



Metropolitan Cases

Delta Smelt and Salmon Biological Opinions Litigation (*Metropolitan v. United States Fish and Wildlife Service; United States Bureau of Reclamation and California Department of Water Resources real parties in interest; San Luis & Delta Mendota Water Authority v. Salazar; State Water Contractors v. Salazar; Coalition for a Sustainable Delta v. U.S.F.W.S.; MWD v. U.S.F.W.S. and State Water Contractors v. Locke, et al; Kern County Water Agency, et al. v. Gary Locke, et al.*) (U.S. District Courts, Eastern District of California)

A detailed oral report will be provided at the June 8, 2010 Legal & Claims meeting. Additionally, please refer to the May 18 and May 28, 2010 memoranda to the Board of Directors.

Colorado River QSA Coordinated Cases (Sacramento Superior Court)

As previously reported, the trial court held that the Quantification Settlement Agreement Joint Powers Authority (QSA JPA) agreement was invalid. Under the QSA JPA agreement, Imperial Irrigation District (IID), Coachella Valley Water District (CVWD) and San Diego County Water Authority (SDCWA) had agreed to contribute \$163 million toward Salton Sea mitigation and restoration costs and the State had agreed to pay for any costs in excess of that amount. The court found that this violated the State constitutional debt limitation. The court also held that 11 other agreements, including the QSA itself, were invalid because they were inextricably linked to the QSA JPA agreement.

This decision has been appealed by most of the parties. On May 7, the appeals court for the third appellate district issued a scheduling order that requires Metropolitan, IID, CVWD, SDCWA and the State (Category 1 Parties) to submit their opening briefs within 40 days of when the reporter's transcript is filed with the court of appeal. The County of Imperial (County), Imperial County Air Pollution Control District (ICAPCD), Cuatro Del Mar (CDM) and other parties opposing the QSA (Category 2 parties) then will have 30 days to file their opening/respondent briefs. Lastly, the Category 1 and 2 parties will have 20 days and

40 days, respectively, to submit reply/respondent briefs. Currently, we anticipate that the reporter's transcript will be filed with the court of appeal by the end of June. In the interim, the parties are working to pull together the record that will be used for the appeal.

On March 1, 2010, Metropolitan, IID, CVWD and SDCWA filed a joint petition requesting that the lower court's judgment be stayed during the pendency of the appeal. The State filed a similar petition at the end of March. The County, ICAPCD, CDM and others filed oppositions to these petitions. Concurrent with its May 7 scheduling order, the court of appeal granted the stay request.

Finally, the County and ICAPCD filed a federal lawsuit last October asserting that the Department of Interior, Bureau of Reclamation and other federal parties failed to comply with the Clean Air Act and National Environmental Policy Act in approving the Colorado River Water Delivery Agreement. That lawsuit named Metropolitan, IID, CVWD and SDCWA as real parties in interest. This case is still in its early stages, with answers to the complaint having been filed only two months ago. Pursuant to the court's order, the parties participated in an early neutral evaluation conference on May 13, 2010, to explore the possibility of a settlement. The parties did not reach any agreement and, accordingly, the court set September 9, 2010 as the deadline for the federal defendants to file and serve the administrative record that will be used in this case. In addition, the court set a case management conference for October 8, 2010, which will focus on establishing a schedule for motions and trial. (See General Counsel's November 2009 and April 2010 Monthly Activity Reports)

Alameda County Flood Control & Water Conservation District, Zone 7, et al. v. California Department of Water Resources

As previously reported, on September 14, 2009, the court issued a final ruling in favor of the Department of Water Resources (DWR) and the intervenors. The court rejected all of the arguments made by the plaintiffs challenging the manner in which revenues from the



Hyatt-Thermalito (H-T) power complex have been and are being allocated. On October 16, the court issued a Statement of Decision, which tracked its earlier ruling verbatim, and a proposed Interlocutory Judgment holding that (1) Article 22(a) of the State Water Contract does not mandate that full market value of H-T power be reflected in a credit toward the Delta Water Charge; and (2) DWR's resale of H-T power after purchasing it under the State Power Contract does not constitute a sale or other disposal of power that must be credited toward the Delta Water Charge. That Interlocutory Judgment was affirmed on November 2.

On February 16, 2010, DWR and the intervenors filed separate Motions for Judgment on the Pleadings, in which they requested that all of the remaining causes of action asserted by the plaintiffs in two separate cases be dismissed in light of the court's ruling and judgment. The motion was granted on April 21, 2010, and a proposed judgment dismissing the original case in its entirety was entered by the court on May 3, 2010. However, the language of the judgment is somewhat unclear as to whether it applies to a related case filed by plaintiffs in 2007 that had been consolidated with the original case. Intervenors believe this is simply an oversight and have filed a motion to clarify the court's judgment.

As part of the judgment, DWR and the intervenors were awarded their costs. (Attorneys' fees are not recoverable.) Accordingly, on May 20, 2010, intervenors filed a Memorandum of Costs seeking approximately \$550,000 in reimbursable costs. Plaintiffs have 15 days to file a motion challenging the types or amount of costs requested by intervenors.

