



MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

March 31, 1997

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

From: General Counsel

Subject: Legal Department Report for March, 1997

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

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

DETAILED REPORT

I. Recent Developments of Interest to Metropolitan

Bennet v. Plenert

In a unanimous 9-0 opinion, the United States Supreme Court reversed the decision of the Ninth Circuit Court of Appeals, which held that parties regulated by the Endangered Species Act (ESA)--in this case irrigators who asserted that a biological opinion under the ESA regarding the operation of a reservoir--had no standing to sue the government over an action taken under the statute, even though their property or other economic rights may be harmed by that action. If the Ninth Circuit's ruling had been affirmed, it could have foreclosed Metropolitan's opportunity to seek judicial review of any ESA action affecting its water supply or other economic interests. As a result of the decision, parties regulated under the

ESA can assert standing to challenge such actions. Metropolitan had filed arguments with the Ninth Circuit supporting a petition for that court to rehear the case and, as part of the State Water Contractors, had contributed to plaintiff's legal expenses for the Supreme Court appeal because of the importance of the issue. Gregory Wilkinson of the firm of Best, Best & Krieger, who represents Metropolitan and other State Water Contractors on Bay-Delta issues, represented plaintiffs before the Supreme Court.

Spirit of the Sage Council, et al v. Babbitt ("No surprises litigation")

A settlement agreement has been signed by the parties and submitted to the Court for approval in this action. Plaintiffs' complaint had alleged that the Secretary of the Interior's "no surprises" policy with respect to Endangered Species Act (ESA) habitat conservation plans was invalid because it was adopted without meeting the procedural requirements of the Administrative Procedure Act (APA) and Section 10 of the ESA. The Secretary had provided an opportunity for comments from interested parties, believing that the specific procedures established in the APA were not necessary for adoption of the policy. If plaintiffs had been successful in invalidating the no surprises policy, it could have called into question the status of several habitat conservation plans adopted under the policy.

Under the settlement agreement, the Secretary shall publish within 60 days notice in the Federal Register soliciting comments on the policy, and shall reissue the policy within 150 days of the close of the comment period. Pending that action, the Secretary shall follow the existing policy for each new proposed habitat conservation plan and will provide an opportunity for public comments on any no surprises assurance contained in any proposed plans. In return, the plaintiffs agree to dismiss their complaint and to not challenge any habitat conservation plans and associated no surprise assurances in existence or approved prior to reissuance of the policy on the basis that the policy was invalidly adopted, pending the reissuance of a new policy. The Legal Department will continue to monitor this issue and will work with the General Manager in participating in the Secretary's process to review and reissue the policy.

II. Litigation to Which Metropolitan is a Party

Metropolitan Water District v. All Persons Interested

As previously discussed with the Board, Metropolitan counsel has commenced service of process in this action to validate the wheeling rates adopted by your Board on January 14, 1997. Consistent with the fast track rules of the Los Angeles Superior Court and the January 14, 1997 procedural agreement with the San Diego County Water Authority (SDCWA), service is being completed by publishing the summons in appropriate newspapers, posting it in certain public places and mailing copies to any persons interested in the matter, specifically including SDCWA. Under the summons, responses in the action would have been required to be filed by April 15, 1997. Subsequently, SDCWA sought and obtained an order extending the time for it to respond until June 15, 1997, or until 30 days after Metropolitan and SDCWA in good faith

mutually agree that negotiations have failed in reaching an agreement between Metropolitan and SDCWA with respect to SDCWA's proposed transfer with the Imperial Irrigation District. At such time the parties will meet to agree on a briefing schedule. Metropolitan agreed to the extension until June 15, pursuant to its prior agreement with San Diego, but asked for an earlier response if the parties determined that negotiations had failed, as reflected in the court order.

Additionally, SDCWA has submitted to the General Counsel a stipulation asking that San Diego be given an independent right to challenge any wheeling rates adopted by Metropolitan irrespective of the outcome of the pending validation action. The General Counsel's office has responded by offering to stipulate that the pending wheeling litigation concerns only the Metropolitan short-term wheeling rates and does not involve long-term wheeling such as is currently the subject of negotiations between SDCWA and Metropolitan.

Monterey Amendment related litigation

San Bernardino Valley Municipal Water District has agreed to execute the Monterey Amendment contingent upon removal of a provision requiring sale of unneeded entitlements in a year to occur only through the "Turnback Pool" provided for under the Monterey Amendment. The Pool rate is pegged to a percentage of the Delta Water Rate. As a result, San Bernardino is able to use pre-existing provisions permitting it to request approval from the Director of Water Resources to sell water within other contractors' service areas. Metropolitan's water supply contract continues to require the Director to obtain Metropolitan's consent before any approval for a sale in Metropolitan's service area can be granted.

