

## • General Counsel's September 2005 Activity Report

### Summary

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

### Attachments

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None.

### Detailed Report

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#### 1. Litigation/Claims To Which Metropolitan Is A Party

##### a. *Consejo de Desarrollo Economico de Mexicali v. United States*

This lawsuit challenges the All-American Canal Lining Project. It was filed by a Mexican economic development organization on behalf of a class of Mexican groundwater users, and by American environmental organizations. The Mexican plaintiffs allege that the Lining Project will deprive them of water that seeps from the unlined All-American Canal and enters the groundwater where it is pumped for use in Mexico. The American environmental organizations allege that federal officials violated a number of federal environmental laws in carrying out the Lining Project.

Certain Arizona and Nevada water users have intervened in the case. The United States has filed a motion to dismiss the claims that seek a water right for the Mexican groundwater users, and some but not all of the environmental claims. The Five Bands of Mission Indians, who will receive some of the water conserved by lining the Canal, also have filed a motion to dismiss. The Five Bands argument is that because of their interest in the Canal water, they must be joined as parties but because Tribal sovereign immunity prevents that, the water rights claims must be dismissed.

On September 28, 2005 Metropolitan filed a motion to intervene as a defendant along a brief supporting the United States' and the Five Bands' motions to dismiss. Motions to intervene also have been or will be filed by the Imperial Irrigation District and the San Diego County Water Authority.

#### 2. Other Matters Involving Metropolitan

##### a. *Mt. San Jacinto Community College District v. Superior Court* (Azusa Pacific University).

Metropolitan has joined the League of California Cities and California State Association of Counties in filing an *amicus* brief with the California Supreme Court in this eminent domain case. The issue involves a provision of the Eminent Domain Law that allows a condemning agency to take possession of property prior to completing the litigation if the agency deposits the amount of its appraised value of the property for the benefit of the property owner. The purpose of this provision is to allow a condemning agency to avoid delays in beginning important public works, while allowing the property owner to purchase replacement property with the funds provided. If the trial of the eminent domain case later determines that the amount of compensation owed to the owner is greater or lesser than the amount deposited and withdrawn,

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the difference is awarded to the appropriate party. The law also provides that a property owner who challenges the right of the condemning agency to take the property cannot withdraw the deposited amount. Otherwise, the owner could attempt to defeat the acquisition while benefiting from the funds provided to replace the real property.

In this case, Azusa Pacific University challenged the community college district's action to condemn vacant land that it was holding for a future campus. The college district also sought the land to build a school. Azusa Pacific did not withdraw the deposit made by the community college district while it litigated the authority of the district to acquire the land. The final decision upholding the community college district's authority to condemn the property took several years to determine and during this period the price of land in the area allegedly increased significantly. Azusa Pacific then sought to change the date of valuation of the land from the date of deposit, as established by the Eminent Domain Law, to the date of trial, so that it would obtain the advantage of the increased market. The court of appeal upheld the validity of using the statutory date of valuation and the Supreme Court granted review.

Establishing the date of valuation early in an eminent domain action is important to the efficient prosecution of these cases. Allowing the date to change on the eve of trial, as proposed by Azusa Pacific, would discourage early settlements and require additional expense to update appraisals. The amicus brief filed by the League of California Cities, California State Association of Counties and Metropolitan, supports the continued use of eminent domain procedures that have been in place for decades. The brief also argues that if the Supreme Court finds the procedure is unconstitutional, the remedy should be to allow withdrawal of the deposit by the landowner during the litigation over the condemnors right to take, rather than changing the date of valuation.

### 3. Matters of Interest Not Involving Metropolitan

#### a. National Marine Fisheries Service Designation of Critical Habitat for Central Valley Spring Run Salmon and Central Valley Steelhead

The National Marine Fisheries Service (NMFS) designated critical habitat for the Central Valley spring run salmon, Central Valley steelhead and a number of other salmonoid fish species on the Pacific coast on September 2, 2005. NMFS previously designated critical habitat for these species in February 2004, but those designations were successfully challenged in court because NMFS had not properly analyzed the economic impact of the designations as required by the Federal Endangered Species Act (FESA). The designated habitat for the spring run salmon and steelhead include major portions of the Sacramento River, Feather River, San Joaquin River and Delta. Designation of habitat for these species could have some impact on State Water Project operations. But since the State Water Project already is restricted by the jeopardy and take prohibitions of the FESA, the impacts are not likely to be significant. Metropolitan staff, along with other State Water Contractor staff, is reviewing the designation to determine whether any action should be taken in response to the listing.

