average annual precipitation that originates upstream of the west dam. For the purposes of this report, the Legislature finds that the average annual precipitation upstream of the west dam is estimated to be 7,000 acre-feet per year, based on daily precipitation records from 1941 to 1987, inclusive.

(b) The district's report to the state board pursuant to subdivision (a) shall include an estimate of all of the following:

(1) The average annual water losses that result from natural consumptive uses, including runoff and evapotranspiration, within the drainage area above the project site and east of the west dam, excluding evaporation losses from the project.

(2) The average quantity of water necessary to recharge the Domenigoni groundwater basin to supply the well owners' current and projected future water demands and to maintain the groundwater elevation required by section 563.

(3) The average quantity of surface water releases to be made by the district at the west dam to certain surface water

rights holders downstream of the west dam pursuant to the "Memorandum of Understanding and Agreement on Operation of the Domenigoni Valley Reservoir (Agreement No. 4671)," dated November 21, 1994.

(c) The state board shall not approve any application required pursuant to section 564 until the state board determines, after notice to, and a hearing for, well owners regarding the estimates, that the estimates in the report required pursuant to subdivision (a) and (b) are reasonable. The district may submit amended estimates with the state board if the state board determines that the submitted estimates are unreasonable.

563. (a) The mitigation plan shall include all of the following:

(1) The district shall prepare and file an annual report with the state board to account for the water stored and used in the project. The report shall include all of the following:

(A) Evidence that the project is not capturing any amount of local water for export outside the watershed, except as authorized by the state board pursuant to Section 564.

(B) Evidence that the district is not using local water to offset or otherwise account for the evaporation losses in the project, except as authorized by the state board pursuant to Section 564.

(C) The quantity of water necessary to recharge the

Domanigeni groundwater basin to supply the well owners' current and projected future water demands and to maintain the groundwater elevation required by Section 963.

(2) The district shall, at its own expense, construct, maintain, and operate, at a minimum, the 12 existing injection wells at the base of the west dam identified by the district as Wells R-1 through R-12, as necessary to meet the injection requirements imposed by paragraph (6).

(3) The district shall, at its own expense, construct, maintain, operate and monitor, at a minimum, the existing row of monitoring wells located not less than 500 feet west of the injection wells identified by the district as Wells WM-A through WM-F.

(4) The district shall, at its own expense, construct, maintain, operate and monitor, at a minimum, the existing observation wells west of the project, at the following locations along Winchester Road:

(A) The intersection of Holland Road and Winchester Road, identified by the district as Well WM-J.

(B) 500 feet north of Holland Road, identified by the district as Well WM-RA.

(C) One-quarter mile south of Holland Road, identified by the district as Well WM-K.

(D) One-half mile south of Holland Road, identified by the district as Well WM-L.

(E) One mile west of Winchester Road and one-half mile

South of Holland Road, identified by the district as Well WM-N. The well at this location shall be a "fail-safe" observation well.

(5) Pursuant to existing agreements with the well owners, the district has installed facilities to deliver local agency water to the well owners. Within 14 days after the effective date of this section, the district shall, at its own expense, establish, operate, and maintain permanent facilities including permanent separate metered potable water connections at the existing facilities to the well owners in accordance with the local agency's policies, rules and regulations applicable to demand agricultural service, and shall pay all connection fees and meter charges. The district will not be entitled to any reimbursement by the well owners.

(6) (A) The district shall inject or extract water as necessary to maintain groundwater elevation at 1260 feet above mean sea level in the fail-safe well required by subparagraph (E) of paragraph (3) and at 1455 feet above mean sea level at the Control Wells. The district will not inject sewage effluent into the basin. The district will only inject into the basin: (1) water extracted from the basin during project construction dewatering, (2) San Diego Canal water, (3) water stored in the project, or (4) treated potable water.

(B) During any period that the groundwater elevation in the control wells falls below 1455 feet above mean sea level, the district shall deliver, at its own expense, substitute water

supplies to any well owner in Section 3, 4, 9, or 10 of Township 6 South, Range 2 West, San Bernardino Base and Meridian who requests delivery under this subparagraph. The district may deliver water from the San Diego Canal if the water is for irrigation use by the well owner. Otherwise, the district shall deliver potable local agency water. The district shall continue delivery of substitute water supplies under this subparagraph without interruption until groundwater elevation in the Control Wells is restored to a level at or above 1455 feet above mean sea level.

(C) During any period that the groundwater elevation in the fail-safe well falls below 1260 feet above mean sea level, the district shall deliver substitute water supplies to any well owner in Section 3, 4, 9, or 10 of Township 6 South, Range 2 West, San Bernardino Base and Meridian who requests delivery under this subparagraph. The district shall continue delivery of substitute water supplies under this subparagraph without interruption until groundwater elevation in the fail-safe well is restored to a level at or above 1260 feet above mean sea level.

(D) In any period that the district is not required to supply substitute water to the well owners under this part, any well owner may use local agency water delivered through the existing facilities at the well owner's expense for the local agency water supplied. The well owner shall not be responsible for any connection fees or facility costs, as all such costs are required to be paid by the district pursuant to this section.

564. In order to use local water for project purposes, including export or evaporation, the district must first apply for and receive a permit or license from the State Board. Any permit or license issued to the district shall have a capacity lower than the current and projected future water uses by the well owners, and lower than the district's groundwater recharge obligation imposed by this part. No local water shall be used for project purposes prior to the state board's issuance of a permit or license for such use in accordance with this section.

565. In exercising its jurisdiction under this part, the state board shall comply with both of the following:

(a) There is a rebuttable presumption that any adverse impact on groundwater resources in the vicinity of the west dam is caused by the project.

(b) The state board shall require the district to immediately mitigate any adverse impact of the project on groundwater resources wherever those impacts occur.

566. The district shall reimburse the state board for administrative costs incurred by the state board in enforcing the mitigation plan and processing any application by the district to use local water under Section 564.

SEC. 2. No reimbursement shall be made from the State Mandates Claims Fund pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code for costs mandated by the state pursuant to this act. It is recognized, however, that a local agency or school district may pursue any

