

January 26, 1999

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

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

**Subject:** Legal Department Report for January 1999

## RECOMMENDATION(S)

For information only.

## EXECUTIVE SUMMARY

This report discusses significant matters which the Legal Department was concerned with during the month of January 1999.

## DETAILED REPORT

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

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

At the request of the new Secretary of the California Resources Agency, the California Department of Water Resources (DWR) withdrew its application to file an amicus curiae brief in this litigation. The litigation involves interpretation of the provision of the CVPIA which requires the Secretary of the Interior to dedicate 800,000 acre-feet of Central Valley Project (CVP) yield to the environment. Various CVP export contractors allege that actions which the Secretary has taken under this provision have dedicated considerably more water than the 800,000 acre-feet authorized by the CVPIA. DWR's proposed brief supported the contention of the federal contractors. The State Water Contractors also have filed a brief in support of the federal contractor position. A January 12, 1999 hearing on the matter has been continued to February 8, 1999.

#### Westlands Water District v. State Water Resources Control Board

This matter has been settled by the parties. Westlands Water District and the San Luis & Delta Water Authority filed this action seeking a writ directing the State Water Resources Control Board to accept a protest they had filed to a water rights application before the State Board. State Board had refused to accept the petition, asserting that Westlands' contract right to receive water from the Bureau of Reclamation did not qualify it as a "legal user of water" under the Water Code provision authorizing the filing of protests to water rights permit applications. The

parties have agreed that Westlands will participate in the proceeding at issue as an “interested party”, with both parties reserving their rights to argue the issue at a future time, if necessary.

Southwest Center for Biological Diversity v. Bruce Babbitt

A Federal District Court judge in San Diego has ordered the United States Fish and Wildlife Service to make its determination whether to list the Sacramento splittail as threatened under the Endangered Species Act (ESA) by February 1, 1999. The splittail had initially been proposed for listing in January, 1994. However, for a variety of reasons, the Service had not made the listing decision within the one year period established by the ESA. The Service reopened its comment period on the proposed listing last summer, and planned to make its listing decision in the very near future in any case. The State Water Contractors, Department of Water Resources, Department of Fish and Game and many other parties have submitted comments documenting the high abundance of splittail populations over the last few years and recommending that the splittail does not qualify for listing under the ESA.

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

Delmonico v. MWD

In late December 1998, the District was dismissed in the last of seventeen (17) consolidated cases arising out of landslides in the Anaheim Hills area of Orange County during the heavy rains of winter 1993. The District was initially served on October 14, 1993 with the first complaint seeking damages for inverse condemnation, negligence, nuisance, dangerous condition of property and other torts. It was asserted that Metropolitan’s pipeline which underlies the area, the Santiago Lateral, leaked thereby contributing to the high groundwater table conditions in the area. Over time, seventeen (17) cases were consolidated including some 500 plus plaintiffs who are owners of in excess of 250 properties affected directly or indirectly by the slide. Initially included as defendants, in addition to the District, were the City of Anaheim and County of Orange. Eventually, engineering firms and the manufacturers of plastic residential pipe used in the area were brought into the action. By this action, the plaintiffs claimed damages in excess of 40 million dollars and the matter is currently set for trial on certain threshold issues early in 1999.

Metropolitan’s Santiago Lateral Pipeline was constructed in the mid-1950’s and operated and owned by Metropolitan since. In the spring of 1993, following the initial slide, the District closed down the pipeline and did a thorough inside inspection. Plaintiffs and City of Anaheim representatives participated in that inspection. Metropolitan’s experts opined that the pipeline did not leak and was sound, while plaintiffs’ experts found the inspection results to be inconclusive. In December 1995, the District, together with experts retained by Pillsbury, Madison & Sutro, attorneys for the vast majority of the plaintiffs, conducted a hydrostatic test of the tunnel portion of the pipeline which, by any measure, showed that it does not leak.

Finally, in the fall of 1997, the District conducted a bore hole test along the pipeline, the results of which demonstrated that the pipeline does not leak, and in any event, any slight leakage would not migrate into the slide area. The other parties’ experts participated fully in monitoring these events.

As a result of the imperical demonstration that the Santiago Lateral Pipeline does not leak, plaintiffs’ attorneys agreed to dismiss Metropolitan from these consolidated lawsuits, without the payment of any settlement funds, in an exchange for waiver of costs. The matter is now closed.

Tin Mine Ranch Partners II v. MWD

The Fourth District Court of Appeal had scheduled January 6, 1999 as the date for its hearing of Tin Mine's appeal of the Riverside County Superior Court's denial of its petition challenging the adequacy of the District's final EIR for its proposed Central Pool Augmentation raw water conveyance, water treatment and water delivery project (CPA Project). However, on December 30, 1998, the Court of Appeal dismissed the appeal in response to a settlement agreement that Tin Mine had entered into with Metropolitan. In addition to abandoning its appeal, Tin Mine agreed not to file any action or proceeding under CEQA challenging the District's implementation of the CPA Project as proposed in the final EIR and further agreed that the Riverside County Superior Court judgment in the District's favor is effective and shall remain in place as a final judgment. In consideration of Tin Mine's agreements, the District waived any costs it would have received on appeal and the superior court judgment awarding the District its trial preparation costs of approximately \$14,730 against Tin Mine.

**3. Resource Matters**State Water Resources Control Board Water Rights Hearings

The State Water Resources Control Board held eight more days of water rights hearings during January. The focus was on Phase 2A, in which parties proposing alternatives to State Board adoption of the San Joaquin River Agreement as a means to implement San Joaquin River flow objectives presented their proposals. The State Board also held a workshop to discuss various procedural issues, including whether and how the State Board should adopt a decision or decisions on Phases 1 through 7 of the hearings prior to commencing Phase 8. Phase 8 is the phase in which the State Board will attempt to allocate responsibility for meeting flow requirements among various water users in the Bay/Delta watershed.

**4. Claims**

None to report.

**5. Financing**

Nothing to report.

**6. Administrative Matters**

None to report.

NGT:sk