#### b. Ramirez et al. vs. City of Pasadena

On September 19, 2005, the Actuarial & Employer Services Division of CalPERS issued an administrative determination in *Ramirez et al vs. City of Pasadena*. *Ramirez* is a class action lawsuit similar to *Cargill et al vs. Metropolitan Water District*, Los Angeles Superior Court Case No. BC191881. As with *Cargill*, the Pasadena lawsuit seeks regular employment benefits for persons providing services to the City of Pasadena as contracted supplemental labor.

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CalPERS examined the claims of five temporary agency workers who performed services at the City of Pasadena and concluded all five individuals are employees of the City, rather than of the temporary employment agencies. In addition, CalPERS applied the penalty provision of Government Code Section 20283 thereby requiring the City to pay all arrears costs for member contributions and the administrative cost of \$500 per individual. The decision lists various factors considered in determining whether the workers qualified as employees of the City under the common law. CalPERS primarily relied on a former IRS Revenue Ruling identifying a 20-factor test. On the penalty issue, CalPERS noted the common law control test has been known for decades. Further, CalPERS pointed out that the City could have sought clarification from CalPERS if the City was unsure. Pasadena has 30 days to appeal this determination to an administrative law judge; an appeal is anticipated.

### b. U.S. EPA Issues Memo Addressing Necessity of NPDES Permits for Water Transfers under the Clean Water Act

The U.S. Environmental Protection Agency (EPA) Office of the General Counsel recently published a memo responding to the question of whether the National Pollutant Discharge Elimination System (NPDES) permitting program set forth in the Clean Water Act applies to water control facilities that merely convey or connect navigable waters (water conveyances). The memo concludes that under most circumstances an NPDES permit would not be required for most water transfers. The issue of whether an NPDES permit is required for routine water transfers has been the subject of several important court decisions including the Supreme Court's holding in *South Florida Water Management Dist. v. Miccosukee Tribe of Indians* and the U.S. Court of Appeals decision in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*.

In the memo EPA concludes that, based on the Clean Water Act as a whole, Congress intended to leave the oversight of water transfers to authorities other than state or federal NPDES program agencies. Individual state water resource management agencies would therefore be left with oversight responsibilities for most water transfer and related water quality issues. EPA also found that while resort to a case-specific evaluation of waters would not ordinarily be necessary or appropriate in light of Congressional intent, where such an evaluation was determined to be necessary, a permit would only be required for waters that were "meaningfully distinct." The memo concludes with an indication that EPA will initiate a rulemaking process to more fully address water transfers.

## 4. Intellectual Property

### a. California Friendly Certification Mark

The United States Patent and Trademark Office notified Metropolitan that its application for certification trademark protection for the "California Friendly" water conservation program, sponsored by Metropolitan and the Family of Southern California Water Agencies, has been approved for publication in the Official Gazette on September 27, 2005. If no one opposes this application, after notice provided by the Trademark Office, Metropolitan will have six months to prove that it is actually using this mark in interstate commerce. With this trademark protection, Metropolitan can stop others from using the "California Friendly" name in any manner which interferes with this program for certifying that certain manufactured items, plants, landscapes, buildings and related services meet established standards for conserving water, power and natural resources.

**5. Administrative**

Catherine Stites was selected to fill the vacant Deputy General Counsel position from a highly qualified pool of 88 applicants. Ms. Stites has been employed at the Los Angeles office of Bingham McCutchen for the past six years, where she has focused on environmental compliance and litigation, including state and federal water quality issues and groundwater litigation. Ms. Stites received her Bachelor of Arts degree in Political Science from the University of California at Irvine and her Juris Doctorate from Washington University School of Law in St. Louis. Her employment in the Legal Department will begin on October 3, 2005.