



Metropolitan Cases

Metropolitan Water District v. Campus Crusade for Christ, Inc. (California Supreme Court Case)

On July 23, the California Supreme Court handed down its unanimous decision in this eminent domain case brought by Metropolitan to acquire property for the Inland Feeder Project. The case was tried in the San Bernardino County Superior Court where Metropolitan won a favorable judgment awarding \$478,278 as just compensation for the property being condemned. Campus Crusade had sought compensation totaling \$15.6 million. On appeal, the appellate court for the Fourth Appellate District reversed the judgment and ruled that Campus Crusade should have been allowed to present evidence of additional damages to a jury. Metropolitan sought and was granted a hearing in the California Supreme Court. (For further background of the case, see the General Counsel's May 2007 Activity Report.)

At the time of the Supreme Court's decision a memorandum detailing the matter was sent. In sum, the court clarified the role of the trial court and jury in eminent domain actions. The court rejected Metropolitan's position that the trial court has the authority to make an initial determination whether a claim for severance damages or a reasonable probability of zoning change has been proven by the landowner. Rather, the court held that the trial judge must leave that decision to the jury and must admit evidence on these issues unless the offered evidence is speculative or conjectural.

The Supreme Court did rule in Metropolitan's favor that Campus Crusade had failed to offer sufficient evidence of temporary severance damages based on interference with efforts to use, develop or market the property. These temporary severance damages constituted a substantial portion of Campus Crusade's claim for \$15.6 million. However, the court ruled that Campus Crusade would have the opportunity on remand to provide other evidence to support its claim.

The court failed to rule on another issue that Metropolitan raised—the nature of evidence that is admissible to support a claim that re-zoning of the property is reasonably probable. This issue was extensively briefed by both sides and was raised

by Metropolitan's counsel during oral argument. The court's decision did not address the issue at all. Metropolitan has filed a Petition for Rehearing and/or Modification asking the court to provide a ruling on this issue.

The case will be remanded to the court of appeal, and ultimately to the trial court for a new trial based on the evidentiary rules established by the California Supreme Court.

Natural Resources Defense Council v. Secretary of the Interior Kempthorne (Norton) (U.S. District Court)

During the month of July, the parties filed their briefs and supporting declarations in response to Judge Wanger's request for legal argument and evidence in the "remedy" phase of this litigation. In May 2007, Judge Wanger invalidated the United States Fish and Wildlife Service's (USFWS) biological opinion regarding operation of the Central Valley Project and State Water Project, leaving the projects without "take" authorization under the Federal Endangered Species act. At that time the Judge also established a schedule to determine whether he should order additional restrictions on project operations to protect the delta smelt pending development of a new biological opinion, expected in late summer 2008. USFWS' and the Department of Water Resources' (DWR) briefs raised legal issues with respect to the Judge's authority to impose restrictions in this litigation, but in the alternative proposed additional restrictions similar to actions called for in the Delta Risk Assessment Matrix previously developed by USFWS and DWR. The State Water Contractors' filings made similar legal arguments and suggested changes to the actions recommended by USFWS and DWR that could provide a similar or better level of protection for delta smelt but at a potentially lower cost in water supply. Plaintiffs' documents proposed restrictions on project operations that could reduce total exports during 2008 by the two projects by about 50 percent. Judge Wanger also directed the parties to produce testimony supporting their proposals at the August 21, 2007 hearing on the remedy issue and authorized depositions of the potential witnesses.



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

The California Court of Appeal upheld the favorable trial court ruling in the *Shank v. Metropolitan* matter on July 19, 2007. This case involves the original contracts for construction of the Arrowhead East and Arrowhead West tunnels between Metropolitan and Shank/Balfour Beatty. Work on Arrowhead East was suspended in April 1999 due to concerns expressed by the San Manuel Indians and the U.S. Forest Service relating to groundwater. When all issues were still not resolved, both the Arrowhead East and Arrowhead West contracts were terminated in April 2000. The project is adjacent to the San Manuel reservation and located within the boundary of the San Bernardino National Forest. Metropolitan was required to obtain a special use permit from the Forest Service to construct the project.

After termination Shank filed claims for a total of \$21 million. These claims included pass-through claims from Shank's vendors and subcontractors, including Ameron, the manufacturer of the pipe for each tunnel. The cases were consolidated for trial. Prior to trial Metropolitan settled all matters except for the Ameron pass-through claim of \$11.5 million plus interest (a claim of approximate \$15 million at the time of trial). Metropolitan also filed a cross-complaint for false claims. Prior to trial, pursuant to board authorization, Metropolitan made a settlement offer of \$3 million. This offer was rejected. At the conclusion of the trial the court awarded Ameron \$1.9 million. Because the award was less than Metropolitan's statutory offer, MWD was awarded costs. The court ruled that based upon the award, there was not sufficient basis to rule in Metropolitan's favor on the false claim causes of action.

