



MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

November 21, 1997

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

From: General Counsel

Subject: Legal Department Report for November 1997

RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

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

DETAILED REPORT

I. Recent Developments of Interest to Metropolitan

Associated Builders and Contractors v. San Francisco Airports Commission

The California Court of Appeal Opinion has issued an opinion in the case of *Associated Builders and Contractors (ABC) v. San Francisco Airports Commission* holding that the use of a project labor agreement by a public agency does not violate competitive bidding laws, is not preempted by federal law and does not violate an employee's right of association. The case arises from a suit brought against the Airports Commission by the Associated Builders & Contractors, the same organization which sued Metropolitan challenging our use of a project labor agreement on the Eastside Reservoir Project. (See p. 3, *infra*, for report on ABC case against MWD) Metropolitan filed a friend of the court brief in the appeal urging the result which was achieved.

II. Litigation to Which Metropolitan is a Party

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

On Friday, November 7, 1997, Judge Laurence Kay of the San Francisco Superior Court heard a full day of oral argument on the first two fundamental issues involved in the validation of Metropolitan's one-year wheeling rates. Those issues are:

1. May MWD set "postage stamp" wheeling rates, and set such rates in advance without regard to any particular proposed wheeling transaction, in light of Water Code §§1810-1814, and the legislative history, intent, and purpose of those statutes?

2. May MWD include system-wide costs in calculating its wheeling rates, or may it only include costs relating to particular facilities?

The judge allotted approximately equal time for argument by Metropolitan and by the parties opposing Metropolitan's rate. (These are SDCWA, IID, Cadiz Land Co., Quechan and Chemehuevi Indian Tribes, the Center for Public Interest Law and the Inyo-Mono County Farm Bureau.) The judge did not issue a decision at the end of trial. Instead he requested each side to submit by December 9, 1997 a proposed order of no more than 15 pages on the two questions at issue and on various evidentiary objections and issues that had been raised by the parties. All parties will be given 10 days to comment on the other side's proposed order. Finally, after reviewing and considering the proposed orders, the judge will issue his decision, which may or may not be based, in whole or in part, on the proposed orders. Given this schedule, it is not likely that the judge will issue his decision before mid-January, 1998.

Depending on the judge's decision, trial on additional issues could be required. For example, if the judge decides that Metropolitan is entitled to include system-wide costs, and is not limited to point-to-point costs, trial may be necessary to determine whether Metropolitan's allocation of those costs was supported by substantial evidence.

MWD v. San Bernardino Valley Municipal Water District;
Western Water Company and Santa Margarita

This litigation was commenced on September 30, 1997 in Los Angeles Superior Court as a result of San Bernardino Valley Municipal Water District's (SBVMWD) sale of water to Western Water Company for subsequent resale within Metropolitan's service area. SBVMWD is unwilling to obtain consent from Metropolitan for this transaction. It is anticipated that the parties will shortly complete execution of a stipulation dismissing the Los Angeles filing and providing for refiling of the case to take place in Sacramento Superior Court. The stipulation will provide that the refiled case will, for purposes of the suit, be considered to have been filed on September 30, 1997. Given that SBVMWD raised objections to the filing in Los Angeles Superior Court, as well as the applicable venue provisions, it was decided that it would be economical to refile the case. Metropolitan has filed interrogatories and document requests which are to be responded to by December 2, 1997 and November 26, 1997 respectively. It is anticipated that the Department of Water Resources will also be a plaintiff when the case is refiled.

County of San Joaquin v. State Water Resources Control Board

Petitioners have filed a petition for writ of certiorari with the United States Supreme Court seeking review of a decision of the California Supreme Court affirming a dismissal of the action. Plaintiffs challenged the State Water Resources Control Board's (SWRCB) interim water right order 95-6 which had amended the water rights permits of the United States Bureau of Reclamation and the Department of Water Resources in certain respects to make them consistent with the May, 1995 Bay-Delta Water Quality Control Plan. If plaintiffs had been successful, the projects would have been subjected to inconsistent regulatory requirements which could have had significant water supply impacts. Metropolitan and other contractors intervened in support of the SWRCB. The trial court dismissed the case, based on California Code of Civil

Procedure Section 389, because the USBR was an interested party who could not be joined to the action because it had not waived its sovereign immunity. The California Court of Appeal and Supreme Court affirmed. Whether the United States Supreme Court accepts the petition for certiorari is entirely within its discretion, and most petitions are denied.

