

• General Counsel's March 2006 Activity Report

Summary

This report discusses significant matters in which the Legal Department was involved during the month of March 2006.

Attachments

None.

Detailed Report

1. Litigation/Claims To Which Metropolitan Is A Party

a. Arizona v. California (U.S. Supreme Court)

In this long-running litigation over rights to Colorado River water, the Supreme Court accepted the Report of Special Master Frank McGarr on March 27, 2006, and approved the final settlement agreements of the California and Arizona parties with the Quechan Tribe for the reserved water rights of the Fort Yuma Indian Reservation. The California settlement with the Quechan Tribe was approved by the Court in the form previously approved by Metropolitan's Board.

In addition to approving the Fort Yuma settlements, the Court on March 27, 2006 also granted the motion of various parties, including Metropolitan, to enter a consolidated decree which was entered by the Court on that day. This consolidated decree brings together in one document the past decrees and settlements that have been entered in the case since the 1960s. This consolidated decree specifies water rights and entitlements for Lower Basin states, water agencies, Indian Tribes, federal establishments, and present perfected right holders and will be one of the major foundations of the Law of the River in years to come. Entry of the final consolidated decree represents the culmination of years of work by Metropolitan staff, both in the Legal and other Departments, to resolve the complex legal and technical issues regarding rights to Colorado River water. This marks the conclusion of historic litigation over rights to Colorado River water that began more than half a century ago.

b. Alameda County Flood Control & Water Conservation District, Zone 7, et al. v. California Department of Water Resources (Hyatt-Thermalito)

As reported previously, Metropolitan and its 12 coalition partners moved to intervene in the litigation concerning allocation of certain energy costs and revenues pursuant to Article 22 of the State Water Contract, in order to ensure that its interests were adequately represented. This Motion to Intervene was granted by the Court in December 2005, giving Metropolitan and its partners the same rights and status as all other parties to this litigation.

Subsequently, the Department of Water Resources (DWR) moved to disqualify Plaintiffs' lead attorney, James Wiesel of Kronick, Moskowitz, Tiedemann & Girard, on the ground that he previously had represented DWR in a matter involving facts similar to those at issue in this case. Ultimately, the parties agreed that Mr. Wiesel would no longer work on this matter. As a result, Plaintiffs retained new legal representation and then requested a four-month stay of the litigation

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to enable their new counsel to become familiar with this case. This request was granted by the Court on February 28, 2006.

A Case Management Conference (CMC) had been scheduled for March 17, 2006 but, in light of the stay, was rescheduled for July 21, 2006 at 1:30 p.m. The CMC will establish the preliminary schedules and basic procedures for various stages of this case, including discovery, pre-trial law and motion, and the trial. Between now and July 21, we will continue to develop our defense strategy, prepare for the commencement of discovery, and review, analyze and index key documents in this matter.

c. *Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (California Supreme Court)*

On March 24, Metropolitan filed its Opening Brief in its appeal to the California Supreme Court for review of the recent Court of Appeal decision invalidating the Environmental Impact Report (EIR) for the CALFED Bay-Delta Program. Metropolitan is a respondent party in these coordinated California Environmental Quality Act challenges that were brought by the California Farm Bureau in one case and by the Regional Council of Rural Counties and the Central Delta Water Agency in another. The Court of Appeal reversed the trial court and invalidated the EIR based on its view that the CALFED agencies failed to consider a project alternative that would reduce Delta exports as a means of curbing population growth in Southern California. It also found that the EIR was required to evaluate in detail all future water sources for the 30-year CALFED Program. Both of these issues are addressed in Metropolitan's brief.

Briefs were also filed by the State of California, the State Water Contractors, and Westlands Water District. The Court of Appeal decision and all of the legal briefs filed to date can be viewed at <http://www.mwdh2o.com/DocSvcsPubs/bdeir/index.html>.

d. *Granados v. Metropolitan (Riverside Superior Court)*

On March 9, 2006, Judge Michael Kaiser of the Riverside Superior Court denied plaintiff Ronald Granados' motion for a preliminary injunction. Judge Kaiser found that the entire premise of Granados' complaint (that Metropolitan violated the Surplus Lands Act by not selling or leasing the subject property for low-income housing) was false. He also found that Granados failed to exhaust his administrative remedies, that Metropolitan complied procedurally with the Surplus Lands Act, and that Granados did not show that his case has a reasonable probability of success on the merits.

