



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

August 6, 1997

**To:** Board of Directors (Legal and Claims Committee--Information)  
**From:** General Counsel *[Signature]*  
**Subject:** Legal Department Report for July 1997

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## RECOMMENDATION(S)

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For information only.

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## EXECUTIVE SUMMARY

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This report discusses significant matters which the Legal Department was concerned with during the month of July 1997.

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## DETAILED REPORT

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### I. Recent Developments of Interest to Metropolitan

#### Delta Wetlands Water Rights Application

The State Water Resources Control Board held 10 days of hearings in July on a water rights application by Delta Wetlands. Delta Wetlands proposes to use two islands in the Delta for storage of water, which it would sell to interested buyers, and to use two other islands to establish wildlife habitat and recreation. James Roberts of the Legal Department is appearing on behalf of the California Water Urban Agencies (CUWA) in the proceeding. CUWA witnesses (including members of Metropolitan's Water Quality Division) presented evidence of the potential for the proposed project to exacerbate disinfection by-product, salinity and other drinking water quality problems. The State Water Contractors also presented evidence on the potential impact of the project on SWP water supplies and Delta fisheries. During the hearing,

Delta Wetlands and the Department of Water Resources agreed to a stipulation which would protect the SWP from any potential water supply or operational impacts that might be caused by the proposed project. No agreement has been reached on a stipulation for water quality protection. Two additional days of hearings have been scheduled for August.

## **II. Litigation to Which Metropolitan is a Party**

### **MWD v. All Persons Interested (Wheeling Rates Validation Action)**

In a hearing on July 28 on the demurrer brought by IID and joined by SDCWA, Judge Kay ruled for Metropolitan. In particular, the judge ruled that (i) Metropolitan's summons was legally sufficient to give the required notice; (ii) Metropolitan is entitled to validate its wheeling rates adopted January 14, 1997, through validation proceedings; and (iii) Metropolitan's setting of the wheeling rates is not void as a matter of law, as was asserted by IID and SDCWA.

Judge Kay set a hearing date of October 9, 1997, for hearing on the merits of the action. This hearing will be limited to deciding the validity of Metropolitan's ratesetting methodology, whether Metropolitan may set rates in advance rather than on a case-by-case basis under the wheeling statutes, and related matters. If the levels of the actual rates remain at issue after that hearing, a further hearing may be required.

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

All parties in this action have filed briefs in this matter supporting summary judgment motions that will be heard on August 5, 1997. In this action, plaintiff had originally sought a court order directing the Bureau of Reclamation to lower the elevation of Lake Mead to 1,178 feet above sea level--an action that would have cost 3.5 to 5 million acre-feet of water in 1996--in order to protect cottonwood and willow trees used as habitat by the endangered southwestern willow flycatcher. The court denied that claim, leaving a remaining 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. The Biological Opinion includes an incidental take statement which authorizes the Bureau to continue operations subject to carrying out certain reasonable and prudent alternatives to mitigate impacts on endangered species. Plaintiff's summary judgment motion requests the court to invalidate the Biological Opinion (and its accompanying incidental take statement) and require a new opinion with additional protections for the flycatcher. The United States has filed a cross-motion for summary judgment requesting the court to determine that the existing opinion is proper. Metropolitan has intervened in the case and filed briefs in support of the United States and in opposition to plaintiff. Metropolitan's briefs are on behalf of a group of intervening parties, including the Southern Nevada Water Authority, Arizona Power Authority and Salt River Project. Other

California Colorado River contractors also provided input into the brief. Additionally, California and the six other Colorado River Basin states renewed their assertion that, to the extent plaintiffs' requested remedy would impact water supplies available for use in those states, the action is barred by the Eleventh Amendment.

Oral argument was held before the federal court in Phoenix on Tuesday, August 5, 1997. The court took the matter under submission and indicated a decision will be issued within the next few weeks (see comments filed on Biological Opinion, page 6).

