



Board Report

File #: WRAG 17-074, **Version:** 1

Consider recommending the Monterey County Water Resources Agency Board of Supervisors approve a Policy Relating to the Reconstruction of Structures Damaged by the 2016 Chimney Fires in and around Nacimiento Reservoir; and authorize the General Manager to exercise the provisions within the Policy and/or provide direction to staff to proceed forward on this issue.

RECOMMENDATION:

It is recommended that the Monterey County Water Resources Agency Board of Directors recommend that the Monterey County Water Resources Board of Supervisors:

1. Approve the Policy Relating to the Reconstruction of Structures Damage by the 2016 Chimney Fires in and around Nacimiento Reservoir;
2. Authorize the General Manager to exercise the provisions within the Policy and/or provide direction to staff to proceed forward on this issue.

SUMMARY/DISCUSSION:

In August 2016, 28 privately owned structures were destroyed at the Cal-Shasta Club as a result of the Chimney Fire. Approximately eight of these structures were located within the Monterey County Water Resources Agency (MCWRA) Floodage Easement (Easement) at or below 825 (NGVD29). Owners of these structures are requesting MCWRA permission to replace these eight fire-damaged structures. MCWRA staff finds that the reconstruction of these structures would represent an encroachment into the Easement area. MCWRA staff has consulted with the Monterey County Counsel Office for advice on how to respond to the request for reconstruction. County Counsel's Office has advised that any relief that the MCWRA might be able to afford would entail some form of permission to encroach into the Easement area (i.e., an encroachment permit).

Owners are essentially seeking disaster relief which would allow in this one instance the ability of the structures within the Easement area to be reconstructed. MCWRA staff recommends the MCWRA Board of Directors (BOD) and the MCWRA Board of Supervisors (BOS) consider some minimal encroachment for these structures destroyed in the Easement area, if they were constructed under lawful permits and under certain terms and conditions.

The reconstruction Policy has been presented to the Personnel and Administration Committee (Committee) twice (January 6, 2017 and March 3, 2017). At the January 2017 meeting the Committee was presented with the first draft of the Policy. Various owners and Cal-Shasta Club representatives were present and expressed dissatisfaction with the first draft. The Committee directed staff to meet with them and to go over the concerns. So, on February 10, 2017 MCWRA staff met with the owners and Cal-Shasta Club representatives in King City. The result was MCWRA staff made edits to the Policy and a second draft was created. The second draft (aka version II 2/28/2017) was made public as part of the March 2017 Committee meeting. During the public comment, the owners and Cal-Shasta Club representatives expressed continued concerns regarding section G (indemnification agreement) and section J (amortization). Therefore, the Committee directed staff to bring the item forward to the March 2017 MCWRA BOD with Counsel present. MCWRA staff has received numerous phone calls and emails requesting section G and section J be removed from the Policy.

The indemnification provision was included in the draft policy to protect MCWRA from potential liability as a result of granting an easement. Indemnification is regularly required by MCWRA (and the County) when granting permission for some activity on MCWRA property (here, MCWRA's floodage easement). Indemnification is standard in encroachment easements granted by both public and private parties. If the property or person of third parties (including guests of the persons to whom the easement is granted) is damaged or injured while in the floodage easement, there is a substantial likelihood the MCWRA would be sued. This is so because MCWRA owns the easement, MCWRA is a public entity, and public entities are seen to be "deep pockets." Activities on or near water can be above-average sources of potential liability.

The amortization provision was included in the draft policy to protect MCWRA's rights in the floodage easement. Bear in mind that MCWRA has the right to deny any easement outright. MCWRA could also seek a court order seeking to abate any encroaching structures, meaning they could be modified, removed or relocated from the MCWRA easement. Instead of recommending such action, staff recommends a draft policy that allows limited reconstruction of these encroaching structures. The amortization provision means that after a lengthy period of years-based on the useful life of the structure-the structures are subject to removal or relocation. Amortization is the means of preserving MCWRA's ability to use the full extent of the floodage easement in the future, in the case, for example, that changes in the structure of the dam or in operations require that.

MCWRA purchased the floodage easement for valuable consideration. Amortization is a means of avoiding a constituting a gift of public funds, which could be argued if blanket, unconditional easements were granted. Finally, amortization is intended to preserve MCWRA's right to enforce the easement as to other properties, which were built without permission and/or permits from San Luis Obispo County. Without it, parties who are not currently seeking reconstruction permits and an encroachment permit could argue that MCWRA could not enforce the easement as to them, even if in the case of an egregious encroachment.

MCWRA staff has explained a decision to remove these sections is a policy decision and would need to be done at the discretion and direction of the MCWRA Board of Directors and/or MCWRA BOS.

The Cal-Shasta Club is working closely with SLO County officials in the Planning and Building Department and SLO County Counsel's office. Those officials have expressed urgency in having MCWRA address the floodage easement encroachment issue. It is likely construction permits can be issued in late spring or early summer 2017 if the Cal-Shasta Club can address a few outstanding code upgrade issues including necessary improvements to the water system, the fire suppression system, and the septic system. According to Steve Demesher, P.E., who is representing the Cal-Shasta Club, the club is very close to having those issues resolved.

The Policy is required to be approved by the MCWRA BOS before it can be implemented. Following adoption of the Policy, the governing body with the authority to grant encroachment permission is the MCWRA BOS. It is recommended the MCWRA BOS delegate to the MCWRA General Manager the authority to approve an encroachment permit and an agreement and covenant for reconstruction of any structures within the Easement area under the proposed Policy.

OTHER AGENCY INVOLVEMENT:

County Counsel has been providing legal review.

FINANCING:

NONE

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Approved by: _____
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Attachments

1. Board Order
2. Policy relating to the Reconstruction of Structures Damaged by 2016 Chimney Fires