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

Plaintiff, the Bureau, Metropolitan and other intervening parties have filed their briefs with the Ninth Circuit Court of Appeal in this matter. The Ninth Circuit will review the decision of the Arizona District Court dismissing plaintiff's request to require the Bureau to lower Lake Mead to protect habitat of the southwestern willow flycatcher and to invalidate United States Fish and Wildlife Service's Biological Opinion for the Bureau's water and power operations on the Lower Colorado River. The Biological Opinion includes an incidental take authorization that allows the Bureau to continue its operations despite the fact that it may "take" listed species as an incidental effect of those operations. The Colorado River basin states also have filed a brief continuing their special appearance to assert that the action is prohibited by the Eleventh Amendment. Oral argument has not yet been scheduled.

Associated Builders and Contractors v. MWD

Oral argument on this matter challenging Metropolitan's use of a Project Labor Agreement on the Eastside Reservoir Project has been set for December 4, 1997, before the Second Appellate District. Plaintiffs recently lost their appeal against the San Francisco Airports Commission before the First Appellate Division (see report above) relying on similar arguments. The court would likely issue its decision during the first quarter of next year.

Kiewit Pacific v. MWD

On November 4, 1997 MWD was served with the above referenced complaint. The action pertains to Kiewit's work excavating the West Dam at the East Side Reservoir Project and seeks approximately \$1.6 million in damages. Kiewit had previously filed a claim for this amount which was rejected by staff and, after an appeal by the General Manager, MWD hired outside counsel and an expert geologist to review the claim prior to the filing of the litigation. The outside experts concurred with the staff analysis of the claim. Outside counsel has been instructed to file an answer to the complaint.

III. Resource Matters

Hayden v. Fish and Game Commission

The California Court of Appeals has refused to stay the trial court's judgment in this case pending the Fish and Game Commission's (Commission) appeal of the trial court's determination that the Commission's special order regarding incidental take of spring run salmon was adopted in violation of the Administrative Procedure Act (APA). The special order had been adopted to authorize incidental take of the spring run while the Commission considered whether to list the species as endangered under the California Endangered Species Act. In anticipation of

the Appeals Court action, the Commission had commenced proceedings, consistent with the APA, to adopt a revised special order authorizing the SWP and CVP to continue operations in accordance with existing protections for other fisheries despite potential incidental take of the spring run. At its November meeting, the Commission did adopt the revised special order authorizing continued project operations, but retaining jurisdiction to reconsider its decision if new information required such action.

IV. Claims

None to report.

V. Financing

On November 19, 1997, Metropolitan's \$650 million fixed rate revenue bond issue authorized by your Board in October was priced by the underwriters at very competitive rates. Legal Department staff participated in the pricing call and have begun preparations for the closing, scheduled for December 9.

VI. Legislative Matters

None to report.

VII. Administrative Matters

Member Agency Legal Counsel Dinner

The next MWD-Member Agency Legal Counsel Dinner meeting will be held at 6:00 p.m. on Monday evening, January 12, 1998, in the Oasis Cafeteria. The guest speaker will be William Fulton, the author of The Reluctant Metropolis: The Politics of Urban Growth in Los Angeles, and numerous articles on water policy and urban planning issues. Mr. Fulton will be speaking on the role of water in shaping the "urban feature" of the American West and the role of Metropolitan and water agencies in this context. Board members are cordially invited to attend. Please contact Grace Yenke at ext. 6322 to confirm your attendance. This promises to be a most informative evening.