### **Hoover Overcollection Litigation**

A status conference was held on July 31, 1997, in the U.S. Court of Federal Claims. All parties agreed that the matter could be resolved by way of motions for summary judgment. In preparation for the filing of the motions, discovery is to be completed within 90 days of the conference. It is anticipated that Edison and Los Angeles will file a joint motion for summary judgment by November 7 and that the government and third party defendants will file their opposition and cross-motion for summary judgment by December 19, reply briefs will be completed by February 16, 1998. The court has indicated that it will set the case for hearing within 60 to 90 days of completion of briefing and it is anticipated that resolution of the matter will occur by mid-1998.

### **Diffenderfer v. MWD**

On July 9, 1997, this case settled for \$4,700. The lawsuit arose from a May 16, 1995, collision between a Metropolitan pick-up truck and Diffenderfer's car on a two-lane freeway on-ramp. Diffenderfer alleged that the Metropolitan driver made an unsafe lane change into her car. She alleged \$5,126 in special damages including \$3,495 in medical treatment, \$1,181 in automobile repairs and \$450 in lost earnings.

### **Holt v. MWD**

On July 24, 1997, Metropolitan's Motion to Dismiss for Plaintiff's delay in prosecution was granted by Judge Marion Johnson. The case arose from an August 1, 1993, incident wherein Holt alleged he slipped and fell as a result of a missing manhole cover. Holt sued both the City of Los Angeles and Metropolitan.

### **Nolen v. MWD**

On July 23, 1997, this case settled for \$75,000. On October 18, 1993, Nolen, a Pedus security guard working under contract for Metropolitan, was pushed by a Metropolitan employee who was demonstrating a prior incident. Nolen fell backward and severely injured his back.

On April 14, 1997, a Voluntary Settlement Conference was held before Judge Lawrence Waddington. At the hearing, Nolen reduced his demand from \$200,000 to \$150,000. Metropolitan found the demand unacceptable and did not tender a responsive settlement offer at that time. However, Judge Waddington retained jurisdiction over the matter. Over the course of the following several weeks, Judge Waddington proactively mediated protracted negotiations by telephone. Eventually, a \$75,000 settlement was reached. This amount is less than the cost of litigating the matter. It is also reasonable in light of Metropolitan's liability exposure, although Metropolitan had a number of defenses.

#### **Searl v. County of Riverside**

The Searl family commenced this inverse condemnation action against the County of Riverside for alleged loss in value caused by the closure of roads for the Eastside Reservoir Project. Metropolitan accepted the County's tender of defense pursuant to an agreement authorizing the closing of roads to allow construction of the Project.

#### **MWD v. Majestic Realty Corporation and Patrician Associates, Inc.**

On January 12, 1991 the Board of Directors approved a lease with Majestic Realty Co. & Patrician Associates, Inc., both California corporations, for office space located at 620 West Covina Blvd. in San Dimas. The lease was subsequently amended and extended to include a total of 50,000 square feet of office space for a term ending on March 31, 2005. In June of 1996 ongoing problems with the HVAC system in this facility became more pronounced and were compounded by the summer temperatures. Employee complaints and Worker's Compensation claims resulted in an investigation of the HVAC system. The investigation disclosed design problems in the system which resulted in inadequate air flow within the facility and poor indoor air quality. Meetings between the landlord and Metropolitan's legal staff, while prompting some action on the part of the landlord, did not remedy the underlying flaws in the system. The landlord's unwillingness to address the flaws in the system coupled with the employee complaints and claims necessitated an urgent search for replacement facilities to protect the health and welfare of the employees and to protect Metropolitan from potential liability.

On July 26, 1996 the landlord leased 12,885 square feet of space to Metropolitan in the Crossroads facility in the City of Industry. Employees most affected by the HVAC problems were moved to this facility on August 23, 1996. The remaining San Dimas employees were relocated on June 2, 1997, to a 24,000 square foot site in Glendora.

Having been granted settlement authority by the Board of Directors on July 8, 1997 (Item 8-6), Metropolitan entered into a settlement agreement whereby Metropolitan was released from its San Dimas lease and the associated \$2.5 million minimum rent obligation in

exchange for a \$600,000 payment. The settlement amount was paid from funds appropriated for lease payments. A mitigating factor in settling this matter is the fact that the combined costs of the replacement leases will save Metropolitan approximately \$720,000 over the remaining term of the San Dimas lease.

