



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

June 30, 1997

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

**From:** General Counsel

*W. Gregory Taylor*

**Subject:** Legal Department Report for June 1997

## RECOMMENDATION(S)

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For information only.

## EXECUTIVE SUMMARY

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

## DETAILED REPORT

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### I. Recent Developments of Interest to Metropolitan

#### Delta Wetlands Water Right Application

A private venture known as Delta Wetlands has filed an application with the State Water Resources Control Board for an appropriative water right for a storage project involving four islands in the Delta. Delta Wetlands proposes to use two islands for storage of water, which it would sell to interested buyers, and two of the islands for wildlife habitat and recreation. The California Urban Water Agencies (CUWA) and the State Water Contractors (SWC) have filed notices to appear in the proceeding, raising issues of concern to their members. CUWA intends to submit evidence of the potential for the proposed project to exacerbate total organic compound, salinity and other drinking water quality problems and to negatively impact Delta

fisheries. The SWC are concerned with the impact of the proposed project on State Water Project water rights and Delta fisheries and will propose terms and conditions necessary to protect those rights. General Counsel and General Manager staff participated in the preparation of evidence to be submitted by CUWA and SWC, and will present evidence on behalf of CUWA at the SWRCB hearing.

## II. Litigation to Which Metropolitan is a Party

### Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation

Judge Carroll has denied plaintiffs request for a preliminary injunction ordering the United States Bureau of Reclamation to lower the level of Lake Mead to 1,178 feet above sea level. Plaintiffs claimed that such an order was necessary to protect cottonwood and willow trees used as habitat by the endangered southwestern willow flycatcher. The court heard oral argument on that request (and on several opposing motions filed by the United States, Lower Colorado River Basin states, Metropolitan and other interested parties) on May 15, 1997. The court agreed with the defense raised by the Bureau and others that plaintiffs had failed to file the 60-day notice of intent to sue required under the Endangered Species Act. Metropolitan had filed two opposition briefs correcting certain misstatements made by plaintiff, pointing out that the requested relief would cause the loss of more than five million acre feet of water this year and raising a number of legal defenses.

Still pending before the court is plaintiff's claim that the United States Fish and Wildlife Service's Biological Opinion on the Bureau's Lower Colorado River operations inadequately protects the flycatcher and its habitat (This claim is not subject to the 60-day notice requirement.). The Biological Opinion recognizes the potential impact of Bureau operations on the flycatcher and other listed species, but identifies 16 specific sets of actions which, if implemented by the Bureau, will avoid the potential impact. The Biological Opinion also includes an incidental take statement which authorizes the Bureau to continue operations, subject to carrying out the actions identified. Also pending are the motions of Metropolitan and a number of entities reliant on Colorado River water and power resources to intervene in opposition to plaintiff's claims.

### MWD vs. All Persons Interested

On June 17, 1997, the Judicial Council assigned Judge Laurence D. Kay, Presiding Judge of the San Francisco Superior Court, to hear this case. The assignment of a neutral judge by the Judicial Council was ordered by the court in the hearing on a motion for change of venue made by the Imperial Irrigation District. Judge Kay has scheduled a status conference to discuss the locale for hearing the case and establishing a time line for future proceedings.

**MWD vs. Kennedy**

This eminent domain action was filed to acquire property for the Eastside Pipeline Project. The acquisition covered 4.7 acres in fee and temporary easements, on a larger parcel consisting of 27 acres. Metropolitan had appraised the acquisition at \$157,111. The owners' appraisal, including a severance damage claim of \$1.8 million, totalled \$2,237,435. At a settlement conference on May 5, Metropolitan offered to settle the case for \$500,000, and the owners made a settlement demand of \$980,000. The Board of Directors considered the owners' demand at its June meeting, and agreed with the recommendation to remain firm at \$500,000. On June 17, the owners accepted Metropolitan's settlement offer. This settlement completes the acquisition of the rights-of-way for the Eastside Pipeline Project.

**Planning and Conservation League, et al. v. Department of Fish and Game, et al.; San Bernardino Valley Audubon Society v. MWD, Department of Fish and Game (RCHCA)**

In April we reported that on April 10, 1997, the California Court of Appeal (Court) issued a published decision (PCL) in which it ruled that the Department of Fish and Game (Department) had erred in its long-standing interpretation that the California Endangered Species Act (CESA) permits the "take" of candidate, threatened and endangered species (protected species) incidental to otherwise lawful activities such as farming and land development. Specifically, the Court ruled that the Department had misconstrued the CESA section 2081 "management purposes" take authorizations to include any incidental take in connection with disparate commercial activities, rather than just projects designed to preserve or benefit protected species.

