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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

7-9

August 24, 1998

To: Board of Directors (Legal and Claims Committee--Action)
(Water Planning and Resources Committee--Action)

From: *for* General Manager Edmund S. Meese III
General Counsel M. Gregory

Subject: Intervention in Spirit of the Sage Council, et al. v. Bruce Babbitt, Secretary, U.S. Department of the Interior, et al. (Conference with Legal Counsel--Existing Litigation; may be heard in closed session pursuant to Government Code Section 54956.9(c))

RECOMMENDATION(S)

It is recommended that your Board authorize the General counsel to intervene and to take all actions necessary to protect Metropolitan's interests in the litigation entitled, Spirit of the Sage Council, et al. v. Bruce Babbitt, Secretary, U.S. Department of the Interior, et al. United States District Court for the District of Columbia Case Number 98-CIV-01873.

EXECUTIVE SUMMARY

On July 29, 1998, a number of environmental organizations and individuals filed suit against the Secretary of the Interior and the Secretary of the Department of Commerce alleging violations of the federal Endangered Species Act (ESA) and the Administrative Procedure Act (APA) with respect to the formal adoption of the "No Surprises" rule issued on February 23, 1998. The No Surprises rule provides an assurance that when the U.S. Fish and Wildlife Service or the National Marine Fishery Service (Services) and an incidental take permittee agree in a habitat conservation plan (HCP) or natural community conservation plan (NCCP) to certain mitigation measures to offset the take of threatened or endangered species, the Service cannot at a later time require additional mitigation or other compensation, so long as a permittee complies in good faith with the HCP or NCCP and the HCP or NCCP is being implemented.

The complaint discusses a number of individual HCPs and NCCPs, even though its intent is to invalidate the overall No Surprises rule. These include the Metropolitan Water District/Riverside County Habitat Conservation Agency (RCHCA) Lake Mathews Multiple Species HCP and NCCP, and the Shell/Metropolitan Water District HCP. Also discussed are the RCHCA Long-Term HCP and the Central and Coastal Subregion HCP and NCCP (Nature Reserve of Orange County), both of which Metropolitan participates in. These and the other HCPs and NCCPs covered by the complaint all rely on the No Surprises rule. Accordingly, staff recommends that the General Counsel be authorized to intervene in this case and take all actions necessary to protect Metropolitan's interest.

DETAILED REPORT

Section 10(a) of the ESA authorizes the Services to reach voluntary agreements with private owners and other non-federal agencies to conserve habitat of threatened and endangered species. In return, under the agreement a permittee may engage in predetermined activities, including activities that may cause an incidental "take" of a listed species. The No Surprises rule provides an assurance that when a government and a permittee agree to an HCP or NCCP, the government cannot, at a later time, require additional mitigation or compensation so long as the permittee complies in good faith with the plan and the plan is being implemented. Under the No Surprises rule, the Service and a permittee determine in advance which measures may be required and then:

- No additional measures may be imposed to address *changed* circumstances without the permittee's consent, beyond those provided for in the HCP or NCCP ("changed" circumstances are foreseeable occurrences, such as a fire in an area prone to fires).
- The Service may require minor changes in the HCP or NCCP to address *unforeseen* circumstances. However, without the permittee's consent, the Service cannot require additional land, water or financial compensation or place additional restrictions on the use of land, water or other natural resources.

The Services first adopted the No Surprises as a policy on August 11, 1994. In November 1996, the Services restated the No Surprises policy in their Habitat Conservation Planning Handbook.

In October 1996, a number of environmental groups and individuals, including several plaintiffs in the current case, filed a lawsuit challenging the No Surprises policy on various grounds, including failure to comply with the ESA and the APA. In March 1997, the court in that case approved a settlement agreement and stipulated dismissal under which the Services agreed to publish the No Surprises policy as a formal rule. The No Surprises policy was issued as a formal rule on February 23, 1998.

The plaintiffs' claim that the adopted No Surprises rule violates various provisions of the ESA because it precludes the Services from making any changes to HCPs and NCCPs and the incidental take permits thereunder, when changes may be necessary to ensure the survival and/or recovery of listed species. According to the plaintiffs, the Services have failed to adequately explain how the specific choices and decisions embodied in the No Surprises rule would promote the conservation purposes of the ESA. The plaintiffs contend that by precluding the Services from making certain changes if "unforeseen" or "changed" circumstances occur, the Services have violated the ESA requirement that incidental take permits not jeopardize a listed species and/or significantly impair the recovery of listed species. According to the plaintiffs, the occurrence of unforeseen or changed circumstances can result in a permittee's plan failing to conserve a species and, to the maximum extent practical, minimize and mitigate the impacts of the taking. The plaintiffs further contend that, when unforeseen circumstances arise, the ESA requires the Services to impose any "necessary and appropriate" conditions as additional mitigation measures. The plaintiffs also claim the No Surprises rule violates language in ESA Section 10(a)(b) requiring an opportunity for public comment by effectively eliminating public input on how a particular HCP or NCCP should include a No Surprises assurance. Finally, the plaintiffs contend the

Services violated the APA by failing, in promulgating the formal rule, to adequately respond to public comments, to adequately explain the rationale for the No Surprises rule, and to address reasonable alternatives to the rule.

The complaint specifically targets a number of individual HCPs and NCCPs, even though its intent is to invalidate the overall No Surprises rule. Among those specifically raised in the complaint are the Metropolitan Water District/RCHCA Lake Mathews Multiple Species HCP and NCCP, and the Shell/Metropolitan Water District HCP. Also discussed are the Central and Coastal Subregion HCP and NCCP (Nature Reserve of Orange County) and the RCHCA Long-Term HCP for Stephens' Kangaroo Rat, both of which Metropolitan participates in.

Efforts in the 105th Congress to codify the No Surprises rule through an amendment to the ESA appear to have failed.

If the plaintiffs are successful in invalidating the No Surprises rule, any HCP and NCCP currently containing the No Surprises rule will be open to challenge. The Services also would be prohibited from agreeing to a No Surprises provision in any future HCP and NCCP, such as those which will be proposed as part of the CALFED solution.

The Services have indicated that they would be receptive to intervention by members of the regulated community. Unlike the status of an amicus curiae, an intervenor has the rights of a full party in the conduct of the litigation and in any settlement negotiations. Accordingly, staff recommends that the General Counsel be authorized to intervene in this case and to take all actions necessary to protect Metropolitan's interest.

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