

February 19, 1999

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

From: General Counsel _____

Subject: Authorization to file litigation regarding the United States Fish and Wildlife Service's listing of the Sacramento splittail as a threatened species under the Endangered Species Act

RECOMMENDATION(S)

It is recommended that the Board authorize the General Counsel to file litigation regarding the United States Fish and Wildlife Service's listing of the Sacramento splittail as a threatened species under the Endangered Species Act, either individually or with others, and to take all actions necessary to protect Metropolitan's interest in the litigation.

EXECUTIVE SUMMARY

On February 8, 1998 the United States Fish and Wildlife Service (USFWS) published its decision to list the Sacramento splittail as a threatened species under the Federal Endangered Species Act. The splittail is a silvery-gold minnow that lives up to 7 years and can grow to a length of 16 inches. It is found throughout the Delta and in portions of the rivers tributary to the Delta. There is no generally accepted population number for the splittail. However, in a two- month period in 1995 more than 6 million of the fish were counted at the state and federal water project facilities alone. Data such as that indicate that there are most likely tens of millions of splittail in the system. Based on relative indices of splittail population, USFWS justifies its decision to list on the assertion that the population has decreased 62% over the last 15 years. However, USFWS has based that conclusion on the use of only a few of several of the indices and without considering the most recent data. In particular, USFWS has refused to consider the results of 1998 sampling which has produced the highest index of splittail ever recorded. If the splittail is listed, additional operational restrictions and pumping limits may be imposed on State Water Project operations. Because of the impact that the listing could have on State Water Project operations and water supply and the relatively weak justification for listing, the General Counsel recommends that Metropolitan challenge the listing.

DETAILED REPORT

The United States Fish and Wildlife Service (USFWS) published its determination to list the Sacramento splittail as threatened under the Federal Endangered Species Act (FESA) in the February 8, 1999 Federal Register. The listing becomes effective on March 8, 1999. The splittail is a silvery-gold minnow that lives up to 7 years and can grow to a length of 16 inches. It inhabits all areas of the Delta and portions of the Sacramento and San Joaquin rivers and their tributaries.

Among many other factors, state and federal water project operations can result in mortality of the splittail. For this reason, the listing decision could result in the imposition of additional restrictions on project operations to mitigate for claimed impacts, including “take” of the fish at project pumps. Metropolitan’s State Water Project water supply could be impacted.

Under the FESA, species may be listed if they are “in danger of extinction” or “likely to become” in danger of extinction, suggesting that very low population numbers are the criteria for listing. USFWS has made no attempt to estimate the actual splittail population and, there are no generally accepted estimates of the population. However, in 1995 more than six million splittail were counted in only two months at the state and federal water projects alone. Given the splittail’s distribution throughout the Delta and in the tributaries, data such as this indicates that the actual population is in the tens of millions or more.

USFWS bases its listing decision on relative indices of splittail abundance through the years, and asserts that the population has declined by 62% over the last 15 years. However, there are 11 different data sets regarding the splittail, of which eight show an increase in population, one shows no change and four show a decline. USFWS considered only two of the data sets, both of which show a decline, and dismissed each of the indices showing an increase. Both of the indices used by USFWS sample at limited locations in the Delta and sample for only one life stage of the splittail. The indices not used by USFWS sample a much wider area, including all of the Delta and the Central Valley rivers, and include all life stages. In addition, the indices used by USFWS have no data after 1995 in one case and 1996 in the other, while most of the indices not used include data from 1997 and 1998. The data for 1998 show the highest populations indices ever recorded for splittail.

Many non-USFWS biologists believe that in view of the relatively high abundance of splittail (most likely tens of millions), the increasing population shown in most of the indices, and the fish’s relatively long life, resiliency and fecundity, it does not meet the criteria for listing under the FESA. In fact, in its formal comments to the proposed listing the California Department of Fish and Game recommend that the USFWS not list the splittail.

Because of the questionable justification for the listing decision and the potential negative impacts it could have on State Water Project operations and water supply, the General Counsel recommends that he be authorized to file litigation to challenge the listing. The State Water Contractors also are preparing to file litigation regarding the decision. If appropriate, Metropolitan may join in that effort rather than filing separately.

JR:rl