

**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

July 30, 1993

To: Board of Directors
From: General Counsel
Subject: Legal Department Report for July 1993

This report discusses significant matters with which the Legal Department was concerned during July 1993.

I. Litigation**A. Proceedings in Which Metropolitan Is a Party****1. Azusa Landfill Litigation (BFI v. SWRCB)**

On July 14, 1993, the Los Angeles Superior Court reaffirmed its denial of Browning Ferris Industries' (BFI) request for discovery regarding State Water Resources Control Board (SWRCB) criteria for denying solid waste landfill permits. This case challenges SWRCB's rejection of BFI's proposed expansion of its Azusa Landfill that is located near critical recharge areas for the Main San Gabriel groundwater basin which provides drinking water for about one million people. Metropolitan has intervened in the case along with its member agency in the area and the basin watermaster, in support of SWRCB. The court has scheduled trial for early December.

2. Lake Skinner Water Releases (U.S. v. Fallbrook PUD)

On July 21, 1993, the State Water Resources Control Board's (SWRCB) Division of Water Rights determined that the SWRCB does not have jurisdiction over releases of water from Metropolitan's Lake Skinner Reservoir into Tocalota Creek, a tributary of the Santa Margarita River. This determination effectively dismissed a complaint filed with SWRCB by a downstream owner, Alexander Borel, challenging Metropolitan's authority to release local runoff accumulated in Lake Skinner during storms, into Tocalota creek.

Metropolitan releases that runoff under the federal court judgment in United States v. Fallbrook Public Utility District, which incorporates reservoir operating criteria that assure protection of the downstream water rights established under that court's water rights adjudication of the Santa Margarita River System.

3. Golden Gate Audubon v. Browner/EPA

On July 19, 1993, the federal district court granted the motion of a number of urban state water contractors, including Metropolitan, to intervene in this case which seeks to require the U.S. Environmental Protection Agency (EPA) to issue water quality standards for the San Francisco Bay/Delta Estuary. The court also allowed Kern County Water Agency and Tulare Lake Basin to intervene.

4. Garvey Reservoir Restoration Litigation (Monterey Park v. MWD)

Metropolitan filed the opening brief on July 25, 1993, in its appeal of the superior court's ruling that Metropolitan's Environmental Impact Report for the Garvey Reservoir Restoration Project did not adequately comply with the California Environmental Quality Act.

5. Robert C. Denman v. MWD

Robert C. Denman, a discharged Metropolitan employee, initiated a mandate action against Metropolitan in June seeking reinstatement. Mr. Denman was discharged for failing to report suspension of his driver's license while continuing to operate Metropolitan vehicles and had been suspended from work previously for a similar infraction. Metropolitan filed a response to the action in July.

6. Idelfonso Hechavarria v. MWD

Metropolitan has been served with a civil complaint for employment discrimination filed in United States District Court by its employee, Idelfonso Hechavarria, charging that Metropolitan has discriminated against him in its promotion policies on account of his race and ethnic origin. Plaintiff currently works as a lab technician and has been employed by Metropolitan since 1976. The General Counsel is taking all steps necessary to protect Metropolitan's interests.

7. Anaheim Hills Slide Claims

Metropolitan received some 250 claims during July from property and home owners in the area of the Anaheim Hills slide, which was in the news during the heavy rains earlier this year. Although Metropolitan's Santiago Lateral Pipeline passes through the area, extensive investigations indicate that it did not leak or otherwise contribute to high groundwater conditions in the slide area.

B. Proceedings of Interest to Metropolitan

1. Endangered Species Act (Westlands Water Dist. v. United States et al.)

The Westlands Water District has sued the Bureau of Reclamation (Bureau) and National Marine Fisheries Service (NMFS) asserting a number of violations of the Section 7 consultation requirements of the Endangered Species Act (ESA). Westlands alleges that the Bureau violated Westlands' Central Valley Project (CVP) contract rights by agreeing with NMFS to restrict CVP export operations; that the Bureau should have complied with the National Environmental Policy Act (NEPA) before agreeing with NMFS to restrict CVP operations; that NMFS' "reasonable and prudent alternatives" (i.e., restrictions on CVP exports) are arbitrary and capricious; that NMFS was required to comply with NEPA before proposing those alternatives; and that NMFS' proposed alternatives result in a taking of Westlands' water supply, requiring compensation from the United States.

