

• General Counsel's March 2004 Monthly Report

Summary

This report discusses significant matters in which the Legal Department was involved during the month of March 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 additional Colorado River water rights, the Quechan Tribe has moved to modify the pretrial schedule and to designate additional expert witnesses. Metropolitan is objecting to the modifications on the grounds that they will delay the trial, and that additional designation of expert witnesses is untimely under the Federal Rules of Civil Procedure. The Special Master has scheduled a hearing on the matter in Chicago on March 29, 2004. An oral report updating this item will be provided at the April Legal, Claims and Personnel Committee meeting.

b. Shank/Balfour Beatty v. Metropolitan

On March 25, 2004 the court issued its ruling on Metropolitan's Motion for Summary Judgment. The court granted Metropolitan's motion to deny compensation to Shank and its pipe vendor Ameron for additional sales tax on pipe and plant make ready expenses (PMR) required for the changed alignment of the Arrowhead East Tunnel. The pipe and PMR was paid for pursuant to an Extra Work Order executed by the parties in December 1999 (EWO 14). The court agreed that it is too late for the Plaintiff to seek additional payments for matters included in EWO 14. This action reduces the total claim by \$259,843. The court denied the remainder of Metropolitan's motion seeking summary judgment for the filing of late claims and accord and satisfaction. These issues will be addressed again at trial.

A new trial date of May 11, 2004 was set. Expert depositions will be conducted in April. Metropolitan staff, special counsel and retained experts have continued to analyze the data obtained during the discovery process relating to the pending claims. Based upon this analysis and the action of the court, prior to trial Metropolitan will make a unilateral payment to the plaintiff for amounts not in dispute and a statutory settlement offer.

c. San Diego County Water Authority et. al. v. Metropolitan (Preferential Rights Case)

The California Court of Appeal in San Francisco affirmed on all counts the San Francisco Superior Court's dismissal of the San Diego County Water Authority's complaint alleging that Metropolitan was improperly calculating the member agencies' preferential rights under Section 135 of Metropolitan's Act. The unanimous published opinion was issued on March 25, 2004. (See <http://www.courtinfo.ca.gov/opinions/documents/A098526.PDF>) There is no automatic right to appeal this case to the California Supreme Court, but the Authority may request the Court to review the case in its discretion; such requests are seldom granted. The

opinion was more fully described in the General Counsel's report of the case to the Board dated March 25, 2004.

2. Other Matters Involving Metropolitan

a. El Dorado Irrigation District v. SWRCB and El Dorado County Water Agency v. SWRCB

On March 3, 2004 the State Water Contractors appealed the Sacramento Superior Court's ruling that the State Water Resources Control Board's (SWRCB) inclusion of Term 91 in plaintiffs' water rights permits was improper. SWRCB's Term 91 is generally included in water rights permits because, when certain conditions exist in the Delta, in-basin water users who otherwise are senior to the state and federal water projects must cease diverting due to insufficient natural flow to support their appropriative rights. However, the trial court held that because Term 91 has not been included in the water rights permits of a number of in-basin water rights holders who have rights junior to plaintiffs', it was improper to include it in plaintiffs' permits. The State Water Contractors, including Metropolitan, had intervened in this action; the state Department of Water Resources also is a party to this action and appealed as a real party in interest.

b. Electric Industry Restructuring

On March 10, 2004 the presiding Administrative Law Judge issued her Initial Decision in the ISO successor transmission access charge proceeding. At the hearing, Metropolitan, the State Water Contractors and the State Water Project (SWP) submitted expert witness testimony challenging the ISO's flat, volumetric transmission service rate. The judge's Initial Decision concluded that, although SWP, Metropolitan and the State Water Contractors had submitted "strong arguments" in favor of their respective on/off-peak and coincident peak methodologies, a 1997 Federal Energy Regulatory Commission (FERC) decision approving the ISO's interim volumetric rate resolved transmission rate design issues. Thus, the case presented by Metropolitan and the State Water Contractors has not been considered on its merits; this decision essentially punted the issue to FERC.

This conclusion conflicts with at least one subsequent FERC decision that found a component of the ISO's transmission access charge design unjust and reasonable. Furthermore, it is inconsistent with other, more recent FERC decisions that identified the pending proceeding as the one that should resolve the ISO's successor transmission rate. The parties will file briefs addressing these issues on April 9. Following submission of reply briefs, the matter will be forwarded to FERC for resolution.

c. Enron Power Marketing, Inc.