Finally, on May 25, 2010, plaintiffs filed a Motion for a New Trial. Opposition briefs are due on June 4 and reply briefs are due on June 11. A hearing on this motion is scheduled for June 18. Assuming this motion is not granted, plaintiffs will have until July 2 to file a notice of appeal. (See General Counsel's December 2009 Monthly Activity Report)

Solano County Water Agency, et al. v. State of California Department of Water Resources (Sacramento Superior Court)

All of the parties (plaintiffs, DWR, and Metropolitan and its fellow intervenors) filed their responses to the cross summary judgment motions in this case on May 11, 2010. Plaintiffs (four state water

contractors located north of the Delta) allege that since they are located in the watershed of State Water Project (SWP) water, they should not be subject to the shortage provisions of their state water contracts. If plaintiffs are successful, there would be less SWP water for Metropolitan and the other contractors during shortage years. DWR and the 13 state water contractors intervened in support of DWR dispute plaintiffs' claim. A final round of reply briefs will be filed on June 17, 2010 and the motions are scheduled to be argued on June 24, 2010. To the extent issues are not resolved in the summary judgment motions, a trial is expected in the fall of 2010. (See General Counsel's February 2010 Activity Report)

Management and Professional Employees Association, AFSCME Local 1001 v. Metropolitan (Public Employment Relations Board)

As previously reported, the Management and Professional Employees Association (MAPA) filed a PERB unfair practice charge on August 31, 2009, alleging Metropolitan violated the MMBA by purportedly engaging in anti-union conduct towards MAPA employees. Although Metropolitan was able to substantially reduce the scope of the charge by lodging position statements, PERB issued a complaint on five alleged incidents involving two employees. Metropolitan responded to the complaint on March 22, 2010, by denying the allegations. On April 20, 2010, MAPA filed a motion to amend the complaint, and to compel the deposition of an executive manager. The motion to amend seeks to name a department head and thirty-seven individual Board members in connection with one claimed incident in the complaint, which concerns the issuance of a written employee evaluation. Metropolitan opposed this motion, and PERB Administrative Law Judge Anne L. Weinman denied MAPA's motion in its entirety on May 18, 2010. This matter is set for trial in July 2010, and the parties continue to engage in settlement discussions. The Legal Department represents Metropolitan. (See General Counsel's March and April 2010 Activity Reports)

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

As previously reported, Hearing Officer David Hart issued a decision on February 26, 2010, denying Metropolitan's request to dismiss two Local 1902 grievances. The grievances seek CalPERS credit



for certain overtime worked by a desert crew of maintenance workers. The overtime resulted from the assignment of irregular 12.5-hour shifts for a period of 12 months in connection with the District's effort to control the Quagga mussel infestation.

Metropolitan objected to the hearing on the basis that CalPERS has primary jurisdiction to determine whether overtime hours can be credited towards a CalPERS retirement. On May 25, 2010, Metropolitan appealed Hearing Officer Hart's decision by filing a petition for writ of administrative mandamus with the Los Angeles Superior Court. The petition alleges the Hearing Officer failed to proceed in the manner required by law by applying arbitration principles, which is contrary to an earlier court of appeal determination that the MOU hearing officer appeal procedure is not arbitration, but rather an administrative proceeding. (*AFSCME Local 1902, AFL-CIO v. Metropolitan Water District of Southern California* (2005) 126 Cal.App.4th 247) In addition, the petition alleges the Hearing Officer improperly determined that MWD waived its objections on subject matter jurisdiction because under well-established legal precedents it is axiomatic in the context of jurisdictional challenges that subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel. (*Mumaw v. City of Glendale* (1969) 270 Cal.App.2d 454, 459-460) The Legal Department represents Metropolitan. (See General Counsel's March 2010 Activity Report)

***Susan Robinson v. Metropolitan* (Los Angeles County Superior Court)**

On May 20, 2010, plaintiff served her summons, petition for writ of mandate, and complaint on Metropolitan. Metropolitan's deadline to respond is June 19, 2010.

As previously reported, in January 2010, Hearing Officer Robert Bergeson issued his decision sustaining plaintiff's discharge from employment, following an appeal hearing pursuant to the Supervisors Association MOU. On April 22, 2010, plaintiff filed a petition for writ of mandate and

complaint in Los Angeles County Superior Court against Metropolitan. Plaintiff alleges three causes of action: writ of mandate (Cal. Code of Civil Procedure section 1094.5) alleging the Hearing Officer should have applied an adverse inference against Metropolitan, the evidence did not support the findings, and the findings did not support discharge; violation of pre-discharge due process (*Skelly v. State Personnel Board*); and declaratory relief concerning the materials to which an employee is entitled before discharge. Metropolitan's Legal Department is providing legal representation for Metropolitan. (See General Counsel's April 2010 Activity Report)

