

• General Counsel's February 2005 Activity Report

Summary

This report discusses significant matters in which the Legal Department was involved during the month of February 2005.

Attachments

None.

Detailed Report

1. Litigation/Claims To Which Metropolitan Is A Party

a. Arizona v. California

In January, Metropolitan's Board approved settlement of this long-running lawsuit in which the Quechan Indian Tribe sued to increase the amount of reserved water for the Fort Yuma Indian Reservation. The governing bodies of all other parties to the case have also approved the settlement, and on February 24 the parties executed the final settlement agreement.

b. OSA Related Litigation

The County of Imperial filed a petition to the Third District Court of Appeal for review by extraordinary writ of the Sacramento Superior Court's January rulings that dismissed one County case entirely and the CEQA causes of action from another. The rulings at issue were based on the County's failure to name Metropolitan and Coachella Valley Water District (CVWD) as indispensable parties in two of the County's complaints that seek to overturn the Imperial Irrigation District (IID)- San Diego County Water Authority (SDCWA) transfer agreement and the State Water Resources Control Board approval of the transfer. Amici briefs in support of the County's petition were also filed by the Imperial County Air Pollution Control District, South Coast Air Quality Management District, and Planning and Conservation League. At the close of the month, Metropolitan, CVWD, SDCWA, and IID were finalizing their oppositions to the County's petition for writ review.

2. Other Matters Involving Metropolitan

a. 2005 Water Transfer Option Agreements

Metropolitan and three other state water contractor buyers executed water transfer agreements with the Glenn-Colusa Irrigation District, Western Canal Water District and Richvale Irrigation District in February. These agreements make available up to 127,000 acre-feet of water to the buyers in 2005; Metropolitan's share is about 115,000 acre-feet. Metropolitan has until April 1 to exercise its option, and can delay the option call until May 2 with an additional option payment (credited to the purchase price) and payment of identified land preparation costs. CEQA review has been completed and the 30-day statute of limitations on potential CEQA litigation has run.

3. Other Matters Not Involving Metropolitan

a. *Casitas Municipal Water District v. United States*

Casitas Municipal Water District has filed suit in the Court of Federal Claims to recover damages for costs incurred and water supplies lost due to requirements for compliance with the federal Endangered Species Act. Casitas is a municipal water district that serves municipal and agricultural customers in Ventura County. It operates the Ventura River Project pursuant to a contract with the Bureau of Reclamation that built and owns the project facilities.

In 1997, the National Marine Fisheries Service listed the west coast steelhead trout as an endangered species. After a consultation between the Bureau of Reclamation and the Service on the effects of operations of the Ventura River Project on the trout, the Service issued a biological opinion that required construction of a fish diversion facility and maintenance of bypass flows from the project. Reclamation required Casitas to comply with the provisions of the biological opinion and Casitas has expended \$8.3 million to construct the fish bypass. The suit filed by Casitas seeks to recover the costs of constructing and maintaining the fish bypass, as well as the value of the water that is used to maintain bypass flows for the endangered trout.

The newly filed Casitas case is the latest in a string of cases by water districts seeking compensation for losses incurred due to compliance with the federal Endangered Species Act. Other pending cases were brought by Klamath Irrigation District and a group of Central Valley water districts led by Stockton East Water District. The United States recently settled a case brought by Tulare Lake Basin Water Storage District after the trial judge awarded the water district \$26 million for the taking of water rights to protect Delta smelt and chinook salmon. The settlement was entered into despite the objections of the California State Water Resources Control Board and Resources Agency, which argued that the decision should be appealed.

The Casitas case has been assigned to the same trial judge as the Tulare Lake case and is likely to result in further development of this area of the law. The Legal Department will monitor each of the pending cases and review the potential effect on Metropolitan's obligations under the federal Endangered Species Act.

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

In March of 2004 the U.S. Supreme Court held 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 but failed to decide whether an NPDES permit is required "when water from one body is discharged, unaltered, into another body." As part of its decision, the Court remanded the case back to the trial court to determine whether the two water bodies involved in the case are, in fact, separate. In compliance with the Supreme Court's order, the District Court for the Southern District of Florida has ordered a pre-trial scheduling conference and it is anticipated that trial on the limited issues to be determined will be set to begin in the fall.