The Supreme Court has agreed to hear the Planning and Conservation League's petition from the Court of Appeal's refusal to accept (based upon untimeliness) the League's appeal from the Superior Court's ruling granting of the motion to quash the summons on the invalidation action portion of the League's challenge to the Monterey Amendment. It is anticipated that this issue will be briefed on a schedule ending in June of this year and that the Court of Appeal briefing schedule on the CEQA based causes of action will be suspended until the Supreme Court rules on the petition.

Winchester Fire Litigation - Lead Case, Ross, et al. v. Southern California Edison Company, MWD

Pursuant to Administrative Code § 6433(a), the General Manager and General Counsel have agreed to a settlement which will remove the District from involvement in the eight consolidated cases which arose from the Winchester fire of October 26/27, 1993. The fire burned approximately 25,000 acres and at least 30 structures. It originated on District property in the Domenigoni Valley on or adjacent to a Southern California Edison Company ("SCE") easement over which SCE maintained high-voltage power lines. The plaintiffs are individual property owners, and insurance companies subrogated to the claims of individual property owners, who lost property or, in a few cases, suffered personal injuries as a result of the fire.

Plaintiffs' claims total in excess of \$8.5 million. The District was a party defendant in one case, a party cross-defendant in four cases, and had been removed as a party in three of the actions following motion for summary judgment. The most credible evidence supports the conclusion that the fire started as a result of eucalyptus trees coming in contact with SCE's power lines during high winds. This would be the basis for Edison liability as it has responsibility for keeping trees clear of its lines. The District has potential liability as landowner of the land on which the fire originated. Even a five percent (5%) finding of fault on the part of Metropolitan could result in substantial liability. As a result, after a recent two-day mediation conference, the District and SCE negotiated a resolution which will remove the District from this litigation and the possibility of significant liability, as well as save the expense of taking this matter to trial. The terms of the settlement are that the District will pay to SCE the sum of \$100,000. In exchange, SCE will dismiss its cross-complaints and will substitute its attorneys for the District's attorneys in the defense of the one case wherein the District is a defendant. Further, SCE will indemnify the District for any verdict rendered against the District in these consolidated cases, while the District will agree to produce any employee witnesses upon reasonable notice at trial. As the cost of trial was likely to approximate \$65,000 to \$75,000, and given the possibility of liability, the settlement was agreed to and has been consummated, as in the best interest of the District.

III. Resource Matters

California Electric Industry Restructuring

Members of the General Counsel's and the General Manager's staff have continued to review numerous drafts and submit comments and proposed text for the documents implementing the Independent System Operator (ISO) and the Power Exchange (PX) to be filed at the Federal Energy Regulatory Commission on March 31. It is anticipated that FERC will require comments on the voluminous filing on or before April 30. Meanwhile, Metropolitan and other members of the Governmental Entities class (California Department of Water Resources, Western Area Power Administration, and City and County of San Francisco) submitted documents to the Oversight Board nominating Mr. Viju Patel of CDWR and Mr. Robert Schempp of Metropolitan to the ISO and PX Governing Boards, respectively. The Oversight Board is anticipated to appoint members of the Governing Boards at its meeting on March 27, 1997.

IV. Claims

None to report.

V. Financing

None to report.

VI. Legislative Matters

February 28th was the deadline for State Senators and Assemblymembers to introduce bills for 1997. 1,074 bills were introduced in the Senate and 1,542 in the Assembly. Many of the bills are "spot bills" and do not contain substantive language at this time. The Legal Department and various technical staff from the General Manager's Department are in the process of reviewing those bills that may affect the District.

Members of the staff continue to work on the discussion draft of a proposed bill, "Endangered Species Reauthorization Act of 1997," authored by Senator Kempthorne (R-ID) and Senator John Chafee (R-RI). The bill provides independent peer review, a greater role for the states, and minimum requirements for listing petitions. Staff is also working closely with our Washington, D.C. office, reviewing the President's FY '98 budget request and preparing Metropolitan's response.

VII. Administrative Matters

The Legal Department will present its 1997/98 annual budget at the April meeting. The Department's budget has been restated to reflect actual/projected/proposed outside counsel and expert fees and costs in the capital project program.

The Department has recently expanded its law library to include the Environmental Law Reporter on CD-ROM. The use of CD-ROM technology will provide the Department with access to a wide array of legislative, code or related information that can be cut and pasted into a word document, thus shortening the turnaround time of work product with greater accuracy and efficiency and reducing staff time in updating hard copies of publications.

On-Go, the district standard e-mail and calendaring system, is being installed in the Department. Most of the staff has taken training classes and rollout to the entire Department is scheduled to occur next month. Concurrently with installation of On-Go, transition from Sabre to accommodate the Windows NT migration has begun.

The Assignment module of the Department's project and case management system has been developed, tested and implemented to a small group within the Legal Department. This module tracks staff assignments by attorney, date assigned, due date and completion date and will allow for better accountability within the Department.