

December 22, 1998

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

**From:** General Counsel \_\_\_\_\_

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

## RECOMMENDATION(S)

For information only.

## EXECUTIVE SUMMARY

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

## DETAILED REPORT

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

#### Delta Wetlands Water Right Application

The State Water Resources Control Board (SWRCB) has responded to the water rights application filed by Delta Wetlands for an appropriative water right for a storage project involving four islands in the Delta. As reported earlier, the SWRCB held 12 days of hearings on the application in 1997. Numerous parties, including the California Urban Water Agencies (CUWA), State Water Contractors and Department of Water Resources, raised concerns regarding the project's economic feasibility and potential impact on other water users, water quality, fisheries, Delta levees in the vicinity and public utility infrastructure on neighboring islands. CUWA urged the SWRCB not to issue the permit at the present time in view of significant questions regarding the projects' potential to increase total organic carbon, salinity and other water quality problems in Delta source waters.

The SWRCB did not formally issue or deny the requested permit. However, it raised a number of issues that must be considered by the SWRCB when it finally decides the issue. Among these issues are:

- That the EIR must be supplemented and probably recirculated before it is completed.
- There is "substantial remaining uncertainty" regarding several issues, including drinking water quality impacts and new information being developed in CALFED and other processes, that may need to be added to the record, requiring additional hearings.

- There is no evidence that there are any buyers for the project's water and the project's ability to develop a water supply sufficient to make the project feasible is uncertain.

The SWRCB requested Delta Wetlands' input on whether the SWRCB should issue a decision based upon the existing record or hold further hearings to obtain more evidence prior to issuing a decision. The clear implication of the SWRCB response is that, absent further proceedings and answers to the questions raised, the requested permit will be denied.

San Luis & Delta-Mendota Water Authority v. U.S. Department of Interior  
and Save San Francisco Bay Assn. v. U.S. Department of Interior

The parties to these consolidated actions have filed their briefs regarding the partial summary judgment motion scheduled for January 12, 1999. The issue to be decided at that hearing is whether, as San Luis & Delta-Mendota Water Authority asserts, the Department of the Interior's November 1997 plan to implement the 800,000 acre-foot environmental water dedication of the Central Valley Project Improvement Act is invalid because it will result in a loss of more than the 800,000 acre-feet of yield designated by Congress. The State Water Contractors filed a brief as amicus curiae in support of the San Luis & Delta-Mendota Water Authority's position on this issue. Another issue of interest to the Contractors raised by Save San Francisco Bay Assn.--that the State Water Project is illegally diverting and exporting a portion of the 800,000 acre-foot dedication--is not at issue at the January 12, 1999 hearing.

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

Metropolitan Water District v. All Persons Interested

The record on appeal of the trial court's decision in this matter has been compiled, certified and deposited with the appellate court. Issuance of a briefing schedule is now imminent; Metropolitan will be required to file its opening brief in this matter within 30 days of the notice. The court may grant an extension of time to file at Metropolitan's request. At the suggestion of the State Water Contractors, the General Counsel, a representative of the Contractors and counsel for the San Diego County Water Authority and the Imperial Irrigation District have informally discussed the possibility of using the appellate court's mediation services pending resolution of the appeal.

Metropolitan Water District v. M.A. Mortenson Co.

In July, 1997, M. A. Mortenson Co. (MAM) presented its \$18 million claim for additional compensation to Metropolitan for various matters in connection with construction of the Henry J. Mills Filtration Plant Expansion No. 2. Metropolitan and MAM subsequently entered into settlement negotiations, which ultimately reached an impasse due to an inability to agree on a settlement amount. Following Board authorization, Metropolitan filed an action against MAM on October 21, 1998, for damages, civil penalty (false claims act) and breach of contract. On December 10, 1998, MAM answered and cross-complained against Metropolitan for breach of contract, seeking compensatory damages in the sum of \$18 million. Metropolitan has commenced document discovery.

### Southern California Edison Company v. United States

On December 15, 1998, Federal Claims Court Judge Wiese heard oral argument on cross-motions for summary judgment submitted by plaintiffs Southern California Edison Company (Edison) and Los Angeles Department of Water and Power (LADWP), defendant and third party plaintiff the United States, and third party defendants Arizona Power Authority, Colorado River Commission of Nevada, Cities of Burbank, Glendale, Pasadena and Boulder City, Nevada, and Metropolitan. This action concerns complaints by Edison and LADWP asserting that they should have received a greater portion of the remaining funds distributed by the United States at the end of the original Hoover Power Plant energy contract. Judge Wiese indicated that he expects to issue a decision within 60 to 90 days of the date of oral argument.

### **3. Resource Matters**

#### State Water Resources Control Board Water Right Hearings

On December 3, 1998 the State Water Resources Control Board (State Board) issued a new Order WR 98-9 extending existing WR 95-6 an additional year, through the end of 1999. Order 95-6 was adopted by the State Board in 1995 at the request of the Department of Water Resources, the Bureau of Reclamation and the project contractors. WR 95-6 temporarily amended DWR's and the Bureau's water rights permits to conform them to the December 1994 Bay/Delta Accord and subsequent State Board 1995 Bay/Delta Water Quality Control Plan. Absent WR 95-6, the projects would have been subject to inconsistent flow requirements and export restrictions, which could have resulted in loss of water supply. WR 95-6 was scheduled to terminate at the end of 1998. Phase 1 of the current State Board water rights hearings focused on whether the order should be extended. The projects, State Water Contractors and Central Valley Project contractors requested and supported extension of the order. In addition to the extension, WR 98-9 adds a requirement that DWR and the Bureau work with the South Delta Water Agency to minimize any impacts on water levels caused by the joint use by the projects of each others' diversion facilities.

Legal Department staff participated in eight additional days of State Board water rights hearings during December. The State Board completed Phase 5, which considered alternatives for meeting southern Delta salinity and dissolved oxygen objectives. The hearings will continue in January, 1999, commencing with Phase 2A which will consider alternatives to adopting the San Joaquin River Agreement for meeting San Joaquin River flow requirements.

#### Western Water Company Exchange

An exchange agreement was executed for the transfer of water purchased by Western Water Company from Tulare Lake Basin Water Storage District through the facilities of the Department of Water Resources and Metropolitan to Santa Margarita Water District, which is within the Municipal Water District of Orange County. At the time of this report, the Department of Water Resources had not approved usage of the California Aqueduct for this transaction.

### **4. Claims**

None to report.

## **5. Financing**

Legal Department staff met with Finance staff and members of Metropolitan's underwriting team to discuss options for financing the headquarters building and are providing research and background information with respect to certain options.

## **6. Administrative Matters**

The next Member Agency Legal Counsel dinner will be held on Monday, January 11, 1999, at 6:00 p.m. in Metropolitan's new headquarters dining room (The Courtyard Cafe) at 700 North Alameda Street in Los Angeles. The speaker will be J. David Rogers, Professor of Civil Engineering at the University of California at Berkeley. Professor Rogers will lecture on the cause of the collapse of the St. Francis Dam and the fallout this event posed to the civil engineering profession.

NGT:sk