2. Endangered Species Act Litigation (Colorado Wildlife Federation v. Turner)

California's Colorado River Six Agency Committee (SAC) has filed an amicus curiae brief in this action which seeks to impose Endangered Species Act's (ESA) critical habitat protection requirements for Colorado River fish. The SAC brief opposes plaintiffs' motion to order the U.S. Fish and Wildlife Service (USFWS) to immediately publish an "interim final" regulation designating habitat for the Colorado River. The brief asserts that USFWS has not done the economic analysis required by the ESA, and that neither the ESA, its legislative history nor executive orders authorize such premature regulations.

3. Hoover Dam Power Contract Litigation (Overton Power District v. Watkins)

On July 27, 1993, the federal District Court in Nevada directed the Federal Energy Regulatory Commission (FERC) to reconsider one of the issues in a Hoover Power rate order which two Nevada power resale customers had challenged. The court also denied a request by California Hoover power contractors, including Metropolitan, to file a joint friend-of-the court brief.

The issue which the court remanded to FERC involves the auditing of capacity and energy payments and of project expenditures, by the Western Area Power Administration (Western). The Hoover power contractors have been negotiating various issues, including auditing procedures, with Western for several months. Those issues could have a significant financial impact on Metropolitan over the remaining 24 years of Metropolitan's current Hoover power contract. Federal agencies and the Hoover power contractors are currently evaluating the effect of the court's July 27 decision on those negotiations.

4. Ward Valley Litigation

On July 28, 1993, Metropolitan submitted a letter to the California Supreme Court supporting the Senate Rules Committee's petition for review of the Court of Appeal's May 7 Opinion which voided the Department of Health Services' plan for holding an adjudicatory hearing on a proposed license for a Low Level Nuclear Waste Disposal facility in Ward Valley, 20 miles west of the Colorado River.

Several other entities have filed similar letters with the court, including the Los Angeles City Attorney, the Senate Minority Floor Leader, the cities of Needles and Lake Havasu, and the Fort Mohave and Colorado River Indian tribes, urging review of the Court of Appeal's decision. The General Manager is submitting a related letter to the Board on this matter.

II. Resource/Environmental Issues

1. Endangered Species Act (Winter Run Salmon)

The National Marine Fisheries Service (NMFS) published its final rule designating virtually the entire Sacramento River system and San Francisco Bay north of the Bay Bridge as critical habitat for the winter run salmon. It did not list the delta channels (other than the Sacramento River) because the NMFS biological opinions contain measures (i.e., closure of Delta Cross Channel) to keep most of the winter run out of the interior delta. NMFS rejected the State Water Contractors' argument that the NMFS' approach of analyzing only the incremental economic impact of designation above those impacts resulting from listing was improper.

2. Endangered Species Act (Delta Smelt)

The U.S. Fish and Wildlife Service (USFWS) has revised its Endangered Species Act jeopardy opinion for the Delta smelt by deleting restrictions on the State Water Project and the Central Valley Project (Projects) which had imposed additional export pumping limits in May, June, and perhaps July, and additional delta outflow requirements in February. USFWS instead now requires the Projects to contact it to discuss alternate Project operations when the 14-day running average of delta smelt take reaches 400 fish.

The California Fish and Game Commission has decided to proceed with the process of listing the delta smelt under California's Endangered Species Act.

3. State Water Project Contract

A member of the legal staff participated with members of the General Manager's staff in meetings with the Department of Water Resources and others during July regarding the water shortage allocation and other provisions of Metropolitan's State Water Project contract.



N. Gregory Taylor