



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

August 31, 1993

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

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

**I. Litigation**

**A. Proceedings in Which Metropolitan Is a Party**

1. San Gabriel Basin Conjunctive Use

On August 13, 1993, the General Counsel transmitted to the Main San Gabriel Basin Watermaster (Watermaster), for approval, a proposed groundwater storage/extraction agreement for implementing Metropolitan's proposed conjunctive use program. Metropolitan has been negotiating that agreement with Watermaster representatives for the past two years. Although not all issues have been fully resolved, it is anticipated that Watermaster will consider Metropolitan's request at its October 6 monthly meeting.

The Los Angeles Superior Court established the Watermaster, a nine-person board, to implement the 1972 San Gabriel Basin water rights adjudication in Upper San Gabriel Valley MWD v. Alhambra et al. Metropolitan is a party to that judgment and has, for several years, stored imported water in the basin in cooperation with its member agencies and with Watermaster for eventual sale as replenishment water.

Although Metropolitan developed its storage/extraction agreement proposal as a water supply project, it has designed it to also assist federal, state, and local efforts for removing contaminated groundwater from the Baldwin Park area of the basin, which the U.S. Environmental Protection Agency (EPA) has designated a superfund site. On August 11, the General Manager transmitted comments to EPA urging

inclusion of Metropolitan's conjunctive use program in EPA's remedial plan for that area.

2. SWRCB Mono Basin Water Rights Hearings

On August 27, 1993, Metropolitan submitted comments to the State Water Resources Control Board (SWRCB) on the Draft Environmental Impact Report (DEIR) on reducing the City of Los Angeles' Mono Basin water rights. Those comments note that most of the resulting water supply reductions would probably be offset by purchases of Metropolitan water by Los Angeles, thus, adversely impacting Metropolitan's water supply situation.

At least 15 entities, including several state, federal and regional agencies and environmental entities, have filed notices of intent to participate at the SWRCB water rights hearings this fall, as has Metropolitan. SWRCB requires participants to file written testimony and exhibits by September 22. The Legal Department reported on those proceedings at your Board's August meeting.

B. **Proceedings of Interest to Metropolitan**

1. Endangered Species Act Issues

Winter Run Salmon

The Westlands Water District has served a new 60-day notice of intent to sue on the National Marine Fisheries Service (NMFS) regarding the endangered winter run salmon. The notice alleges that NMFS has violated the Endangered Species Act (ESA) by failing to adopt regulations to control the impact on salmon of non-native predator fish, legal and illegal fishing, municipal and industrial pollution, and diversions by Delta farmers. The notice alleges that NMFS' focus on water project operations is too narrow. At the end of the 60-day period following service of this notice, Westlands may file new litigation based on the notice, or add these claims to its existing action against NMFS (Westlands Water Dist. v. United States, reported in the Legal Department Report for the month of July). A number of parties, including the Kern County Water Agency (Agency) and the Friant Water Users Association have moved to intervene in the existing litigation.

The Agency also has served a 60-day notice on NMFS with respect to the winter run salmon. That notice alleges that NMFS has not used the best data available, has failed to adequately consider the economic impacts of its reasonable and prudent alternatives for salmon, and has imposed arbitrary and capricious restrictions on water project operations. While the 60-day period has elapsed, the Agency has not filed litigation based on the notice. As reported above, however, it has moved to intervene in the existing Westlands litigation.

#### Delta Smelt

Westlands also has served a 60-day notice on the United States Fish and Wildlife Service (USFWS) asserting that water project restrictions contained in its biological opinion violate the ESA. The biological opinion determines that project operations will not jeopardize the smelt or adversely impact its habitat and provides an incidental take statement. However, even though it finds no jeopardy, it imposes additional project restrictions. Westlands argues that while USFWS may have the authority to propose "reasonable and prudent measures" even where it finds no jeopardy, those "measures" must be limited to minor changes that do not alter the basic project. Westlands alleges further that the proposed measures are more than minor changes, which do alter the basic project.