***Jena Minor v. Metropolitan* (Los Angeles County Superior Court)**

On March 26, 2010, plaintiff, a Metropolitan employee, filed a complaint in Los Angeles County Superior Court against Metropolitan. On April 2, 2010, plaintiff filed an amended complaint. Plaintiff alleges one cause of action: retaliation in violation of the Fair Employment and Housing Act (FEHA) for having engaged in the protected activity of complaining about gender and race discrimination and sexual harassment, and for having complained about retaliation. Plaintiff served the summons and amended complaint on April 6, 2010. Metropolitan filed a Notice of Related Case on April 14, 2010 concerning plaintiff's previous complaint against Metropolitan containing the same claim, which plaintiff filed in June 2009 and then dismissed without prejudice in October 2009, after missing a discovery deadline. On April 26, 2010, the court ordered the case related to plaintiff's previously filed case, resulting in a change in judicial assignment to the Honorable Daniel J. Buckley.

On May 6, 2010, Metropolitan filed its answer to plaintiff's first amended complaint, containing a general denial and affirmative defenses. Metropolitan's Legal Department is providing legal representation for Metropolitan. (See General Counsel's October 2009 and April 2010 Activity Reports)

Cases to Watch

***PCL v. DWR* (Monterey Amendment EIR) (Sacramento Superior Court)**

On May 5 the DWR filed a Notice of Determination (NOD) regarding the Monterey Amendment to the

State Water Project Contracts, bringing to an end a 7-1/2-year process to redo the EIR for this project. The Monterey Amendment changed the allocation provisions and made other changes to the delivery



contracts, largely to settle a dispute in the early 1990s between agricultural and urban SWP contractors over the allocation of water during droughts.

The new EIR was completed as part of a settlement of litigation originally brought in 1995 by the Planning and Conservation League (PCL), Plumas County Flood Control and Water Conservation District, and the Citizens' Planning Association of Santa Barbara County. In 2000 that litigation led to a ruling by the Third District Court of Appeal that invalidated the original EIR, principally on the grounds that the wrong lead agency prepared it. (The original EIR was prepared by the Central Coast Water Authority, not DWR.) A settlement reached in 2002 required that the new EIR be prepared by DWR through a committee structure of both plaintiff and contractor representatives. Metropolitan Legal staff has participated as one of the four Contractor representatives on the EIR committee throughout the process.

DWR's final decision on the project is essentially to continue operating under the Monterey Amendment, which has been effective and operating since 1996. No new approvals on the contracts are required by DWR or by the contractors.

The filing of the NOD starts the 30-day CEQA statutes of limitation period for challenging the new EIR. While the settlement agreement prevents PCL and the other original plaintiffs from challenging the EIR, there is nothing to prevent others from filing new lawsuits. The NOD along with completion of the EIR process also triggers dismissal of the original case from the Sacramento County Superior Court, effective June 19.

Central Delta Water Agency, et al. v. State Water Resources Control Board (Sacramento Superior Court)

On May 4, 2010, the Sacramento Superior Court denied plaintiffs' request to enjoin the State Water Resources Control Board's (SWRCB) current Cease and Desist proceeding against several of the plaintiffs. SWRCB issued proposed cease and desist orders against several water diverters within the Delta in late 2009 alleging that they are diverting water without, or in excess of, any documented right. (See *State Water Resources Control Board Cease and Desist Order Regarding Delta Diversions*) Plaintiffs assert that SWRCB does not have jurisdiction to issue cease and

desist orders against their diversions because they claim riparian and "pre-1914" rights, but SWRCB's jurisdiction is limited to "post-1914" rights. (See General Counsel's April 2010 Activity Report)

State Water Resources Control Board Cease and Desist Order Regarding Delta Diversions

On May 5, 2010 the SWRCB began hearings on its proposed cease and desist orders against a number of water diverters within the Delta alleging that those diverters have not documented water rights supporting those diversions. The proposed orders were initially issued in late 2009. The proposed orders were prompted, in part, by investigations of diversion rights on two islands in the South Delta by state and federal contractors and the San Joaquin River Tributary Association. The investigation indicated that many claimed riparian rights may not actually exist because the parcels of land involved had been sold and no longer were riparian to the Delta channels, and that many asserted appropriate diversion rights appeared to be in excess of the claimed rights. Subsequent proposed orders have been issued against other diverters. The hearings beginning on May 5 involving the initial proposed orders are continuing and additional hearings regarding other diverters are scheduled to begin in June. If SWRCB adopts the proposed orders, additional water would be available in the Delta to help meet flow requirements, or for export by the SWP and CVP, and potential entrainment of listed species by in-Delta pumps could be reduced. The current effort also could result in SWRCB enforcement proceedings regarding diversions in other areas of the Delta. (Last fall's Delta Legislative Package authorized an additional 25 positions for SWRCB to enhance its ability to pursue this type of enforcement proceeding.) Plaintiffs unsuccessfully sought an order from the Sacramento Superior Court enjoining SWRCB from pursuing these proceedings on May 4, 2010. (See *Central Delta Water Agency, et al. v. State Water Resources Control Board*)