



MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

7-5

September 26, 1997

To: Board of Directors (Legal and Claims Committee--Action)
(Organization and Personnel Committee--Action)

From: General Counsel W. Gregory Taylor

Subject: Amendment of Contract with the firm Best, Best & Krieger Regarding *Southwest Center for Biological Diversity v. U. S. Bureau of Reclamation*

RECOMMENDATION(S)

It is recommended that your Board authorize the General Counsel to amend an existing agreement with the firm of Best, Best and Krieger, for representation in the litigation entitled *Southwest Center for Biological Diversity v. U. S. Bureau of Reclamation*, to increase the maximum amount payable to \$150,000.

EXECUTIVE SUMMARY

As you will recall, Metropolitan intervened and fully participated in the above-entitled litigation in federal court, which sought to require the Bureau of Reclamation to dump three to five million acre-feet of water from Lake Mead in order to protect habitat of the endangered southwestern willow flycatcher. The General Counsel retained the firm of Best, Best & Krieger to represent Metropolitan in the litigation. On August 22, 1997 the trial court entered an order favorable to the United States (and its co-parties) on all issues. However, plaintiff has appealed to the Ninth Circuit Court of Appeals. Significant attorney time will now be required to protect the favorable trial court decision. The maximum amount payable under the General Counsel's current agreement with Best, Best & Krieger is the \$100,000 limit authorized by Metropolitan Administrative Code Section 6431. The legal fees and expenses necessary will exceed this amount, requiring an increase in the maximum amount payable under the contract. To date, Metropolitan has paid Best, Best & Krieger \$47,200 for work on this case. Two additional invoices in the amount of \$42,500 for work through the trial court's judgment remain to be paid. Outside counsel estimates that the appeal process could involve additional legal work amounting to \$40,000 to \$50,000, depending on whether a petition for review by the Supreme Court is sought from the Ninth Circuit's decision.

DETAILED REPORT

At its May 1997 meeting, your Board ratified the General Counsel's intervention in *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, filed in the United States District Court for the District of Arizona. In this case, plaintiff had requested the court to order the Bureau of Reclamation to lower the level of Lake Mead to 1,178 feet above sea level to protect the habitat of the endangered southwestern willow flycatcher. Metropolitan intervened in order to support the United States' opposition to this request. If plaintiff had been successful, as much as three to five million acre-feet of water could have been lost in 1997. On August 22, 1997, the court rendered an opinion favorable to the United States (and its co-parties) on all issues in the case. This result was reported in the General Counsel's letter to the Board dated August 25, 1997. Plaintiff has subsequently appealed the decision to the Ninth Circuit Court of Appeal.

The General Counsel retained the firm of Best, Best & Krieger to represent Metropolitan in the litigation. Metropolitan appeared, through its outside counsel, in all of the hearings in Phoenix, Arizona and filed legal briefs and associated documents on all issues. In addition, Metropolitan acted as the "lead" counsel for a number of other parties who intervened in the litigation (including the Salt River Project, Southern Nevada Water Authority and Arizona Power Authority), filing several documents and making oral arguments on behalf of all of these parties. Metropolitan also worked closely with the other California Colorado River contractors to include their interests in the litigation. The General Counsel believes that Metropolitan's participation contributed to the favorable trial court result and intends to continue full participation in the appeal.

Best, Best & Krieger was retained by the General Counsel pursuant to Metropolitan's Administrative Code Section 6431 under a contract for a maximum of \$100,000. The firm previously represented Metropolitan and the California Six Agency Committee in similar litigation involving federal Endangered Species Act issues on the Colorado River, which was resolved successfully. The firm also, of course, represents Metropolitan and the State Water Contractors on a range of Bay-Delta matters, including endangered species issues. This background made Best, Best & Krieger an ideal firm to quickly respond to Metropolitan's immediate need to intervene in the litigation.

The additional legal work required to participate in the appeal of the trial court decision will exceed the General Counsel's contracting authority under Administrative Code Section 6431. To date, Metropolitan has paid Best, Best & Krieger \$47,200 for work on this case. Two additional invoices in the amount of \$42,500 for work through the trial court's judgment remain to be paid. Outside counsel estimates that the appeal process could involve additional legal work amounting to \$40,000 to \$50,000, depending on whether a petition for review by the Supreme Court is sought from the Ninth Circuit's decision. Consequently, it is necessary to seek your Board's approval of a contract amendment to increase the maximum payable under the current contract. The General Counsel recommends that your Board authorize an amendment in the contract with Best, Best & Krieger for representation in the litigation entitled *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, to increase the maximum payable to \$150,000.