MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Report

February 2, 2004
Legal Department

• General Counsel's January 2004 Monthly Report

Summary

This report discusses significant matters in which the Legal Department was involved during the month of January 2004.

Attachments

None.

Detailed Report

1. Litigation/Claims To Which Metropolitan Is A Party

a. *Arizona v. California*

In this case regarding the Quechan Tribe's claim for Colorado River reserved water rights, Special Master McGarr denied the summary judgment motions on the boundary issues by the California parties and Arizona because of disputed issues of fact, and ruled that the boundary issues should be resolved at trial. The judge did not rule on the substantive arguments raised by the parties but postponed such a ruling to a trial. No trial date has been set yet.

b. Arvin Edison Intertie Pipeline Settlements

The Arvin Edison Water Storage District has settled claims and lawsuits it had outstanding against the pipeline manufacturer, installers, and design/inspector consultant for its intertie pipeline ("Intertie") connecting its South Canal to the California Aqueduct. The Intertie is designed to return Metropolitan water previously stored under the Arvin Edison Metropolitan/Water Management Program. The Intertie, funded pursuant to a loan from Metropolitan, was completed on schedule in June 2000, but subsequent testing uncovered significant leakage from as much as 50% of the 2,200 joints in the pipeline. The primary defect was oversized bells created in the manufacturing process. It was subsequently determined that a new steel pipeline had to be installed within the existing concrete Intertie segments at a cost in excess of $10 million. That work has now been completed, and the intertie has been online since mid-2002. Metropolitan's engineering staff aided in the design and inspection of the new steel liner pipeline. In addition, Legal Department staff monitored developments, and provided input to Arvin Edison to assure that Metropolitan's interests are protected. This included development of a tolling agreement regarding any potential action by Metropolitan against Arvin Edison for failure to timely bring the Intertie online in accordance with agreement between the parties. Arvin Edison then presented claims and litigation against the pipeline manufacturer, its designer/inspection consultant, and the installers. The installers, in turn, made claims against Arvin Edison for their extra work once the leaks manifested themselves. Pursuant to the settlements recently reached, Arvin Edison has received full payment for all of its out-of-pocket expenses from the pipeline manufacturer. In addition, the design/inspection consultant donated its fees for the design/inspection of the new steel liner pipeline, and paid the installer claims, as there was no evidence that installation was a cause of the leaks. These settlements bring this matter to a conclusion, leaving all the physical improvements necessary for the Arvin Edison/Metropolitan Water Management Program up and operational at no additional cost to Arvin Edison or Metropolitan.

c. Energy Matters

In the California Independent System Operator's Transmission Access Charge docket at the Federal Energy Regulatory Commission, Legal Department staff took the laboring oar in the preparation of the Post-Hearing Initial Brief filed December 18, 2003 and the Reply Brief filed January 13, 2004. The assigned Administrative Law Judge's Initial Decision will be issued by March 11, 2004. Additionally, staff attended several meetings and a technical conference concerning the Cal ISO's proposed market redesign, which the ISO intends to file for approval at FERC by the end of the year.

d. *Laub v. Davis; Regional Council of Rural Counties v. State of California*

In mid-January, Appellants' California Farm Bureau, Regional Council of Rural Counties and Central Delta Water Agency filed opening briefs with the Third Appellate District in their appeal of the lower court's decision upholding the CALFED EIR. Metropolitan is a party to these consolidated cases to protect our interests in a successful outcome of the CALFED process. Staff is coordinating with the State to defend the program and have begun preparing Metropolitan's response. Metropolitan's response is due in mid-March and argument is anticipated in early summer. http://www.saccourt.com/CoordCases/baydelta/baydelta.asp

e. *San Diego County Water Authority v. Metropolitan Water District* (Preferential Rights Case)

The First District Court of Appeal (San Francisco) has set this matter for oral argument on February 17, 2004. San Diego County Water Authority appealed the lower court's ruling which upheld Metropolitan's preferential rights calculations under Section 135 of the MWD Act.