In May we reported that on May 14, 1997 the trial court in Riverside County issued its ruling in the Lake Mathews lawsuit that the NCCP Act does not provide independent authorization for incidental "take" for development purposes but instead refers back to the CESA section 2081 "management purposes" take authorization which the appellate court in PCL ruled does not authorize the Department to issue any incidental take in connection for development purposes.

We also reported that on May 12, 1997 the PCL Court issued a modification of its April 10, 1997 opinion. As modified, the PCL opinion addresses the NCCP Act and acknowledges that it is existing state law that also permits a state, local, or federal agency to independently or cooperatively engage in an NCCP Act which both protects national wildlife diversity and allows compatible and appropriate growth and development through authorized take pursuant to section 2081.

On May 27, 1997 Metropolitan and the Riverside County Habitat Conservation Agency filed a joint motion requesting that the trial court in the Lake Mathews lawsuit reconsider its May 14, 1997 ruling in light of the modified PCL opinion.

On June 18, 1997 the California Supreme Court granted the Department's request that it review the PCL decision. The grant of review supersedes the Court of Appeal's decision in PCL and also depublishes that decision. Accordingly, on May 30, 1997 Metropolitan, the Department, and the

Riverside County Habitat Conservation Agency will urge the Riverside County trial court to reverse its May 14, 1997 ruling in the Lake Mathews lawsuit which placed heavy reliance on the PCL decision.

### **III. Resource Matters**

#### **Petition to List Sacramento River Spring Run Salmon**

The California Fish and Game Commission voted to designate the Sacramento River spring run salmon as a "candidate" species under the California Endangered Species Act (CESA) at its June 13, 1997 meeting. The Commission has been ordered to designate the salmon by the court in Hayden v. Fish and Game Commission. Under CESA, the Department of Fish and Game now has up to one year to determine whether to recommend to the Commission to list the spring run as threatened or endangered. The CESA also protects candidate species from "take." However, in view of existing fisheries protections provided as a result of the December 15, 1994 Bay-Delta Accord and SWRCB Water Quality Control Plan, as well as numerous projects underway to improve conditions for salmon, the Commission also issued an incidental take permit to the Department of Water Resources and Bureau of Reclamation to allow them to continue operations consistent with the existing SWRCB requirements.

#### **California Electric Industry Restructuring**

Metropolitan filed Comments and Protest in the Phase II filing by the Independent System Operator and the Power Exchange on June 6 at the Federal Energy Regulatory Commission (FERC), a copy of which has been sent to each Director. On that same date, Metropolitan also filed a Motion to Intervene, Protest, and a Request for Hearing in the separate rate cases initiated by Southern California Edison Company and Pacific Gas and Electric Company, respectively, and a Motion to Intervene in the San Diego Gas & Electric rate case. Metropolitan assisted in the preparation of similar documents on behalf of the State Water Contractors. Subsequent to the filing of reply comments by the ISO and PX on June 23, we anticipate FERC will schedule technical conferences and/or hearings on these matters. Additionally, Metropolitan submitted a letter to the ISO/PX counsel suggesting additional changes to the ISO and PX Tariffs and related documents.

### **IV. Claims**

None to report.

### **V. Financing**

In April 1996 your Board increased the existing commercial paper authorization to a maximum of \$400 million of commercial paper notes, of which \$200 million is currently

outstanding. The offering memorandum and legal documents for the outstanding commercial paper were drafted to permit the issuance of additional authorized commercial paper notes through April 3, 1998, pursuant to existing documents. Thus additional authorized commercial paper may be issued on a flexible schedule as needed for capital construction. Legal Department staff are advising Finance and Business Services Division staff on the procedures for issuance of additional commercial paper notes in compliance with the existing note documents.

#### **VI. Legislative Matters**

None to report.

#### **VII. Administrative Matters**

##### Implementation of Special Counsel Billing Guidelines

During the past year, the Special Counsel Program was evaluated by Edward Poll & Associates, Inc. and guidelines for future interaction between Special Counsel and the Legal Department were developed. Copies of these guidelines were provided to you last month for informational purposes. Legal Department staff is currently working with Mr. Poll in the development of a training program and manual. Implementation of the guidelines and training on evaluation of special counsel is scheduled for the month of October.

##### Legal Department Retreat

An off-site retreat is scheduled for the middle of September for the Legal Department. Further information will be forwarded once plans are finalized by the retreat's facilitator and department staff.

##### Member Agency Legal Counsel Dinner

A reminder that the Department's quarterly member agency dinner meeting is scheduled for Monday, July 7, at 6 p.m. in the Oasis Cafeteria. Our guest speaker will be Michael Remy of the law firm Remy, Thomas & Moose in Sacramento. Michael will speak on the recent decision in *Planning and Conservation League v. Dept. of Fish and Game* and its impact on Section 2081 "take permits" under both the California Endangered Species Act and the Natural Community Conservation Planning Act, as well as the current status of legislative attempts to address the decision. Committee members are cordially invited to attend.