Metropolitan tendered the net amount due to the Plaintiff. Plaintiff refused to accept payment and filed an appeal. The payment is currently held by Metropolitan. Metropolitan filed a conditional cross-appeal on three of the false claims, providing that the court should only consider the cross-appeal if it ruled against Metropolitan on any issue in the primary appeal.

The matter was argued on May 15, 2007. During argument, the court had questions regarding the provisions in the Metropolitan contract relating to compensation for overhead for delay and provided an opportunity for each side to submit further briefing. After the briefs were filed, the matter was deemed submitted on June 4.

The primary issues in the case were:

- (1) Was the action of Metropolitan a termination of the two contracts or a deletion of work? It was Metropolitan's position that the contracts were terminated. Although, at the time, Shank and Ameron both stated that the act was a termination, they subsequently characterized the action as a deletion. A determination that the act was a deletion rather than a termination would have provided Ameron with approximately \$7 million in additional damages.
- (2) If the contracts were terminated, was the termination improper and a breach? If the action was determined to be a breach, this would also entitle Ameron to additional damages.
- (3) Does the provision in Metropolitan's contracts establishing a formula for compensation for suspension or delay of work (direct costs plus a specified percentage for overhead) violate the Public Contract Code and is it therefore unenforceable? Again, if Plaintiff prevailed they would (arguably) be entitled to additional compensation. Shank attempted to seek a reversal of the award of costs of trial, but they did not properly file an appeal of that issue and the court did not address it.

The court ruled in Metropolitan's favor on all issues, finding:

- (1) The contract was terminated.
- (2) Shank is barred from arguing the termination constituted a breach because they failed to comply with the claims provisions in the contract.
- (3) The provision in Metropolitan's contract relating to compensation for overhead during a suspension is enforceable.

Because the court ruled in Metropolitan's favor on all issues, they did not address the conditional cross-appeal.

Metropolitan was awarded costs for the appeal; Shank was awarded costs for the cross-appeal. (For past reports, see April 10, 2007 Board Letter 8-9 and the General Counsel's March 2006 Activity Report.) Opinion found at <http://www.courtinfo.ca.gov/opinions/nonpub/B184987.PDF>

Electric Industry Restructuring

On August 6, 2007, Pacific Gas and Electric petitioned the U.S. Supreme Court for review of the favorable Ninth Circuit decision in *Bonneville*



Power Administration v. Federal Energy Regulatory Commission decision (422 F.3d 908 (2005)). This is the case in which the Ninth Circuit found that FERC exceeded its Federal Power Act authority when it imposed refund liability on public power sales (including those by State Water Project and Metropolitan) to the California Independent System Operator (ISO) and the California Power Exchange (PX) during California's energy crisis. Metropolitan, the State Water Contractors and other California publicly owned electric utilities will file a brief in opposition. Of note, only one of three California investor-owned utilities, PG&E, seeks to overturn the *BPA* decision; neither Southern California Edison Company nor San Diego Gas & Electric Company joined in the Petition. The U.S. Supreme Court accepts review of very few petitions. This case presents a rather unusual circumstance in that federal agencies are adverse to one another, since FERC ordered governmental agencies, including BPA and the Western Area Power Administration, to provide refunds. We are cautiously optimistic the U.S. Supreme Court will deny review of PG&E's petition. We last reported to the Board on this matter in March 2007, when the Ninth Circuit denied rehearing *en banc*.

Lance Charles, Sr. v. Metropolitan
(Los Angeles County Superior Court)

On July 25, 2007, Lance A. Charles, Sr., a Special Projects Manager in Human Resources, filed a second lawsuit against Metropolitan. The new lawsuit alleges retaliation and harassment in violation of California's Fair Employment and Housing Act. His previous lawsuit, which currently consists of a single count of retaliation, was scheduled to begin trial on September 17, 2007 before Judge Rolf M. Treu of the Los Angeles Superior Court. (See the General Counsel's March 2007 Activity Report.) However, after filing a Notice of Related case, Charles moved for a continuance of the current trial to allow time to conduct discovery regarding the allegations in the new lawsuit. Judge Treu continued the trial to March 24, 2008. Girardi and Keese, Charles' second attorneys of record, substituted out as his attorneys on May 23, 2007. The third firm to represent Charles, Hindin & Abel LLP, also represented former employee Carla Villanueva in her discrimination and retaliation lawsuit against Metropolitan. In that case, Charles was a named defendant who gave testimony at trial.

