

- General Counsel's July 2006 Activity Report

Summary

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

Attachments

None.

Detailed Report

1. Litigation/Claims To Which Metropolitan Is A Party

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

In December 2005 Metropolitan and its 12 coalition partners were granted intervention in this suit filed by 14 State Water Project contractors regarding allocation of energy costs and revenues pursuant to Article 22 of the State Water Contract.

At the Case Management Conference (CMC) held on July 21, 2006, the Court ordered the parties to meet and confer to develop a joint, comprehensive case management statement detailing the anticipated progression for this case. This statement is to include specific dates for all proposed discovery, motions and trial, as well as a plan for managing discovery, particularly the production of documents. With respect to the latter, the Court emphasized that the parties should establish a discovery schedule that was "reasonable" in light of the inherent complexities of this case. The joint case management statement must be submitted to the Court by October 11, 2006. The next CMC is scheduled for October 13, 2006.

The Court also discussed the possibility of bifurcating this case into two phases: liability and damages. Plaintiffs objected to bifurcation, arguing that it was not possible because the facts and evidence relevant to these two phases overlapped. The Department of Water Resources (DWR) and the intervenors (i.e., Metropolitan and its Southern Coalition partners) responded that bifurcation was feasible and would result in a significant savings of time and resources for both the Court and the parties. Ultimately, the Court directed the parties to meet and confer in an attempt to informally resolve the issue. If the parties are unable to do so, then DWR and the intervenors must bring a formal Motion to Bifurcate Trial. The Court has tentatively reserved September 29 as the hearing date for such a motion and directed the parties to develop a proposed briefing schedule based on that date.

Finally, the plaintiffs noted that they would seek to amend the complaint to add two State Water Contractors (Littlerock Creek Irrigation District and Ventura County Flood Control District) who are not currently parties to the action, and to assert additional claims against DWR and the intervenors. At the CMC, plaintiffs did not elaborate on what these additional claims would be. However, on July 26, plaintiffs circulated a draft Amended Complaint that included additional claims for unjust enrichment and for breach of the covenant of good faith and fair dealing. DWR and the intervenors currently are assessing whether and to what extent to challenge plaintiffs'

Board Report (General Counsel's July 2006 Activity Report)

proposed amendments. As with the items discussed above, the Court has ordered the parties to meet and confer before filing any papers on this issue.

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

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.

On July 13, Metropolitan filed its Reply Brief in its appeal to the California Supreme Court for review of the Court of Appeal decision in response to answer briefs filed by the plaintiffs. Metropolitan also assisted in coordinating preparation of amicus curiae briefs in support of the adequacy of the CALFED Program EIR. 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>.

c. *Cadiz, Inc. v. Metropolitan, et al.*

On July 21, 2006, Cadiz filed a Second Amended Complaint containing six causes of action including breach of express contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, promissory estoppel, breach of implied contract and specific performance. Many of these causes of action and the factual allegations contained therein, are duplicative of the First Amended Complaint. Metropolitan successfully demurred to the First Amended Complaint, although the Court granted Cadiz leave to amend. Metropolitan will file another demurrer and seek to have most of the causes of action dismissed without leave to amend.

2. Other Matters Involving Metropolitan

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

In this federal court lawsuit challenging the All-American Canal Lining Project, District Judge Pro granted summary judgment to the federal defendants on July 3, 2006 and entered a final judgment in favor of the federal government that same day. The plaintiffs have appealed this district court judgment to the U.S. Court of Appeals for the Ninth Circuit. Plaintiffs have also asked Judge Pro to enter a stay pending appeal, which would halt the All-American Canal Lining Project while the appeal proceeds. The plaintiffs must ask the district judge for such a stay before asking the Ninth Circuit for a stay. We expect that if Judge Pro denies the request for a stay, plaintiffs will immediately make a similar request to the Ninth Circuit.

b. *Protect Our Water and Environmental Rights v. Imperial Irrigation District*

In this state court lawsuit challenging the All-American Canal Lining Project, the plaintiffs have moved for a preliminary injunction to halt the project while the California Environmental Quality Act (CEQA) claims asserted by plaintiffs are adjudicated. Metropolitan, San Diego County Water Authority and Imperial Irrigation District have filed extensive pleadings opposing a preliminary injunction. Metropolitan and IID have also filed demurrers which argue that the

Board Report (General Counsel's July 2006 Activity Report)

CEQA claims should be dismissed on technical legal grounds. A hearing on the motion for a preliminary injunction and on the demurrers is set for August 10, 2006 in Superior Court in San Francisco.

3. Matters of Interest Not Involving Metropolitan

a. *Bighorn-Desert View Water Agency v. Verjil* (California Supreme Court)

In its July 24, 2006 decision in this matter, the California Supreme Court declared that charges to a property owner or resident for water delivery through a pipeline are charges for a "property-related service" and thus are subject to the limitations of Article XIII D of the California Constitution (adopted as Proposition 218 in November 1996). Additionally, the Court confirmed that voters may use the initiative process to reduce or repeal a public agency's water rates and other water delivery charges pursuant to Article XIII C of the Constitution, also enacted by Proposition 218.

