



## Metropolitan Cases

### ***Central Basin Municipal Water District v. Metropolitan (San Francisco Superior Court)***

Central Basin Municipal Water District's action alleging that Metropolitan's Water Supply Allocation Plan is invalid has been assigned to San Francisco Superior Court Judge Curtis Karnow and a case management conference has been scheduled for October 17, 2008. Metropolitan and Central Basin currently are discussing the contents of the administrative record that will be filed with the court and serve as the evidentiary basis for this litigation.

Metropolitan has received a First Amended Petition for Writ of Mandate filed by Central Basin with the San Francisco Superior Court on October 1, 2008. The amended petition appears to reorganize the original petition and drops a claim demanding that Metropolitan "specifically perform" its obligation under the Metropolitan-member agency Purchase Orders. It does not appear to include any new allegations or new causes of action. Metropolitan staff and outside counsel continue to review the amendment in preparation for filing our responsive pleadings. (See General Counsel's April, May and June 2008 Monthly Activity Reports and September 9, 2008 Board Letter 8-4)

### ***Colorado River QSA Coordinated Cases (Sacramento Superior Court)***

The Superior Court issued an order on September 17, 2008 directing the parties to submit statements describing the issues they intend to raise at trial. The court also ordered the parties to submit status conference statements for an October 30, 2008 status conference. (See General Counsel's August 2008 Activity Report)

### ***Grand Canyon Trust v. U.S. Bureau of Reclamation (U.S. District Court, Arizona District)***

Along with Imperial Irrigation District (IID) and Central Arizona Water Conservation District (CAWCD), Metropolitan is an intervening party in this case. The plaintiff environmental organization asserts that the Bureau of

Reclamation is operating Glen Canyon Dam in violation of the federal Endangered Species Act (ESA) and National Environmental Protection Act (NEPA) through its determination of release schedules and its method of ESA and NEPA compliance for Annual Operation Plans (AOPs). Metropolitan's primary interest in intervention is plaintiff's challenge to the AOP process, through which Reclamation reports expected annual operations of Lake Mead, Lake Powell, and the rest of the Colorado River system. On September 26, the court ruled that the Bureau's AOPs are not "agency actions" for purposes of ESA and NEPA, because the actual decisions regarding flow regimes are made through other processes complying independently with ESA and NEPA. For this reason, the court ruled that the Bureau has not been adopting AOPs in violation of ESA and NEPA. The court's ruling is favorable to Metropolitan's interest in this case, and the General Counsel will defend this ruling as the other elements of the litigation moves forward. (See General Counsel's May 2008 Monthly Activity Report)

### ***Juli Smith v. Metropolitan, et al. (U.S. District Court, Central District of California)***

On March 27, 2008, former Metropolitan employee Juli Smith, who was released during her probationary period, filed a complaint in Los Angeles County Superior Court against Metropolitan and five Metropolitan employees. Plaintiff alleged three causes of action against all defendants: violation of Labor Code Section 6310 (a "whistleblower" protection statute), wrongful termination in violation of public policy, and intentional infliction of emotional distress. Plaintiff then amended her complaint to add a fourth cause of action for harassment and/or discrimination based on gender, against Metropolitan and three of the individual defendants. These individual defendants removed the case to the United States District Court, Central District, and filed a motion to dismiss and a motion to strike certain claims. Plaintiff did not oppose the motions, agreed to remove the challenged claims, and did so in a second amended complaint filed in August 2008.



## Metropolitan Cases (continued)

### ***Juli Smith v. Metropolitan, et al.* (U.S. District Court, Central District of California)** (continued)

This complaint reduces the claims against the individual defendants and certain damages.

Plaintiff served the summons and second amended complaint on all individual defendants, and they filed their answer in September 2008. Plaintiff has not yet served Metropolitan. The parties have exchanged their initial discovery disclosures pursuant to federal law. The parties appeared at the first Scheduling Conference in July 2008, at which the court set a trial to begin on June 9, 2009 and ordered the parties to participate in a settlement conference/mediation by March 2009. (See General Counsel's August 2008 Monthly Activity Report)

### ***Gregg Whittlesey v. Metropolitan* (Los Angeles County Superior Court)**

On December 7, 2007, Metropolitan was served with a summons and complaint for damages by Gregg Whittlesey, a former Metropolitan employee who was released during his probationary period. Plaintiff alleges three causes of action: wrongful termination in violation of public policy, defamation, and intentional infliction of emotional distress.

