



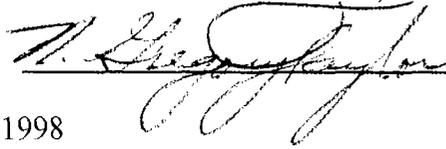
MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

May 29, 1998

To: Board of Directors (Legal and Claims Committee--Information)
From: General Counsel
Subject: Legal Department Report for May 1998



RECOMMENDATION(S)

For information only.

EXECUTIVE SUMMARY

This report discusses significant matters which the Legal Department was concerned with during the month of May 1998.

DETAILED REPORT

1. Recent developments of interest to Metropolitan

Nothing to report.

2. Litigation to Which Metropolitan Is a Party

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

San Diego County Water Authority, Imperial Irrigation District and the participating Indian Tribes have appealed Judge Kay's decision denying them attorney fees. We anticipate that all of the appeals of Judge Kay's ruling on the payment of attorneys' fees and costs will be consolidated with the appeal of the ruling on wheeling rates. Preparation of the clerk's record for this appeal is still underway. The briefing and hearing schedule will be calendared after the record has been completed.

Associated General Contractors, San Diego Chapter (AGC) v. MWD

Metropolitan's Motion for Dismissal was granted following an April 27, 1998 hearing before Judge Jeffrey Miller of the U.S. District Court. Judge Miller ruled that Project Labor Agreements (PLAs) are not state laws preempted by the Employee Retirement Income Security Act of 1974 (ERISA). AGC's Complaint sought to enjoin Metropolitan from using PLAs on the Eastside and Inland Feeder Projects alleging that Metropolitan, as a state entity, could not include language in its bid specifications related to local collective bargaining agreements requiring contributions to ERISA benefit funds. AGC is appealing the Court's decision denying a

preliminary injunction and has already filed its brief with the United States Court of Appeals for the Ninth Circuit. Metropolitan's brief is due in early June.

Southwest Center for Biological Diversity v. USBR

As reported orally last month, the Ninth Circuit Court of Appeals affirmed the decision of the trial court in this matter on May 4, 1998. Plaintiff had sought a court order (1) 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 order to protect cottonwood and willow trees used as habitat by the endangered southwestern willow flycatcher and (2) declaring 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. Metropolitan and other Colorado River contractors intervened to support the federal party defendants. The trial court granted summary judgment in favor of the federal defendants on all counts. The Ninth Circuit Court of Appeals agreed and affirmed the judgment. This order upholds the Service's Biological Opinion, which 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.

3. Resource Matters

State Water Resources Control Board Hearings

As expected, the SWRCB has issued a Revised Notice of Public Hearing setting hearings on several dates in July and August, 1998 on a variety of Bay/Delta issues. The issues to be considered in this phase are:

- Whether SWRCB's Water Rights Order 95-6 should be extended. Order 95-6 conforms the state and federal project permits to the requirements of biological opinions for the Delta smelt and winter run salmon, removing potentially inconsistent regulatory requirements. However, the order expires in December, 1998;
- Adoption of the San Joaquin River Agreement (also known as VAMP) settling Bay/Delta responsibility for the San Joaquin watershed;
- Adoption of the Suisun Marsh Preservation Agreement, an agreement among the state and federal water projects, the Suisun Resource Conservation District and California Department of Fish and Game establishing a physical solution to meeting SWRCB objectives for the Marsh
- Consideration of any other negotiated agreements settling the responsibilities of upstream water users to contribute to Bay/Delta requirements.

Metropolitan is preparing, where appropriate in conjunction with the State Water Contractors, CUWA and other water users, to participate in these hearings. Other issues, including

consideration of a joint point of diversion for the state and federal projects and the allocation of Bay/Delta responsibilities on water users who do not reach agreement with the projects, will be the subject of yet to be scheduled hearings.

Proposal to List Sacramento Splittail

On May 18, 1998, the United States Fish and Wildlife Service reopened the comment period on an earlier proposal to list the Sacramento splittail as threatened under the Federal Endangered Species Act (FESA). The splittail reside in the Delta and its tributary rivers. The Service initially proposed to consider listing the splittail on January 6, 1994 and extended the deadline for its determination in response to comments, including comments by the State Water Contractors (SWC), raising substantial disagreement regarding the sufficiency or accuracy of the data to support a listing. Consideration of the listing petition also was delayed by a Congressionally imposed moratorium on additional listings under FESA and a subsequent backlog of listing petitions. In early 1998, the Service informally determined to issue its listing decision. However, since it had been over four years since the listing had been proposed, in March, 1998 both the SWC and the Department of Water Resources (DWR) urged the Service to reopen the record for additional comment prior to making a listing decision. As pointed out by the SWC and DWR, in the intervening four years substantial new information on the splittail's condition has been developed and many programs to protect sensitive species such as the splittail are being implemented (Bay/Delta Accord, Category III Proposition 204, CalFED), factors which must be included in the record before a listing decision is made. The Service's decision to reopen the comment period followed, and the record has been reopened for comments until July 17, 1998. Metropolitan is working with the SWC and other parties to submit the new information to the Service.

4. Claims

None to report.

5. Financing

Legal Department staff participated in preparation of the draft Long Range Finance Plan and helped analyze some suggestions proposed by Board members. Chapters 5, 6 and 7 were reviewed by the Budget and Finance Committee on May 14.

6. Administrative Matters

None to report.