Metropolitan has filed a demurrer to the complaint. Hearing on the demurrer has not yet been set.

e. *Laron Daffin v. J.F. Shea Construction, Inc.*

On January 9, 2006, Metropolitan received a claim filed on behalf of an individual, Laron Linton Daffin, who alleges he suffered personal injury arising out of a motorcycle accident on a portion of temporary road that is part of the ongoing construction of the San Diego No. 6 Pipeline Project (project). Mr. Daffin alleges medical expenses in the amount of \$50,000 to \$100,000, and estimates an additional \$2 million in future damages. The accident occurred on July 17, 2005 on a temporarily relocated portion of Anza Road in an unincorporated area of Riverside County (County), east of the City of Temecula. Pursuant to its contract with Metropolitan for work on the project, J.H. Shea Construction Inc. (Shea) constructed the temporary portion of road where the injury occurred, in response to the County's requirements and subject to the

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County's approval. Shea was responsible for construction and maintenance of the temporary road, and agreed to indemnify Metropolitan for claims arising out of the work on the project. Accordingly, Metropolitan tendered its request for defense and indemnity to Shea. On March 27, 2006 we received notice that AIG (American International Group), Shea's insurance carrier, accepted Metropolitan tender of the case.

f. LH Woods v. Metropolitan

LH Woods was the contractor for the Highland Pipeline portion of the Inland Feeder Project. In addition, as part of the contract Woods was given a change order to install the intertie with the San Bernardino Municipal Water District allowing a portion of the Inland Feeder to be placed into service.

During the course of construction of the Highland Pipeline, the project was impacted by a flood of Bledsoe Creek. A portion of the pipe "floated" and had to be re-installed with new bedding. After completion of the job Woods filed claims in the amount of \$1.8 million against Metropolitan alleging delay, disruption and damages resulting from the flood. In August 2005, at a meet and confer between Metropolitan and Woods regarding the pending claim, Woods raised the amount of the claim from \$1.8 million to \$3.2 million claiming additional costs for idle equipment under the suspension provisions of the contract, although there was no time when the work was suspended. After the meet and confer, Metropolitan made an attempt to negotiate with Woods regarding a limited list of items. Woods declined negotiation at that time and filed litigation in November 2005. Metropolitan's demurrer was denied on March 28. However, a partial motion to strike was granted and Woods has 15 days to file an amended complaint, after which Metropolitan will have 30 days to answer. There has been no formal discovery or other activity to date in the litigation.

g. Shank/Balfour Beatty, et al. v. Metropolitan (Court of Appeal)

Metropolitan entered into three contracts with Shank/Balfour Beatty (SBB) to construct the Riverside Badlands, Arrowhead East and Arrowhead West Tunnels as part of the Inland Feeder Project. In April 2000 the contracts for the Arrowhead East and Arrowhead West contracts were terminated. SBB subsequently sued Metropolitan for approximately \$21 million for alleged damages to itself, its subcontractors and vendors. In May 2004 the Board authorized a partial settlement resolving all claims of SBB and its subcontractors for \$3,836,271. The remaining claim was that of Ameron, the pipe vendor for both tunnels, in the principal amount of \$11,552,355.

The matter went to trial in September 2004. Ameron requested interest on its claims bringing the total amount requested to over \$15 million. Prior to trial Metropolitan made a statutory offer to settle the matter for \$3 million. The offer was rejected. In June 2004 judgment was entered for SBB [Ameron] in the amount of \$1.9 million with no interest. Metropolitan was deemed the prevailing party and awarded costs.

SBB/Ameron appealed the decision of the trial court. Their opening brief was filed on March 27, 2006. Metropolitan's response is due on April 27. It will probably be the end of 2006 or early 2007 before there is a decision on the appeal.

