

## • General Counsel's December 2006 Activity Report

### Summary

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

### Attachments

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None

### Detailed Report

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

##### a. *Soboba Band of Luiseño Indians v. Metropolitan* (U.S. District Court)

On December 14, 2006 in Las Vegas, the Legal Department met with representatives of the parties including the Tribe, Eastern Municipal Water District and Lake Hemet Municipal Water District. Also present were representatives of the federal government, including the U. S. Fish and Wildlife Service, the Department of Interior, the Department of Justice, the Bureau of Indian Affairs and the Bureau of Reclamation. The purpose of the meeting was to discuss the recently solidified administration position on the settlement, i.e., the response of the Office of Management and Budget to the presentation of the settlement by the Department of Interior.

Generally speaking, the Administration is receptive to the settlement, including its agreement to support full funding of the government contribution, \$21 million. However, the Administration will not support a provision in the settlement bill that includes taking the property to be transferred to the Tribe by Metropolitan and Eastern into trust, preferring that the Tribe follow the normal application process for Native American tribes to have fee land taken into trust. As well, the Administration insists that the pay-out of the federal contribution must be incremental, probably to be paid over a period of three years. Neither of these proposals are seen as deal-breakers by the parties.

Given this, it is expected that a bill will be introduced some time in February or March.

##### b. *Holy Hill Community Church v. Kim, et al.* (aka Sunset Garage litigation)

This litigation involves a dispute between the current owners of Metropolitan's former headquarters regarding rights to parking in the adjacent parking garage that is still owned by Metropolitan. On December 11, 2006, the parties commenced mediation. Although no settlement has been reached yet, the parties have agreed to continue the process because they anticipate informal resolution is possible. Metropolitan is continuing to research possible settlement options, and will continue with the mediation process in January 2007. Trial is set for March 14, 2007.

**2. Other Matters Involving Metropolitan**

a. *Consejo de Desarrollo Economico de Mexicali v. United States* (Federal All American Canal Lining Case)

This lawsuit by Mexican water users and U.S. environmental organizations challenges the All American Canal (AAC) Lining Project. The district court upheld the project and ruled in favor of the Federal Government in July 2006. However, after the Mexican water users and environmental organizations appealed, the U.S. Court of Appeals for the Ninth Circuit enjoined further work on the AAC Lining Project until it could rule on the appeal. The appeal was argued before the Ninth Circuit on December 4, 2006 and is now under submission.

In the final hours of the current session, Congress enacted legislation directing that the AAC Lining Project be implemented immediately notwithstanding any other laws. This legislation also specified that the Mexican Water Treaty would be the only legal criteria used to evaluate the impacts of the project in Mexico. This legislation, which was part of the Tax Relief and Health Care Act of 2006, was signed by the President on December 20, 2006. On December 22, 2006, the Federal Government filed a motion asking the Ninth Circuit to lift that court's injunction against the AAC Lining Project in light of the new legislation that directs that the project be carried out immediately notwithstanding any other laws. The Federal Government's motion also asks the Ninth Circuit to send the environmental law claims in the lawsuit back to the district court with instructions that they be dismissed because of the new legislation which, in effect, exempts the AAC Lining Project from those environmental laws. The Federal Government's motion also urges that in light of the new legislation, the water right claims should be dismissed because they can only be asserted in the Federal Court of Claims, not in the regular federal court system. Other water agencies that are either parties to the appeal or amicus curiae are expected to join in the Federal Government's motion.

b. SWRCB Proceeding to Amend the 1995 Bay-Delta Water Quality Control Plan

The State Water Resources Control Board adopted amendments to its 1995 Bay-Delta Water Quality Control Plan (Bay-Delta Plan) on December 13, 2006. The amendments were narrowly focused to respond to errors in the Bay-Delta Plan identified by the Court of Appeal in litigation over the plan. The revisions specifically authorized the experimental fishery flows on the San Joaquin River that have been implemented since 2000 through the San Joaquin River Agreement/Vernalis Adaptive Management Plan and corrected a date for implementation of a stricter salinity objective for agriculture in the South Delta. The State Water Contractors supported adoption of the amendments, which had been revised to reflect a number of comments submitted by the contractors.