2. Other Matters Involving Metropolitan

a. *Environmental Protection Information Center v. National Marine Fisheries Service*

The Federal District Court in San Francisco heard oral argument on summary judgment motions filed by all the parties (including the State Water Contractors) to this litigation on January 27, 2004. The State Water Contractors intervened in this action to support National Marine Fisheries Service's determination that the green sturgeon does not qualify for listing under the Federal Endangered Species Act. The court took the motions under advisement.

b. *QSA Related Litigation*

Last month, Metropolitan, San Diego County Water Authority, Coachella Valley Water District, and Imperial Irrigation District successfully argued for transfer of venue for four of the QSA lawsuits from Imperial County to Sacramento County Superior Court. The transfer applies to two lawsuits brought by Imperial County, one suit brought by the Imperial Group, and the suit brought by "Protect Our Water and Environmental Rights." County Superior Court Judge Donnelly issued a tentative ruling for transfer of IID's validation action, but has continued that hearing until late February to allow additional briefing by new parties. Meanwhile, Metropolitan joined in a petition to the Judicial Council to coordinate all of the QSA-related cases before a Sacramento County court.

3. Matters In Which Metropolitan Is Not A Party

a. *Bighorn-Desert View Water Agency v. Beringson*

A significant California Court of Appeal decision filed January 13, 2004, *Bighorn-Desert View Water Agency v. Beringson*, establishes that the commodity rates, fees and charges fixed by a water agency cannot be challenged by initiative under Articles XIII C and D of the California Constitution (Proposition 218). Proposition 218, the "Right to Vote on Taxes Act" approved by the voters in November 1996, places limits on property-related charges and states that the power of initiative to affect local taxes, assessments, fees and charges applies to all local governments. The board of directors of Bighorn-Desert View Water Agency (Bighorn) fixed water rates and charges pursuant to the ratesetting provision of Bighorn's enabling act, which is similar to the ratemaking authority granted in the MWD Act and charter legislation for other water districts. An initiative petition seeking to reduce Bighorn's water rates and charges and to require two-thirds voter approval for subsequent rate increases qualified for the ballot. Bighorn filed a declaratory relief action and the trial court ruled that the initiative was invalid on its face because Bighorn's electorate lacked the power to reduce or affect Bighorn's water rates, fees and charges through a voter initiative. Defendants appealed.

The Fourth District Court of Appeal affirmed. The Bighorn board of directors is authorized and required to fix water rates and charges in a sufficient amount to pay operating expenses, provide for repairs, pay debt service and provide a reasonable surplus, as mandated under Bighorn's enabling act, and the court declared that the initiative process cannot interfere with this legislatively-delegated function. This key ruling is the first appellate decision dealing with a challenge of water rates by initiative. It also confirms other decisions that commodity rates for water service are not property-related levies subject to the limitations of Proposition 218. Metropolitan joined ACWA as *amicus curia.*
http://www.courtinfo.ca.gov/opinions/documents/E033515.PDF

b. *Miccosukee Tribe of Indians v. South Florida Water Management District*

On January 14, 2004 the U.S. Supreme Court heard oral arguments in *Miccosukee Tribe of Indians v. South Florida Water Mgmt. Dist.* (280 F.3d 1364, 2002). The case came to the Court on appeal from an Eleventh Circuit holding that the diversion of water containing a regulated constituent from one body of water to another was a point source discharge under the Clean Water Act (CWA), and was therefore subject to National Pollution Discharge Elimination System (NPDES) permitting requirements. Metropolitan filed an amicus brief together with NWRA, ACWA, and several other interested parties, urging the court to reverse the lower court decision.

During argument several members of the court seemed concerned with the possibility that without requiring compliance with the NPDES permitting system, polluted water could be pumped into a pristine body of water. Counsel for the Water Management Agency and the Assistant Solicitor General, also arguing for reversal of the Eleventh Circuit decision, both answered that other provisions of the CWA could be used to prevent such an occurrence. Other comments indicated that the justices appreciated the complexity and necessity of transferring water to meet critical supply demands in the west without restriction. During an exchange with counsel for the Miccosukee Tribe, Justice Kennedy remarked that it seemed extraordinary that the states had been violating the CWA for thirty years and no one had noticed.

It is expected that the Court will announce its decision before the end of April but it could be delayed until the end of the term in June. Given the exchange among the Justices during argument, the decision is likely to be close.