2. Other Matters Involving Metropolitan

a. *Consejo de Desarrollo Economico de Mexicali v. United States (All American Canal Litigation)*
(Nevada U.S. District Court)

In this lawsuit, challenging the All-American Canal Lining project, Judge Pro held a hearing on March 3, 2006 and set a modified briefing schedule for motions to dismiss, for summary judgment, and for a preliminary injunction. The judge also set a hearing on the motion for a preliminary injunction for April 24, 2006. Briefing should conclude by March 31, 2006.

b. Metropolitan Washington D.C. Lease

On March 23, 2006, Metropolitan entered into a 10-year lease for a new External Affairs office space in Washington, D.C. The current lease is expiring on July 7, 2006. The new space is located at 500 New Jersey Avenue, NW, on the fifth floor of a brand new, twelve-story building owned by the National Association of Realtors. Legal Department attorneys assisted in negotiating and finalizing the lease and continue to work on documents for the build out of the new space.

c. FERC Relicensing of the Oroville Facilities

Metropolitan has been actively involved in the relicensing of the hydroelectric facilities at Oroville Dam by the Federal Energy Regulatory Commission (FERC). This relicensing is being conducted pursuant to the FERC's Alternative Licensing Process, which encourages the stakeholders to reach agreement among themselves regarding the terms and conditions they believe should be included in the new license.

This effort culminated with the execution of a proposed Settlement Agreement by over 50 stakeholders, including Metropolitan, the State Water Contractors (SWCs), the City of Oroville, the Town of Paradise, various business and recreation interests, and several key federal and state regulatory agencies. The Settlement Agreement was executed on March 21, 2006 and submitted to FERC on March 24, 2006.

Although the Settlement Agreement has widespread support, certain parties, such as the County of Butte, maintain that it does not fully address their concerns. These parties are seeking to have FERC impose license terms and conditions in addition to or different from those recommended under the Settlement Agreement. Metropolitan and the SWCs strongly believe that the Settlement Agreement fairly, equitably and adequately addresses the competing demands of various stakeholders, including those of Butte County. Accordingly, Metropolitan and the SWCs have formally intervened in the FERC relicensing proceeding in an effort to protect our interests in the Settlement Agreement.

The next step is for FERC to conduct an environmental review of the potential impacts associated with issuance of a new license. A draft Environmental Impact Statement (EIS) currently is expected to be released in August 2006. Metropolitan will provide comments on the EIS, as appropriate, and will continue to be actively involved in all aspects of the relicensing process for the Oroville Facilities.

3. Matters of Interest Not Involving Metropolitan

a. Center for Biological Diversity Emergency Petition to List the Delta Smelt as Endangered under the Federal Endangered Species Act

The Center for Biological Diversity filed an Emergency Petition to List the Delta Smelt as an Endangered Species Under the Endangered Species Act on March 8, 2006. The smelt already is listed as “threatened” under both the State and Federal Endangered Species Acts. However, the petition asserts that because the Delta smelt population has fallen to historically low levels it is in imminent danger of extinction and therefore its status should be changed to “endangered.” Both the State Water Project and Central Valley Project currently are subject to operational restrictions to protect the Delta smelt and it is not clear that the recent decline in smelt population is related to project operations. Staff is reviewing the petition to determine what actions Metropolitan should take in response to the petition.

b. Natural Resources Defense Counsel 60-Day Notice of Intent to Sue the Secretary of the Interior and Bureau of Reclamation

On March 20, 2006 the Natural Resources Defense Counsel (NRDC), through its litigation wing Earth Justice, notified the Secretary of the Interior and Bureau of Reclamation (USBR) of its intent to sue regarding operation of the Central Valley Project and its alleged impacts on the Delta smelt. This notice is required before a citizen’s suit can be filed under the Federal Endangered Species Act (FESA). USBR has fulfilled its obligation under Section 7 of FESA to consult with United States Fish and Wildlife Service (USFWS) and has obtained a “non-jeopardy” Biological Opinion and incidental take authorization. (NRDC previously filed the separate *NRDC v. Norton* against USFWS seeking to invalidate the opinion and take authorization.) Despite USBR’s compliance with Section 7, NRDC asserts that USBR’s actions may jeopardize the smelt and that it has an independent duty to do more to protect and restore the smelt than is required in the opinion and take authorization. The notice of intent to sue refers to USBR’s “partner state agencies” but is not addressed to, and does not demand any action by, the Department of Water Resources and the State Water Project.

c. Watershed Enforcers’ Notice of Intent to Sue Department of Resources Regarding Take of Threatened and Endangered Species

The Watershed Enforcers project of the California Sportfishing Protection Alliance delivered a letter to the Department of Water Resources on March 7, 2006, alleging that the State Water Project is “taking” listed, threatened and endangered species in violation of the California Endangered Species Act. The letter threatens to sue DWR and seeks injunctive relief if DWR does not cure the asserted violation within 30 days of the date of the letter. Staff is reviewing the letter.