Metropolitan filed its answer, containing a general denial and affirmative defenses, in January 2008. The parties appeared at the first Case Management Conference in April 2008, at which the court set a jury trial to begin on December 3, 2008. The parties are engaged in discovery. In August 2008, Metropolitan filed a motion for summary judgment or, alternatively, summary adjudication, requesting dismissal of part or all of the case. The parties participated in mediation in August 2008, but did not resolve the case. On October 31, 2008, the court will hear Metropolitan's summary judgment/adjudication motion, as well as conduct a mandatory settlement conference. (See General Counsel's August 2008 Monthly Activity Report)

### ***Supervisors Association v. Metropolitan* (Public Employment Relations Board)**

On July 9, 2008, the Supervisors Association lodged an unfair practice charge alleging Metropolitan committed an unfair labor practice when the District ended, without negotiation, the long-term vehicle assignment of certain members of the Supervisors Unit. On July 31, the General Counsel lodged Metropolitan's position statement in response, seeking dismissal of the charge on the basis that terminations of vehicle assignments are in compliance with existing District policy. On September 23, 2008, a Regional Attorney from PERB dismissed the charge after determining the Association could not establish a *prima facie* case of a violation. On September 26, 2008, the Association appealed the dismissal to the full Board. The General Counsel will continue to defend Metropolitan's interests by seeking to have the dismissal upheld.

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

On September 11, 2008, Local 1902 filed a charge alleging Metropolitan committed an unfair labor practice by refusing to pay travel expenses for an AFSCME representative who traveled on union release time. On September 29, the General Counsel filed a position statement in response seeking dismissal on the basis that Local 1902 failed to establish a *prima facie* case of an unfair labor practice.

### ***AFSCME Local 1902 v. Metropolitan* (MOU Hearing Officer Appeal)**

On September 19, 2008, Hearing Officer Alexander Cohn issued his decision in response to Local 1902's appeal of a grievance challenging the outcome of a job audit. The underlying job audit determined that a Local 1902 employee appropriately was classified within the Storekeeper job family. Mr. Cohn ruled Human Resources conducted a proper job audit, and that the Union did not meet its burden to establish a violation of the AFSCME MOU.



## Matters Involving Metropolitan

### ***Pacific Coast Federation of Fishermen's Assns. v. Gutierrez (U.S. District Court)***

At the September 11, 2008 status conference, the court indicated that a further hearing was necessary to consider injunctive relief restricting project operations. The court also directed the parties to confer on a pleading schedule and hearing date. The plaintiffs then filed a request for immediate relief with a hearing date sometime in October. The plaintiffs, however, urged that no further pleadings were necessary or needed. The project operators and water agency contractors objected to the absence of a pleading schedule, and urged that they should have an opportunity to analyze the water supply impacts of the plaintiffs' latest injunctive relief proposals. The court has not yet ruled on this dispute over how to move forward with the salmon interim relief proceeding. Consequently, that proceeding remains unresolved. (See General Counsel's July and August 2008 Monthly Activity Reports)

### ***Solano County Water Agency et al. v. State of California Department of Water Resources***

The Department of Water Resources filed its answer in this action on September 4, 2008. Plaintiffs, four state water contractors located north of the Delta, allege in their complaint that since they are located in the "area of origin" of State Water Project water they should not be subject to the shortage provisions of their state water contracts. DWR's answer denies plaintiffs' claims. If plaintiffs were to prevail in this action, the SWP water supply available to Metropolitan and other south of Delta contractors would be reduced. Metropolitan staff is preparing to intervene in the action in support of DWR and is discussing joint intervention with other south of Delta contractors. (See General Counsel's July 2008 Monthly Activity Report)

### ***Butte Environmental Council v. Richvale Irrigation District (Butte County Superior Court)***

The Butte County Superior Court granted Richvale Irrigation District's motion to quash service of summons and to dismiss this case on September 19, 2008. Richvale is one of the Sacramento Valley water districts that signed agreements with Metropolitan and other state water contractors to transfer water to them this year. Butte Environmental Council filed this action in April 2008 alleging Richvale had not complied with CEQA. However, plaintiff failed to take any further action after filing the complaint, missing a number of CEQA procedural requirements. Due to plaintiff's failure to comply with CEQA the court dismissed the action. (See General Counsel's July 2008 Monthly Activity Report)