### **III. Resource Matters**

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

As reported earlier, the California Fish and Game Commission (Commission) is considering whether to list the Sacramento River spring run salmon as an endangered species under the California Endangered Species Act (CESA). Under CESA, the Department of Fish and Game has up to one year to study the proposed listing and recommend to the Commission whether the fish should be listed; the Commission makes the final listing decision. Since the spring run is now a "candidate" for listing, it is subject to "take" restrictions under CESA. The Commission has proposed to adopt a "Special Order Relating to Incidental Take of Sacramento River Spring-run Salmon During Candidacy Period" which would authorize the incidental take of the fish in conformance with the special rule. In particular, the rule would authorize incidental take by the SWP and CVP "in accordance with the 1995 WQCP and the Central Valley Project Improvement Act and as may be modified by the Operations Group." Recognizing the substantial protection currently provided by existing regulations to protect endangered species, this Special Order would appear to minimize any additional impacts on project operations. The Commission will consider adoption of the Order at its August 29, 1997 meeting. The State Water Contractors intend to appear in support of adoption of the proposed Special Order.

#### **Colorado River Threatened and Endangered Species**

Metropolitan has filed comments on Fish and Wildlife Services' Biological Opinion regarding Bureau operations on the Lower Colorado River (See Southwest Center for Biological Diversity v. United States Bureau of Reclamation, above). While the Biological Opinion is final, the Bureau and Service have indicated that they will consider comments in the implementation and possible revision or supplementation of the opinion. Metropolitan's comments generally supported the opinion's conclusion that the Bureau's operations could continue, subject to certain reasonable and prudent alternatives to mitigate for impacts on listed species. However, the comments also identified substantial new information regarding the habitat available for the southwestern willow flycatcher and requested that the opinion be amended to reflect this information, and also raised concern regarding the opinion's jeopardy determination. The Colorado River Board submitted similar comments. Any modification of the Biological Opinion may have an effect on pending litigation challenging the Opinion's validity. (See Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation, page 2.)

**IV. Claims**

On July 18, 1997, Metropolitan received a claim from M.A. Mortenson Company arising out of its construction of the Henry J. Mills Filtration Plant Expansion No. 2. The claim is just shy of \$18 million, on an initial \$69.9 million construction contract (approximately \$1.3 million in change orders have been issued). Mortenson substantially completed the construction project in November 1996. On a macro scale, Mortenson claims almost \$11 million in damages for itself, while the balance is asserted on behalf of three subcontractors. The claim components include approximately \$2.8 million for Mortenson's extra work, and combined lost productivity claims of approximately \$7 million. Almost \$2.5 million is asserted for additional field supervision, even though the project was completed within the time allotted under the contract. The total claim includes \$2 million in overhead and profit, which is asserted on all above-described components of the claim, including field supervision. Metropolitan staff is reviewing the claim, and anticipates hiring outside counsel and other experts in the near future.

**V. Financing**

Legal Department staff have advised Finance and Business Services Division staff with respect to Government Code requirements for investments and deposit of funds in California banks. In particular, Legal Department attorneys have listed the legal requirements which affect a proposed program for deposit of funds with small banks, for the purpose of stimulating economic growth within Metropolitan's service area, and have suggested ways to structure the program in accordance with these requirements.

**VI. Legislative Matters**

None to report.

**VII. Administrative Matters**

The Matter Management module of Corporate LawPack has been fully implemented within the Department. Training was finalized this week with participation by Department staff. This module maintains all vital information about matters within the Department and tracks by matter type, status, in-house staff, outside counsel and experts. It allows unlimited narrative text to be associated with each matter.

Two additional modules of the core system, Database Management and System Administration, have been fully implemented and are being maintained by the System Administrator. These modules maintain master lists of outside counsel and vendors and provide the necessary design tools to provide customized reports.