#### 2. Ward Valley Litigation (California Radioactive Materials, etc. v. Health & Welfare Agency)

On August 25, 1993, the California Supreme Court finalized the Court of Appeal's May 7 Ward Valley opinion that invalidated an agreement between the Department of Health and Safety (DHS) and the Senate Rules Committee to hold adjudicatory hearings in preexisting licensing proceedings for a low-level radioactive disposal facility in Ward Valley, near Needles in the Riverside desert. The opinion holds that the agreement constituted unlawful coercion under the separation of powers provisions of the California Constitution. The Court of Appeal has, accordingly, directed DHS to proceed with the licensing process without the proposed adjudicatory hearing.

Metropolitan had, along with other public agencies, supported that type of hearing. On August 11, the Secretary of the Interior (Secretary), in a letter to Governor Wilson, also requested additional hearings on technical aspects of the project this fall, independently of the California litigation.

The Secretary based his request on his ongoing evaluation under federal law of whether to transfer the Ward Valley site to the state and requested recommendations and findings by the end of the year.

On August 13, Metropolitan submitted a request to DHS requesting comment on a draft consultant's report on the Ward Valley facility, noting that Metropolitan has taken no position either supporting or opposing the facility. The General Manager described that report more fully in his August 3 letter to your Board. At the end of August, Metropolitan received a request under the Public Records Act, for Metropolitan's correspondence regarding the Ward Valley facility, from the Committee to Bridge the Gap. Metropolitan has responded that it intends to comply with that request.

## **II. Resource/Environmental Issues**

### **1. State Water Contract**

A member of the legal staff continued to participate in negotiations relating to amendments to the State Water Contract addressing the water shortage provisions of the contract. The issue has been raised by certain of the agricultural contractors that water should be allocated in a manner significantly more favorable to agricultural uses. Negotiations centered around these provisions as well as revisions to the contract which would guarantee contractors access to project facilities to transport nonproject water as well as ability to store water on an interim basis outside of contractors' service areas. The legal staff, and special counsel, O'Melveny and Myers, continued preparations for the eventuality of future litigation on the water shortage provisions.

### **2. Colorado Wildlife Federation v. Turner**

The court has set a hearing date of September 21, 1993, to hear plaintiffs' motion that the court order United States Fish and Wildlife Service to immediately issue an "interim final order" designating critical habitat for four listed fish species found in the Colorado River, even though the required economic impact analysis has not been completed. Meetings with the Department of Justice and Interior personnel were held in Washington, D.C., on September 13 and 14, to

encourage the federal government to continue to urge that economic considerations be taken into account and to appeal any adverse decisions. The federal government will be filing a supplemental brief regarding problems it is having meeting the deadlines for completion of the designations.

Metropolitan, as part of California's Colorado River Six Agency Committee, has filed an amicus curiae brief opposing the motion on the grounds that neither the ESA, its legislative history nor executive orders authorize final designation of critical habitat absent completion of the required economic impact analysis. A supplemental amicus curiae brief by the Six Agency Committee supporting the federal government's latest filing will be filed. Committee representatives will be present in Denver for the September 21 hearing.

### 3. Audubon v. Environmental Protection Agency

The federal government is expected to announce a settlement agreement with the Sierra Club Legal Defense Fund to publish water proposed Bay/Delta water quality standards on December 15th. The action is being taken without consultation with the Urban and Agricultural State Water Contractors who were granted intervenor status in the case despite the court directing them to be involved in the settlement discussions. The State Water Contractors will file an opposition to settlement. In any event, the action of the federal government indicates that it is prepared to proceed with promulgation of standards at the earliest possible date.

### 4. Water Transfers

Members of the Legal Department continue to work with the State Water Project and Conservation Division to develop and negotiate principles for an agreement to transfer exchange contract water, and to participate in the implementation of the water transfer and other relevant provisions of the Central Valley Project Improvement Act.

## **III. Contracts**

### AMP Negotiations

Metropolitan's negotiating team, including members of the Legal Department, continued to meet with the Municipal Water District of Orange County (MWDOC) Allen McColloch

Pipeline (AMP) negotiating team to review the first draft of the proposed agreement for the sublease and installment purchase of the AMP.

  
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