### ***Proposed North American Green Sturgeon Critical Habitat Designation***

The National Marine Fisheries service proposed on September 8, 2008 to designate critical habitat for the North American green sturgeon. The green sturgeon was listed as a threatened species in April 2006. Under the Endangered Species Act NMFS is required to designate critical habitat within 12 months of listing a species. Due to resource limitations, NMFS was unable to meet that deadline, resulting in litigation. NMFS subsequently agreed with plaintiffs in that litigation to propose designated habitat by September 2, 2008, with a final decision by June 30, 2009. The green sturgeon spends a considerable portion of its life in the Delta and the Sacramento and the lower Feather Rivers, and large portions of those water bodies have been proposed for designation. Designation of critical habitat can result in additional consultation responsibilities under the Endangered Species Act. Metropolitan and other state water contractors are reviewing the proposal and evaluating filing comments by the November 7, 2008 deadline.

## Cases to Watch

### ***Casitas Municipal Water District v. United States***

The United States Court of Appeals based in Washington D. C. issued its opinion on September 25, 2008, upholding a claim by a

water district that a federal biological opinion resulting in a reduction of supply available to the district could support a claim for taking its property in violation of the "Takings Clause" of the United States Constitution.



## Cases to Watch (continued)

### ***Casitas Municipal Water District v. United States*** (continued)

Casitas Municipal Water District (Casitas) has a state water right permit to divert water from Coyote Creek to storage in Lake Casitas. While Casitas operates the diversion and distribution project, the reservoir itself is owned by the United States Bureau of Reclamation (Bureau). In 2003 the National Marine Fisheries Service (NMFS) issued to the Bureau a biological opinion (BioOp) for operation of the reservoir that required construction of a fish passage facility and diversion and release of 3,500 acre-feet of water through the fish facility to aid the listed West Coast Steelhead. The Bureau required Casitas to build the facility and to provide the water as a condition of use of the reservoir. The release requirement caused Casitas to lose 3,500 acre-feet of water that under state law it is entitled to divert to storage. Casitas sued the United States in the United States Court of Claims seeking damages for violation of the Fifth Amendment prohibition against taking private property for public use without just compensation and for breach of its contract.

The trial judge in the Court of Claims granted summary judgment in favor of the United States, finding that the government's action was a "regulatory taking." In a regulatory taking case, the court is required to balance a number of factors to determine whether the regulation is a taking, including the importance of the interests being protected by the regulation and the extent to which the regulation impairs use of plaintiff's property. Casitas had argued that the government's action was a direct physical taking of its property, which entitled it to damages no matter how minor the invasion might be. The trial court also found against Casitas on its breach of contract claim.

The Court of Appeals, however, held that Casitas' state water right was reduced by 3,500 acre-feet

due to the government's action and, even though that right was only partially impaired, the impairment was a direct physical appropriation of the water which Casitas will never get back, resulting in a taking. The Court of Appeals returned the case to the trial court for further proceedings. In particular, the Court recognized that the government had conceded a number of issues for the purpose of the summary judgment, including that Casitas had a property interest in the water, and that these issues must still be determined in the trial court. Consequently, the ultimate decision whether a compensable taking has occurred still remains to be made.

With respect to the breach of contract claims, the Court of Appeals agreed with the trial court that requiring Casitas to expend the money to build the fish facility was not a breach of the contract, but a legitimate maintenance and operation cost under the language of its contract. It also agreed with the trial court that Casitas could not state a breach of contract claim against NMFS for its issuance of the BioOp and against the Bureau for its decision to adopt it, based on the "sovereign acts doctrine." Under that doctrine, the United States acting as a contracting party cannot be held liable for failing to perform a particular term if its failure is caused by a public and general act of the United States. Here, since Congress in its *sovereign* capacity required NMFS and the Bureau to adhere to and implement the Endangered Species Act, those government agencies acting in their *contracting* capacity cannot be held liable for the breach of a contract unavoidably required by Congress.

Staff is still reviewing this recent and complex case to determine how it could impact State Water Project operations and regulation. The opinion can be found at

<http://www.ca9.uscourts.gov/opinions/07-5153.pdf>