On March 18, 2004 Metropolitan responded to a February 10, 2004 demand letter from Enron Power Marketing, Inc. regarding its claim for damages arising out of energy transactions negotiated prior to Enron's bankruptcy filing. Enron's letter, which contains a \$1.6 million demand, updated an earlier demand letter sent November 20, 2002. The majority of damages comprising Enron's demand arises from its contention that Metropolitan terminated a December 2001 transaction, notwithstanding Enron's delivery of, and Metropolitan's payment for energy subsequent to the purported termination. Shortly after its December 2001 pre-bankruptcy filing in New York, NY, Enron initiated litigation against a number of parties, and settled claims with a number of municipal utilities. Most matters that remain in litigation involve sums far in excess of Enron's recent demand. We will keep you apprised of further developments as they occur.

d. QSA Related Litigation

In response to the petition to coordinate the various lawsuits raising CEQA and other challenges to some of the QSA agreements, a Superior Court judge in Imperial County has been appointed to decide the issue of coordination and recommend where the cases might be coordinated. At this time, some QSA-related cases have been transferred to Sacramento County under the "neutral county" change of venue statute while a few others remain in Imperial County. We anticipate that the Imperial County "coordination" judge will hold a hearing on the matter in the near future.

e. Weymouth/Pro Contracting

Traveler's Insurance Company has executed a contract with Brutoco Construction and Brutoco has commenced work to complete the construction of new chlorine containment facilities at Weymouth. The contract for this work was originally awarded to Pro Contracting. Pro filed bankruptcy and Traveler's stepped in as the surety for the performance bond. There was a several-month delay while Traveler's negotiated with various contractors to complete the work.

Although work has commenced, Metropolitan has not yet received payment instructions from Travelers and Travelers is requesting that Metropolitan enter into a take-over agreement for completion of the work. Traveler's is responsible for payments to Brutoco and work will not be delayed while final agreements are drafted.

3. Other Matters Not Involving Metropolitan

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

On March 2, 2004 the San Francisco Federal District Court remanded the National Marine Fisheries Service's (NMFS) determination *not* to list the North American green sturgeon back to NMFS to reconsider its decision. NMFS had determined in January 2003 that the green sturgeon did not warrant listing as an endangered or threatened species and plaintiffs subsequently sued to overturn that decision. While upholding most of NMFS' decision not to list with respect to the *entire* green sturgeon population, the trial court held that NMFS did not adequately explain whether the fish was threatened in a "*significant portion of its range*" as required by the Endangered Species Act. Consequently, NMFS' decision not to list the sturgeon has been voided and it must now expressly consider whether the loss of historic specific spawning habitats is significant enough to warrant listing. The State Water Contractors, who had filed comments in the listing process and successfully intervened in this case in August 2003, will participate in NMFS' further proceedings.

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

On March 23, 2004 the U.S. Supreme Court issued its decision in *Miccosukee Tribe of Indians v. South Florida Water Management District*. The appeal arose from an Eleventh Circuit holding that the diversion of water containing a regulated constituent from one body of water to another was subject to National Pollution Discharge Elimination System (NPDES) permitting requirements. Unfortunately, the court failed to reach a full resolution on all of the issues, and instead, remanded the case back to the trial court to determine whether the two water bodies involved in the case are, in fact, separate.

The Court unanimously decided, however, that a water conveyance system need not itself add a pollutant to waters of the U.S. in order to be required to obtain an NPDES permit. The Court

failed to decide the important issue of whether an NPDES permit is required "when water from one body is discharged, unaltered, into another body." The U.S. Solicitor General had argued that all waters of the U.S. should be viewed unitarily for purposes of permitting and that movement alone of water from one body to another should not require a permit. As *Miccosukee* winds its way back through the federal court system another case pending in the Second Circuit, *Catskill Mountains Chapter of Trout Unlimited v. New York City*, a case that specifically deals with the transportation of water for drinking purposes may provide the Court with another vehicle to decide the issue.

The opinion of the Court may be read at:

<http://a257.g.akamaitech.net/7/257/2422/08mar20041130/www.supremecourtus.gov/opinions/03pdf/02-626.pdf>

4. Finance

Legal Department staff worked with Finance staff and outside bond counsel to issue Metropolitan's Water Revenue Refunding Bonds, 2004 Series B, in the amount of \$274,415,000 on March 25, 2004. In addition, the Legal Department drafted a supplemental resolution for consideration by the Board in April, in anticipation of an issue of Waterworks General Obligation Refunding Bonds at the end of April, and prepared updated disclosure for the Official Statement for Board review. The bank liquidity facility supporting \$100 million Water Revenue Bonds, 1997 Authorization, Series B and C was successfully extended before its March 29, 2004 expiration date.