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

All four of the cases challenging the State Water Resources Control Board's (SWRCB) cease and desist order (CDO) against the State Water Project (SWP) and Central Valley Project (CVP) have been dismissed by stipulation of the parties. The State Water Contractors, the U.S. Bureau of Reclamation and several CVP contractors had filed the cases alleging the CDO violated the SWP and CVP water rights permits. In particular, plaintiffs alleged the CDO requires the Department of Water Resources and Bureau of Reclamation to ensure that certain water quality objectives are met, irrespective of whether the projects cause the objectives to be exceeded or can control the exceedance, in violation of their water rights as defined in SWRCB's Decision 1641.

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After several weeks of productive discussion among plaintiffs and the SWRCB, the SWRCB Executive Director issued a letter explaining SWRCB's interpretation of the CDO. The letter clarified that the CDO did not make any change to the projects' existing obligations and rights under their water rights permits; that the Executive Director will not recommend any enforcement action against the projects, and anticipates the SWRCB would not take any action, for exceedances caused by actions beyond the projects' control; and if the projects are a cause of an exceedance, any enforcement against the projects would be based only on their relative responsibility. Based on the interpretative letter, the parties agreed to a stipulation in which SWRCB concurred with the letter and each of the plaintiffs dismissed their action, without prejudice, on December 5, 2006.

d. *Watershed Enforcers, a project of California Sportfishing Protection Alliance v. Department of Water Resources*

The parties (including the State Water Contractors) filed two rounds of supplemental briefs during December as requested by the trial judge at the November preliminary injunction hearing. The judge has not indicated whether he will schedule additional oral argument or issue his decision on the record now before him. Plaintiff in this case alleges that the Department of Water Resources is "taking" listed fish species in violation of California's Endangered Species Act and seeks an order requiring DWR to stop operating State Water Project facilities in a manner that takes listed fish or to obtain a formal take authorization from the Department of Fish and Game.

e. *Lake Mathews Reserve*

In November 2006, Metropolitan discovered that a property owner adjacent to the Lake Mathews reserve had removed Metropolitan's fence and graded approximately 6.5 acres of the reserve that contained endangered habitat and endangered species. Upon receiving notice of trespass, Metropolitan immediately issued a cease and desist order, and requested local law enforcement criminally prosecute the trespass.

Metropolitan also reported the trespass and grading violations to the local code enforcement office. The Legal Department is preparing to file a trespass and property damages claim against the trespassing property owner.

### 3. Matters of Interest Not Involving Metropolitan

*Pacific Coast Federation of Fisherman's Assns v. Gutierrez* (U.S. District Court) and *Natural Resources Defense Council v. Kempthorne* (U.S. District Court)

The United States District Court for California's Eastern District denied the United States' motion to dismiss or to stay proceedings in these two related cases on December 7, 2006. The *Gutierrez* case challenges a biological opinion issued under the Endangered Species Act (ESA) by the National Marine Fisheries Service (NMFS) and the *Kempthorne* case challenges a biological opinion issued by the United States Fish and Wildlife Service (USFWS). Both opinions were issued after consultation with the Bureau of Reclamation (USBR) over its Operations Criteria and Plan (OCAP) that describes the operations of the Central Valley Project and State Water Project. The biological opinions provide incidental take authorization for operation of the CVP and the SWP. Because of changed conditions (new listings under the ESA; unexpected population decline of the delta smelt) both NMFS and USFWS have begun consultations with USBR for new biological opinions

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regarding the OCAP. Based on this current process to revisit the opinions, the United States moved to dismiss the cases as essentially moot. However, the court has decided to hear the challenges to the existing biological opinions on the merits. The parties (including the State Water Contractors who intervened to support the agencies) are discussing a briefing schedule that should result in a hearing on the merits in the *Kemphorne* case in early 2007 and in the *Gutierrez* case in early summer 2007.

### 4. **Finances**

Legal staff prepared and filed annual statements of year-end financial information regarding Metropolitan's general obligation and water revenue bonds. These filings are required annually under continuing disclosure obligations executed pursuant to Securities and Exchange Commission Rule 15c2-12. The financial information included unaudited financial statements for fiscal year 2005/06. The audited financial statements will be filed after they are issued.