Transcript of the oral argument:

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-626.pdf

Petitioner's (South Florida Water Management District) brief:

http://www.abanet.org/publiced/preview/briefs/pdfs_03/626Pet.pdf

Respondent's (Miccosukee Tribe of Indians) brief:

http://www.abanet.org/publiced/preview/briefs/pdfs_03/626Resp.pdf

c. *Northern California Water Association v. State Water Resources Control Board*

Last fall the Legislature enacted SB 1049, eliminating general funding for the State Water Resources Control Board's Division of Water Rights. Instead of general funds, the statute directed the State Board to develop regulations requiring water right holders to pay user fees to replace the general funds. Upon the State Board's adoption of the fee regulations, the Northern California Water Association and Central Valley Project Water Association filed this litigation challenging the legality of the proposed fees. Plaintiffs and the State Board have entered into a stipulation holding the litigation in abeyance while plaintiffs file and pursue with State Board a petition for reconsideration of the proposed fees. The petition also offers other water users affected by the proposed fees the opportunity to "adopt" the petition and be added as plaintiffs if the litigation is resumed. Under the regulations, Metropolitan has been billed approximately $37,000 related to filings on the Colorado River. Staff anticipates paying the fees (reserving its arguments regarding State Board jurisdiction over Colorado River water) and is reviewing the complaint and stipulation to determine how to proceed.

d. *Rio Grande Silvery Minnow et al v. John W. Keys, III et al*

We previously reported that in June 2003, the Tenth Circuit United States Court of Appeals (Tenth Circuit) had issued a decision in the Rio Grande silvery minnow case, affirming the federal trial court holding that the Bureau of Reclamation (Reclamation) has discretion to limit deliveries of Rio Grande water under its contracts with irrigation districts and municipalities in New Mexico to protect the endangered silvery minnow under section 7 of the federal Endangered Species Act (ESA).

In August 2003, the State of Arizona, Metropolitan and four other agencies holding contracts with Reclamation to collectively receive lower Colorado River water and power for delivery and use in Arizona, California and Nevada (*Amici*) filed a motion in the Tenth Circuit in support of the petitions for rehearing filed by the federal government and the New Mexico water contractors. The *Amici* were concerned that, although the law and contracts governing water deliveries on the lower Colorado River differ from those governing the Rio Grande, the majority opinion relied on a misreading of three Ninth Circuit cases that are precedent in Arizona, California and Nevada, and threatens the *Amici's* paramount interests in their own contracts with Reclamation for and entitlements to water deliveries from the lower Colorado River.

On January 5, 2004, while the petitions for rehearing were pending, the Tenth Circuit dismissed the appeal and vacated its own opinion, ruling that the appeal had been mooted by events occurring after the opinion was issued. The Ten Circuit stated that because of climatological circumstances, Reclamation had not been required to reduce water deliveries to any contract user under the trial court order, which expired on December 31, 2003. But the Tenth Circuit refused to vacate the trial court order, stating that the trial court should be allowed to enter the judgment that it determines to be appropriate, and that the parties may appeal that judgment if they disagree with it.

e. *Spirit of the Sage v. Babbitt*

In November, we reported that on September 30, 2003, the federal trial court issued a brief order stating that it would rule in favor of the plaintiffs' challenge to the "No Surprises Rule" as violating the federal Endangered Species Act and the Administrative Procedures Act. The No Surprises Rule provides assurances that the U.S. Fish and Wildlife Service will not at a later time require additional mitigation or other compensation so long as the permittee is in compliance with the habitat conservation plan (HCP) or natural community conservation plan (NCCP).

Primarily the ruling was based on procedural defects with the promulgation of the rule. Accordingly, the Department of the Interior will have to reissue the rule to cure the procedural defects. The court did not rule on plaintiffs' substantive arguments with the rule. http://www.dcd.uscourts.gov/98-1873.pdf

4. Finances

Bond market conditions in mid-January permitting pricing of an interest rate swap and escrow securities for additional refunding bonds at an effective fixed rate of 2.917% per annum. Legal Department staff assisted Finance staff and outside bond counsel in negotiating the swap documents, bond documents and standby bond purchase agreement for $162,455,000 Water Revenue Refunding Bonds, 2004 Series A. These bonds will be issued in February to refund outstanding Water Revenue Bonds and provide debt service savings.