

May 25, 1999

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

**From:** General Counsel \_\_\_\_\_

**Subject:** Legal Department Report for May 1999

## RECOMMENDATION(S)

For information only.

## EXECUTIVE SUMMARY

This report discusses significant matters which the Legal Department was concerned with during the month of May 1999.

## DETAILED REPORT

### **1. Recent Developments of Interest to Metropolitan**

#### San Luis & Delta-Mendota Water Authority v. U.S. Department of the Interior and Save San Francisco Bay Assn. v. Department of the Interior

The trial court has denied the Department of Interior's (Interior) request to vacate the order entered last month, which restrains Interior's implementation of certain fishery actions in violation of Section 3406(b)(2) of the Central Valley Project Improvement Act (CVPIA). In that earlier order, the court agreed with plaintiff San Luis & Delta-Mendota Water Authority that Interior had not determined whether the actions would reduce CVP yield by more than the 800,000 acre-feet authorized in the CVPIA. That order did not enjoin Interior from carrying out the proposed actions, but it did order Interior to obtain water if necessary to make up any excess yield impacts to CVP contractors caused by those actions. The court firmly rejected Interior's request to vacate the order because Interior still has not calculated the effect of the proposed actions on CVP yield. The court reiterated that those actions could not reduce yield by more than the 800,000 acre-feet set aside in the CVPIA. A tentative date of July 29, 1999 has been set for trial in this matter.

## 2. Litigation to Which Metropolitan Is a Party

### MWD v. All Persons Interested

On May 14, 1999, the Second District Court of Appeal notified Metropolitan that the record on appeal has been filed. Metropolitan's opening brief will be due on June 14, 1999. The parties are working on a stipulation to stay the proceedings while wheeling legislation is pending.

### Fleming Engineering, Inc. v. MWD

On April 1, 1999, Metropolitan was served with this lawsuit from Fleming Engineering, Inc., the general contractor on the Northwest Access Road to Overlook contract at the Eastside Reservoir Project. The job required more common fill material than was estimated. Fleming asserts that once the quantity for fill went over 125 percent of the estimated quantity, the unit price for *all* of the fill for the project was subject to an adjustment based on Fleming's total cost to perform the work. Metropolitan's position is that the unit price is adjusted only for the quantity in excess of 125 percent of the estimated quantity.

### Ameron v. Pascal & Ludwig

On September 25, 1998, this case went to trial between Metropolitan and Pascal & Ludwig before Los Angeles Superior Court Judge Emilie Elias on bifurcated issues arising from Metropolitan's special and affirmative defenses.

On October 28, 1998, Judge Elias ruled in Metropolitan's favor and on February 8, 1999, judgment was entered for Metropolitan and against Pascal & Ludwig. The judgment included an award of costs to Metropolitan and on February 17, 1999, Metropolitan filed its cost bill in the amount of \$38,745.48. A settlement has been reached wherein Pascal & Ludwig waived its right to appeal and withdrew its motion to tax costs, in exchange for Metropolitan's waiver of costs.

### MWD v. Hartford

On April 13, 1999, The Hartford Fire Insurance Company filed its Answer to Metropolitan's complaint. Metropolitan brought this insurance bad faith lawsuit against Hartford for its mishandling of Builder's Risk claims at the Eastside Reservoir Project. These claims arose from the El Nino rain disaster of 1998. A ninety-day stay of discovery and Metropolitan's motion to strike has been granted by the assigned federal district court judge to facilitate mediation/facilitation between the parties. The Hartford has agreed to have Appellate Court Justice Howard B. Wiener (Ret.) of San Diego as the mediator/arbitrator.

### Peiffer, etc., et al. v. Pope, et al.

This wrongful death and personal injury case arises out of a February 11, 1998, automobile accident at Ramona Expressway approaching Hansen Avenue. Plaintiffs allege a dangerous condition of Metropolitan property caused their damages. Because the property at issue is part of the Inland Feeder Project, the claim falls within the coverage of the Owner Controlled Insurance Program and, thus, The Hartford Insurance Company has accepted the defense of this case.

### Valencia v. Advanco

On April 26, 1999, plaintiffs served this action against Metropolitan. Plaintiffs allege a dangerous condition of Metropolitan property caused serious injuries when they fell more than fifty feet from a scaffold while working on the P-1 Pump Station at the Eastside Reservoir Project. This action also falls within the Owner Controlled Insurance Program.

### **3. Resource Matters**

#### Sacramento Splittail Endangered Species Act Listing Litigation

The State Water Contractors (SWC) filed a complaint in the United States District Court in Fresno on May 12, 1999, challenging the United States Fish and Wildlife Service's (USFWS) listing of the Sacramento splittail as a threatened species under the Federal Endangered Species Act (FESA). (State Water Contractors v. Spear, et al.) The San Luis & Delta-Mendota Water Authority (Authority) filed a similar complaint in the same court a day earlier. Both complaints allege that the splittail does not qualify for listing under FESA because its populations over the last two decades have not decreased, and in fact the 1998 population figures are the highest on record; that USFWS used a highly selective subset of all of the data available to it to reach its conclusions that the species had declined; that USFWS ignored a recent report by scientists from the United States Environmental Protection Agency, Department of Fish and Game and Department of Resources showing that the splittail did not meet the criteria for listing and the Department of Fish and Game's recommendation that the species not be listed. Both the SWC and the Authority urged that these cases should be assigned to Judge Oliver Wanger, the judge hearing the San Luis & Delta-Mendota Water Authority v. Department of the Interior case discussed above, because the fish and wildlife regulatory issues involved in each of the cases were similar and assigning them to the same judge would be appropriate. On May 13, 1999, the cases were assigned to Judge Wanger.

In a related matter dealing with the splittail, the Southwest Center for Biological Diversity filed litigation in the United States District Court in San Francisco alleging the USFWS violated FESA by failing to designate critical habitat for the splittail at the same time it listed the species. Southwest Center joined this case with an existing case in which it alleged USFWS' failure to designate habitat for five other listed species.

Finally, the Department of Water Resources has begun consultations with USFWS with regard to operation of the State Water Project (SWP) in a manner which will not jeopardize the splittail. In that consultation, USFWS is considering new take limitations on the operation of the SWP.

#### Colorado River Matters

Legal staff continues to provide legal analysis to the Negotiating Team in the pursuit of a regional solution to Colorado River allocations. Meetings through June 15, 1999 have been scheduled.

### **4. Claims**

None to report.

**5. Financing**

None to report.

**6. Administrative Matters**

Nothing to report.