

FILED
by the Board of Directors of
The Metropolitan Water District
of Southern California
at its meeting held

AUG 20 1996



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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

[Signature]
for EXECUTIVE SECRETARY

9-2

July 31, 1996

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

From: General Counsel

[Signature]

Subject: Legal Department Report for July 1996

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

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

DETAILED REPORT

I. Recent Developments of Interest to Metropolitan

Nothing to report.

II. Litigation to Which Metropolitan is a Party

Indian Child Welfare Consortium et al. v. RCFCD, etc., et al.

Plaintiffs sued Metropolitan, and other defendants, for damages suffered by businesses in Temecula due to the flooding of Murrieta Creek. Metropolitan was sued in its capacity as owner and operator of Lake Skinner, which flows into Murrieta Creek, and as owner of 10.3 acres of Murrieta Creek riparian property.

The January 16, 1993 Temecula Flood began at approximately 3:30 p.m., when Murrieta Creek, which flows through Temecula, overflowed its banks during a heavy rainstorm. At 1:10 p.m. that day, Metropolitan had discontinued discharging water into the Tocalota Creek, which is tributary to Santa Gertrudis Creek and, ultimately, Murrieta Creek. Our technical consultant has concluded that water from Lake Skinner could have been present in Murrieta Creek, or its upstream watershed, at the time of the flood. However, the water Metropolitan discharged before 1:10 p.m. was released at only 6 cubic feet per second. Given that the peak flood flow was approximately 25,000 cubic feet per second, it is clear that Lake Skinner's water could not have substantially contributed to the flood. Consequently, Metropolitan had a strong defense for the Lake Skinner portion of this case.

Metropolitan's position as owner of Murrieta Creek riparian property, however, was not as clear. Accumulation of sediment and dense vegetation in the creek bed in the years preceding the flood had substantially reduced the creek's flood carrying capacity. Metropolitan's property had minimal sediment accumulation, approximately 1.5 feet in depth, and its property was too far downstream to have been a substantially concurrent cause of the flood. These contentions, however, were open to dispute by expert witness.

Metropolitan's chances of prevailing on summary judgment were unlikely because there were factual issues in dispute. Although Metropolitan's defenses were factually sound, the risk of an adverse verdict was high due to California's rule of joint and several liability. A jury could easily decide to share liability among the many parties owning riparian property as a means of spreading costs. Accordingly, Metropolitan agreed to pay \$75,000 in settlement of this matter. A \$75,000 settlement is in Metropolitan's best interests when balancing the risk of an adverse verdict with the high expense of defending a case of this complexity through trial.

MWD v. Beitler & Associates, Inc.

This matter is currently scheduled for oral argument before Division One of the Second Appellate District of the California Court of Appeal on August 26, 1996. The action was initially filed by Metropolitan as a declaratory relief action seeking a judicial determination that an alleged brokerage agreement with Beitler & Associates was void as a matter of law. Metropolitan was successful in obtaining summary judgment in 1994. The appeal, brought by Beitler, seeks to reverse the court's judgment enabling Beitler to pursue alleged damages in excess of \$5 million for causes of action including breach of contract, defamation, interference with prospective business advantage, and unfair business practices. Briefs have been prepared and filed by all parties. Metropolitan and former Chairman of the Board of Directors Michael Gage are represented by firm of Jones, Day, Reavis & Pogue. The law firm of Richards, Watson & Gershon has been retained to represent former General Manager Carl Boronkay.

Planning and Conservation League, etc. et al. v. Department of Water Resources et al.; San Bernardino Valley Municipal Water District v. State of California et al.

As previously reported, the Sacramento Superior Court ruled in favor of the defendants on the challenges by the Planning and Conservation League, Plumas County Flood Control District and Citizens Planning Association of Santa Barbara County to the Monterey Amendment to the State Water Contract. As to the dismissed motion to invalidate the agreement to transfer the Kern Water Bank, cross-complainant San Bernardino Valley Municipal Water District brought a motion to re-open this issue and re-characterize this cause of action as a taxpayer's suit. The motion was heard and rejected by the court on July 26, 1996.

The proposed Final Judgment and Statement of Decision have been submitted to the court. Once these have been signed by the court, the sole remaining portion of the case at the trial level will be San Bernardino's cross-complaint naming the Department of Water Resources and all of the state water project contractors. The judge is considering whether she can enter judgment now on the resolved portions of the case before the cross-complaint has been decided. The deadline for filing answers to San Bernardino's cross-complaint is August 12, 1996.

California Supreme Court denial of review in - San Bernardino Valley Audubon Society v. City of Moreno Valley, California Court of Appeal, Fourth District, Division Two (No. E015810)

On April 15, 1996, the California Court of Appeal (Fourth District, Division Two) issued a very damaging published decision in the case of *San Bernardino Valley Audubon Society v. City of Moreno Valley* that will have highly significant ramifications for the administration of the California Endangered Species Act and the ability of the California Department of Fish and Game to permit incidental take for Metropolitan's activities and projects.

