

- **Board of Directors**
Legal, Claims and Personnel Committee

September 9, 2003 Board Meeting

8-4

Subject

Approve amendment to increase professional services contract with the law firm of Latham & Watkins by the amount of \$150,000 for legal services in *Imperial Irrigation District v. United States*, U.S.D.C. No. 03 CV 0069 W (JFS)

Description

When the Quantification Settlement Agreement was not signed by December 31, 2002, the Department of the Interior (“Interior”) limited California to its base 4.4 million acre-foot (MAF) apportionment of Colorado River water for calendar year 2003. To stay within this apportionment, Interior’s Part 417 determination for Imperial Irrigation District (“IID”) reduced IID’s 2003 water order from the 3.1 MAF IID had originally requested to 2,858,900 AF.

IID sued to overturn the Part 417 determination in *IID v. U.S. Metropolitan* and the Coachella Valley Water District intervened in the litigation. On March 18, 2003, U.S. District Court Judge Whelan ruled that Interior failed to use the proper technical factors in the Part 417 regulations when reducing IID’s water order. The Judge issued a preliminary injunction requiring Interior to deliver water to IID at the 3.1 MAF level on an interim basis. After further briefing, the Judge directed Interior to conduct a *de novo* (or new) Part 417 determination for IID using the proper technical factors in the Part 417 regulations in an administrative proceeding in which interested persons could participate.

The Bureau of Reclamation (“Bureau”) commenced the *de novo* Part 417 determination for IID on April 29, 2003. Numerous parties, including Metropolitan and member agencies, submitted comments and information. On July 2, 2003, the Bureau’s Regional Director issued a new Part 417 determination for IID, that, among other things, found that: (1) IID’s request for 3.1 MAF was excessive and could not be justified as a reasonable beneficial use; (2) IID should be allocated 2,824,100 AF for 2003 rather than the 3.1 MAF requested; and (3) IID should implement, on a longer term basis, water conservation measures to further reduce its unnecessary tailwater discharges. Under the regulations, IID may seek reconsideration of the determination, and on August 5, 2003 IID filed its objections to the Regional Director’s July 2, 2003 decision. The regulations provide for further appeal to the Secretary of the Interior. The entire administrative appeal process could extend to early October 2003.

After the Part 417 administrative process is completed, the parties will return to federal court. Assuming that the final Part 417 determination is similar to the July 2, 2003 decision by the Regional Director, it is likely that IID will challenge the new Part 417 determination, and that the United States and other parties will seek to lift the preliminary injunction issued earlier. Interested persons who submitted comments in the Part 417 administrative process also might seek to intervene in the litigation.

Latham & Watkins, particularly its San Diego office where the lawsuit was filed, has been assisting the Legal Department in the litigation. The original legal services contract with Latham & Watkins was for \$90,000.

Metropolitan has an important stake in the *IID v. U.S.* litigation, and in the *de novo* Part 417 determination that will become the focus of the litigation in the fall of 2003. The *de novo* Part 417 determination will likely set the fundamental parameters for IID’s water use for the next several years. If upheld in the courts, the Part 417 determination will quantify, or provide an important basis for negotiating a quantification of IID’s water use. The water conservation measures identified in the July 2, 2003 Regional Director’s determination (if included in a final Secretarial decision) also provide a “road map” for reducing IID’s water use in later years. A long-term

reduction in agricultural water use in California is one of the criteria for reinstatement of the liberal criteria in the Interim Surplus Guidelines.

Although the Legal Department has played the lead role so far, Latham & Watkins has litigation resources and expertise in certain areas that is highly beneficial given the scope and complexity of this litigation.

The proposed amendment would augment Latham & Watkins' contract by \$150,000, to a maximum amount of \$240,000. The current hourly rate in the contract is a "blended" \$365.

Policy

Metropolitan Water District Administrative Code § 6431: Employment of Special Counsel

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities (Section 15378(b)(2) of the State CEQA Guidelines). In addition, the proposed action is not subject to CEQA because it involves other government fiscal activities, which do not involve any commitment to any specific project, which may result in a potentially significant physical impact on the environment (Section 15378(b)(4) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to the provisions of CEQA pursuant to Sections 15378(b)(2) and 15378(b)(4) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options/Fiscal Impacts

Option #1

Adopt the CEQA determination and approve amendment to increase professional services contract with the law firm of Latham & Watkins by \$150,000.

Fiscal Impact: \$150,000

Option #2

Do not approve amendment to professional services contract, and require all legal services involving the proceedings to be provided exclusively by the Legal Department.

Fiscal Impact: Unknown

Staff Recommendation

Option #1


Jeffrey Kightlinger
General Counsel

8/14/2003

Date