The Interim General Counsel provided a separate report analyzing this decision on August 4, 2006. This decision is found in the Supreme Court's Web site at <http://www.courtinfo.ca.gov/opinions/documents/S127535.PDF>.

b. Litigation Regarding State Water Resources Control Board Cease and Desist Order

The Department of Water Resources and the State Water Resources Control Board have agreed to extend an existing tolling agreement for 14 days to allow them to resolve issues related to the State Board's Cease and Desist Order issued against DWR and the U. S. Bureau of Reclamation (USBR) on February 15, 2006. DWR has authority to initiate litigation if the settlement discussions fail. The State Water Contractors and a group of Central Valley Project contractors, who already filed litigation, have discussed staying action in those cases pending completion of DWR's and the State Board's discussions. The United States has also sued the State Board. The Cease and Desist Order asserts that DWR and USBR are threatening to violate a salinity objective protecting Delta agriculture and directs the projects to ensure that the objective is met, potentially requiring release of substantial amounts of stored water to dilute local discharge of pollutants.

c. *Pacific Coast Federation of Fisherman's Associations v. Gutierrez and Natural Resources Defense Council v. Kempthorne* (Norton)

Both of these cases relate to Biological Opinions (BO) on the United States Bureau of Reclamation's (USBR) Operational Criteria and Plan for operation of the Central Valley Project (CVP). The BOs, which include analysis of the Department of Water Resources' coordinated operation of the State Water Project (SWP), impose restrictions on operation of the CVP and SWP but also provide both projects with incidental take permits. Judge Oliver Wanger is hearing both cases in the United States District Court in Fresno.

The National Marine Fisheries Service (NMFS) issued the BO in the *Pacific Coast Federation of Fisherman's Associations* case focusing on anadromous species such as Central Valley salmon. However, NMFS subsequently listed the anadromous green sturgeon as threatened. For this and other reasons USBR has reinitiated consultations with NMFS on a new BO. Consequently, NMFS and plaintiffs have discussed dismissal of the case. At a July 21, 2006 status conference, Judge Wanger granted the State Water Contractors' and other intervening parties' request that NMFS and plaintiffs provide those intervenors with documentation of the pending negotiations;

Board Report (General Counsel's July 2006 Activity Report)

that the intervenors be allowed to respond to NMFS' and plaintiffs' positions in the discussions; and that the intervenors be involved in the negotiations. The parties will report the progress of the negotiations to the Court at a September 15, 2006 status conference.

The BO in *Natural Resources Defense Council* was issued by the United States Fish and Wildlife Service (USFWS) regarding resident fish and terrestrial species. USBR and USFWS have reinitiated consultation on this BO based primarily on the recent decline in delta smelt populations. USFWS subsequently moved to dismiss the case and to voluntarily remand the BO for further consideration. At the joint July 21 status conference Judge Wanger directed the parties, including the State Water Contractors and other intervenors, to continue discussing the possibility of resolving some or all of the issues in the case and report progress to the Court at an August 15, 2006 status conference. The motion to dismiss and a motion of summary judgment filed by plaintiffs were stayed pending the status conference.

d. *Western Watersheds Project, et al. v. George Matejko, et al.* (U.S. Court of Appeals)

This appeal challenged a U.S. District Court (Idaho) decision finding that the U.S. Bureau of Land Management's (BLM) failure to regulate certain vested rights-of-way held by private landowners to divert water for irrigation uses constituted federal action that required consultation with the Secretary of the Interior or Secretary of Commerce under Section 7 of the federal Endangered Species Act (ESA). Specifically, the District Court found that BLM's recognition of vested irrigation rights granted by Congress in 1866 and 1891, and its failure to regulate such diversions, constituted "action" under the statute thereby triggering the ESA consultation requirement. The Court of Appeals in reversing the District Court's decision found instead that BLM had no duty to exercise its discretion and that the obligation to consult under the ESA is triggered only by affirmative action of the federal agency. The case had the potential to impact any water supplier holding a right-of-way for water diversion or conveyance across federal lands granted before the Federal Land Policy and Management Act of 1976. Metropolitan, along with the Western Urban Water Coalition, Denver Water Board, and the City of Tucson Water Department, filed an *amicus* brief in the appeal urging reversal of the District Court's decision. [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/56AADC244F5CA8D1882571B50058CA48/\\$file/0535178.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/56AADC244F5CA8D1882571B50058CA48/$file/0535178.pdf?openelement)

4. Finances

Legal staff assisted with preparation of the Preliminary Official Statement for the sale of Metropolitan's Water Revenue Bonds, 2005 Authorization, Series C, D-1 and D-2. The \$200,000,000 Series C Bonds were priced on August 2, 2006 and the \$100,000,000 Series D-1 and D-2 Bonds will be sold later in August.

5. Administration

In continuing its succession planning efforts, the Legal Department has filled a vacant junior-level attorney position. Carissa Dunn joined the Legal Department as an Associate Deputy General Counsel on July 31. Ms. Dunn received her Juris Doctorate from Lincoln Law School in Sacramento and her Bachelor of Science degree in Environmental Toxicology from UC Davis. She has held the positions of Watershed Resource Specialist at Contra Costa Water District, Resource Manager at U.S. Bureau of Reclamation, and most recently, Environmental Specialist at Metropolitan.