Specifically, the case focuses on City of Moreno Valley's (City) approval of the Moreno Highlands development project which would impact the State endangered Stephen's Kangaroo rat (SKR). The City relied on the take authorization for SKR granted by the California Department of Fish and Game (DFG) to a joint powers authority of city and county governments, the Riverside County Habitat Conservation Agency (RCHCA). The Audubon Society argued that granting of private development take violated the provisions of the California Endangered Species Act (CESA), and that CESA allows only management take for scientific purposes. The Court of Appeal (Court) upheld the take authorization granted to the RCHCA, but only because of the Audubon Society's delay in initiating its legal action and the extreme prejudice resulting to the respondents.

However, the Court's opinion also includes extensive language that, but for Audubon Society's delay, the Court would have ruled that the DFG's take authorization for SKR was invalid. In other words, the Court has unnecessarily published "dicta" that incidental take of State-listed candidate, threatened, and endangered species is available only for educational, scientific, or scientific management purposes.

The respondents in this case are the City of Moreno Valley, California Department of Fish and Game, Southern California Edison Company, Metropolitan Water District, Southern California Gas Company, Riverside County Habitat Conservation Agency et al., and San Diego Gas & Electric Company.

The DFG, Metropolitan, and RCHCA filed a petition in the Court of Appeal requesting that the Court grant a rehearing to reconsider its dicta, or alternatively to modify its opinion by either deleting the dicta or depublishing the opinion. Although not legally binding on other courts, this decision raises significant concerns regarding future judicial interpretations of the validity of other take authorizations which are part of a Habitat Conservation Plan or Natural Community Conservation Plan. On May 7, 1996, the Court of Appeal denied the petition for rehearing or modification.

On May 28, 1996, the DFG, Metropolitan and RCHCA filed a petition in the California Supreme Court requesting that it grant review of the Court of Appeal's decision.

On July 24, 1996, the Supreme Court issued its order denying both the petition for review and other requests for depublication of the Court of Appeal's decision. The Supreme Court gave no reason for its denials.

III. Resource Matters

California Electric Industry Restructuring Filings

In July, Metropolitan filed an answer responsive to an Explanatory Statement filed at the Federal Energy Regulatory Agency by San Diego Gas & Electric Company which identified deficiencies in, and potential problems arising from, the transmission pricing and generation dispatch proposals supported by Pacific Gas and Electric Company and Southern California Edison Company. Additionally, Metropolitan prepared comments on a Joint Funding Application filed at the California Public Utilities Commission by the three referenced Companies regarding their proposal for interim funding, development, and governance of the restructured industry.

Staff also accompanied the General Manager and other members of his staff in introductory meetings with FERC Chair Moler and Commissioner Santa and participated in the preparation of briefing documents for such meetings.

IV. Claims

Nothing to report.

V. Financing

Nothing to report.

VI. Legislative Matters

Nothing to report.

VII. Administrative Matters**Computer Program**

PC DOCS, the document management system of the Legal Department, is now being utilized by all members of the Department. Users were trained at the end of June and began using the system July 1, 1996. Version control, access control and the searching and retrieval of work product generated by the computer system has been facilitated through the use of DOCS. Documents on the network can be retrieved by a number of separate criteria, e.g., author, document type, client, matter or creation date. Users can search for and locate documents without knowing a specific file name. A complete use history is maintained each time a document has been viewed, edited or printed. Multiple versions of documents can be created for revision and use.

Concurrently with the implementation of DOCS, the Department has begun developing LawPack, a case management system. A LawPack Committee consisting of attorneys and staff, is in the process of defining a basic organizational structure for storing the Legal Department's data and workproduct. Master lists of in-house lawyers, special counsel and clients are being created in the system. Field captions and attributes, menus, data windows and reports are being customized to suit the Department's needs. Completion of phase one is expected to occur well before the end of the year, ahead of the projected schedule.

Legal Counsel Audit

Edward Poll continues to analyze the relationship between the Legal Department and Special Counsel. His recommendations and standard guidelines for the Department's future use of special counsel will be completed by the end of this month. A presentation and report will be provided in September.

Legal Department Reorganization Update

Linda Santos, the Law Office Administrator, has recently completed her six-month probationary period with the Department. During this period, she has become familiar with the Legal Department's functions; has assumed supervision of support staff; has initiated the use of the document management system; has actively participated in the reclassification study; has initiated and participated in the recruitment process for two positions in the department; and has been actively involved in a number of committees.

The Law Office Administrator is in charge with initiating and implementing the administrative changes recommended in the Hildebrandt Management Report on the Legal Department. Effective this month, Linda will assume full responsibility of all legal administrative functions of the Department allowing for full implementation of the Hildebrandt Report.