



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

9-2

June 30, 1998

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

**From:** General Counsel

**Subject:** Legal Department Report for June 1998

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**RECOMMENDATION(S)**

For information only.

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**EXECUTIVE SUMMARY**

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

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**DETAILED REPORT**

**1. Recent developments of interest to Metropolitan**

Southwest Center for Biological Diversity v. Bruce Babbitt

The Southwest Center and Sierra Club have filed this litigation in the Federal District Court in San Diego asking the Court to order the Secretary of the Interior to make a decision with respect to listing the Sacramento splittail as threatened under the Federal Endangered Species Act (FESA). The Secretary had first proposed listing the splittail in January, 1994; however, the decision was delayed due to substantial disagreement regarding the sufficiency or accuracy of the data, a Congressionally imposed moratorium on additional listings under FESA and a subsequent backlog of listing petitions. Prior to the filing of this litigation, the Secretary already had taken steps to make a final decision. In May, 1998, the Secretary reopened the comment period to receive information on the splittail's condition, and to consider the effect of the many programs which have been implemented to protect species such as the splittail, since the initial proposed listing. The comment period will close on July 17, 1998 and a decision whether to list the splittail will follow. It is unclear whether this litigation will have any effect on the ultimate timeline for the listing decision. Staff continues to review the complaint to determine whether and how Metropolitan should participate in this litigation.

## **2. Litigation to Which Metropolitan Is a Party**

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

Metropolitan filed its brief with the Ninth Circuit Court of Appeals in the appeal brought by AGC seeking to overturn the District Court's denial of its request for injunctive relief. This matter arises following AGC's attempt to enjoin Metropolitan from using Project Labor Agreements (PLAs) on the Eastside Reservoir 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 benefit funds regulated by the Employee Retirement Income Security Act of 1974 (ERISA). In a ruling favorable to Metropolitan, the District Court ruled that PLAs are not state laws preempted under ERISA. AGC has filed an Amended Complaint, again challenging the District's use of Project Labor Agreements for the Eastside Reservoir and Inland Feeder Projects under ERISA. Metropolitan is preparing an Answer to the Amended Complaint and will again seek to have the action dismissed.

### Southwest Center for Biological Diversity v. USBR

Plaintiff has filed a Petition for Rehearing and Suggestion for Rehearing en Banc with the Ninth Circuit Court of Appeals. As reported previously, a three-judge panel of the Ninth Circuit affirmed the trial court's decision in favor of the United States, denying plaintiff's request (1) that the Bureau of Reclamation be required to lower the level of Lake Mead to protect Southwestern Willow Flycatcher habitat and (2) that United States Fish and Wildlife Service's biological opinion authorizing the Bureau's continued operation of its Colorado River facilities (subject to certain conditions) be invalidated. Plaintiff's petition requests the same panel to reconsider its opinion or, in the alternative, for all of the Ninth Circuit judges to rehear the matter "en banc." Staff is reviewing the petition and potential responses with outside counsel, counsel for the United States, for the Lower Basin States and other Colorado River contractors.

## **3. Resource Matters**

### State Water Resources Control Board Hearings

All parties have filed exhibits and testimony with respect to the first two issues to be considered by the SWRCB in its upcoming water rights hearings: 1) whether its Order 95-6, which conforms the water projects' water rights permits to existing biological opinion requirements, should be extended beyond December, 1998, and 2) whether the San Joaquin River Agreement (also known as VAMP) should be adopted. Metropolitan and the State Water Contractors (SWC) will be supporting the Department of Water Resources in urging that 95-6 be extended because, absent the extension, the projects would be subject to potentially inconsistent regulatory requirements. With respect to the San Joaquin River Agreement, Metropolitan and the SWC will support testimony by the San Joaquin River interests and state and federal fishery agencies urging adoption of the Agreement. Several hearing dates are scheduled on these issues beginning on July 1, 1998.

**4. Claims**

Nothing to report.

**5. Financing**

Legal staff is presently working with Finance staff to update Metropolitan's bond disclosure statement in preparation for a potential refunding of outstanding water revenue bond and general obligation bond issues, as well as the issuance of the last \$50 million in Metropolitan's voter-approved general obligation bonds. Improvements in the bond market in early June brought the window of opportunity for this refinancing much closer and shortened the anticipated time frame.

Legal staff also worked closely with Sacramento office staff to inform legislators about the impacts of an amendment to the Senate budget bill seeking to freeze Metropolitan's reserves, in violation of bond covenants and contrary to assumptions used in setting water rates and charges and the 1998-99 budget.

**6. Administrative Matters**

Business practices: staff have been consulting extensively with divisional staff on procedural improvements to business practices, including procurement of materials and supplies, consultant contracts, and business outreach. Staff continues to meet with staff Contract Review Committee which approves modifications to standard contract language, requests for proposals, and other contracts-related issues.