AFSCME Local 1902 v. Metropolitan (Public Employment Relations Board)

On August 8, 2006, AFSCME lodged an unfair practice charge with the Public Employment Relations Board (PERB). The charge alleges that Metropolitan committed an unfair practice on August 1, 2006, by requiring Associate Engineers to perform project management, consulting contract management and budgeting duties. On November 28, 2006, PERB's Office of the General Counsel issued a complaint against the District. After Metropolitan filed a motion challenging the complaint, Administrative Law Judge Ann Weinman issued a proposed decision on July 31, 2007, dismissing this matter on the basis that AFSCME untimely filed its charge. In reaching this determination, Judge Weinman ruled that it is undisputed that AFSCME knew that the District required the performance of the aforementioned job duties well before the mandated six-month limitation periods. AFSCME has 25 days from July 31, 2007 to appeal Judge Weinman's ruling to the full PERB Board. A failure to timely appeal will make her decision final.

AFSCME Local 1902 v. Metropolitan (Public Employment Relations Board)

On August 9, 2006, AFSCME lodged an unfair practice charge with the Public Employment Relations Board (PERB). The charge alleges that Metropolitan committed an unfair practice on June 1, 2006, by requiring employees classified as Maintenance Mechanic I to make water treatment decisions, to perform chlorination adjustments, and to engage in engineering tasks. On December 13, 2006, PERB's Office of the General Counsel issued a complaint against the District. After Metropolitan filed a motion challenging the complaint, Administrative Law Judge Ann Weinman issued a proposed decision on July 31, 2007, dismissing this matter, also on the basis that AFSCME untimely filed its charge because AFSCME knew that the District required the performance of the aforementioned job duties well before the mandated six-months limitation periods. AFSCME has 25 days from July 31, 2007 to appeal Judge Weinman's ruling to the full PERB Board. A failure to timely appeal will make her decision final.

AFSCME Local 1902 v. Metropolitan (Public Employment Relations Board)

On November 30, 2006, AFSCME lodged an unfair practice charge with the Public Employment



Relations Board (PERB) alleging that Metropolitan committed an unfair practice by disciplining an employee for engaging in inappropriate conduct during a grievance hearing. On March 19, 2007, PERB's Office of the General Counsel issued a complaint against the District. Local 1902 and Metropolitan reached a settlement prior to the

start of an August 1 administrative trial. As a result of the settlement, AFSCME dismissed the PERB charge as well as several pending grievances related to the employee in question, Metropolitan withdrew the challenged disciplinary action, and the employee agreed to end employment at Metropolitan.

Cases Involving Metropolitan

Investigation into Damage to Rialto Pipeline

As previously reported in the General Counsel's Activity Report of April 2007, significant damage to one pipe segment of the Rialto Pipeline was discovered during a February 2007 investigation. The damage was located along a residential street in the city of Rancho Cucamonga. Metropolitan's preliminary forensic investigation confirmed that at least 15 wires were broken due to third-party damage to the pipeline. The segment was repaired in April 2007 at an approximate cost of \$1.2 million. It appears that the damage occurred

in December 2004 and was caused by a subcontractor, Layne Christensen, working for Boyle Engineering and Converse Consultants on an Inland Empire Utilities Agency (IEUA) project. IEUA is assisting and cooperating with Metropolitan's investigation. Metropolitan filed a claim against the potentially responsible parties on July 30, 2007, and will negotiate with these parties to obtain an informal settlement, if possible. Based on the outcome of these negotiations, Metropolitan will determine if more formal legal action is necessary.

Cases to Watch

Petition to List the Long Fin Smelt Under the State and Federal Endangered Species Act

On August 9, 2007, the San Francisco Bay Institute, Center for Biological Diversity and Natural Resources Defense Council petitioned to list the long fin smelt for protection under both the state and federal Endangered Species Acts (ESAs). The petitions were filed with the California Fish and Game Commission and the United States Fish and Wildlife Service, who are the entities who must now consider whether to list the long fin smelt under the state and federal ESAs, respectively. The long fin smelt is one of the fish, along with the delta smelt, being studied as part of the "pelagic

organism decline" in the Bay-Delta and is experiencing record low population numbers. It is not known what, if any, additional restrictions on State Water Project could result from a decision to list the long fin smelt. Many of the existing fishery regulations to protect previously listed species in the Bay-Delta also protect the long fin smelt. Additionally, the long fin is one of the species expected to be covered under the Bay-Delta Conservation Plan currently being developed. Staff from Metropolitan and the State Water Contractors are reviewing the petition and considering how best to participate in the listing process.