In what is seen as a positive move by western water interests, the U.S. Department of Justice has decided to intervene in the case opposing a requirement that NPDES permits be obtained for such engineered transfers. The Department of Interior has asked that those potentially impacted by the outcome of the case file amicus briefs supporting the government's position and Metropolitan anticipates continuing its active participation in determination of this issue.

c. Natural Resources Defense Council, et al. v. Norton, et al.

Several environmental special interest groups filed this litigation in February 2002 challenging the United States Fish and Wildlife's (USFWS) Biological Opinion (BO) regarding the Central Valley Project's "Long-Term Operations Criteria and Plan" (OCAP). The OCAP establishes the CVP's operational plan for the diversion of water for its contractors. Because the CVP and State Water Project (SWP) closely coordinate their export operations, the Department of Water Resources' (DWR) planned operations of the SWP are included in the OCAP. The OCAP was adopted in June 2004.

Prior to adopting the OCAP, the CVP was required to consult with USFWS regarding potential impacts of project operations on the Delta smelt. That consultation resulted in the BO in July 2004 in which USFWS determined that the planned operations of the CVP and SWP are "not likely to jeopardize the continued existence of the smelt" because of mandatory "reasonable and prudent measures" the projects will take, the Environmental Water Account and other activities to protect the smelt. The BO included an "incidental take statement" allowing the CVP and SWP to continue planned operations so long as those operations do not exceed a specified take of the smelt. The BO also included "early consultation" on DWR's planned South Delta Improvement Program and increased integration of SWP and CVP operations under the Napa Proposal. Once the SDIP is completed, USFWS will reexamine whether SDIP's effects on the Delta smelt are the same as analyzed in the OCAP. If they are, the early consultation and associated incidental take statement for the SDIP and Napa Proposal will become formal. If USFWS finds that SDIP will result in increased impacts on the smelt, USFWS will reinitiate consultation with the projects.

Plaintiffs allege that Delta smelt population has significantly decreased in 2004 and is now near an all-time low. They also allege that the projects' export operations kill smelt and reduce their habitat. Finally it is alleged that USFWS failed to adequately evaluate the effect of project operations on the smelt and that the proposed protective measures do not provide adequate assurance of protection for the Delta smelt. The complaint seeks a judgment directing USFWS to withdraw the BO and to reinitiate consultation with the CVP and enjoining any action taken in reliance on the BO. Metropolitan and other state water contractors are reviewing our options with respect to this litigation, including potential participation.

d. Western Watersheds Project v. Matejko

A federal district court in Idaho last year issued a Summary Judgment Order finding the Bureau of Land Management (BLM) in violation of section 7 of the Endangered Species Act for not conducting ESA consultation to consider changes to existing private irrigation ditch rights-of-way across federal lands in order to provide further protection to ESA listed fish populations. The order has potentially broad ramifications for water providers holding any right-of-way for water diversion, conveyance or other use across federal lands that pre-dates enactment of the Federal Land Policy and Management Act of 1976. It may have a broader effect of requiring ESA consultations to be completed for additional existing federal authorizations, projects or programs for which a federal agency is not currently engaging in discretionary review or action.

The federal district court has now issued an interim or partial injunction order in the case and it is anticipated that the Department of Justice will appeal the injunction order to the Ninth Circuit. One of the issues of such an appeal will be the merits of the Summary Judgment Order. Because

of the potential impacts likely to result from an expanded ESA consultation requirement, Metropolitan is participating with other potentially affected agencies in preparation of an amici brief supporting the appeal and ultimate reversal of the 2004 Summary Judgment Order.

4. Finances

In February, the Legal Department began updating Metropolitan's securities disclosure for a potential issue of refunding general obligation bonds. Appendix A to Metropolitan's Official Statement, containing current information about Metropolitan, will be provided to Board members for review.

5. Administrative

On February 7, 2005, former Solicitor of the United States Department of the Interior John Leshy was the guest speaker at the Legal Department's Member Agency Legal Counsel Dinner. Professor Leshy, who teaches property, constitutional law, Indian law, and various natural resources courses at the University of California Hastings College of the Law in San Francisco, spoke about water rights, takings, groundwater, and the Federal role in water policy. The program, which qualified for continuing legal education credit for California attorneys, was well attended by Metropolitan directors, member agency representatives, outside counsel and other interested individuals.

During the month of February the Legal Department presented a paper on the Lower Colorado River Multi-Species Conservation Program at the University of the Pacific McGeorge School of Law International Law Conference on Transboundary Freshwater Ecosystem Restoration and the Role of Law, Process and Lawyers held in Sacramento.