



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)

The parties submitted proposed findings of fact and conclusions of law to the court for the preliminary injunction hearing that was held from March 30 through April 7, 2010. The court will take these filings under submission and has not yet ruled on the motions for a preliminary injunction. The water contractor plaintiffs also have filed a formal request that the court appoint a single expert to assist the court in the salmon cases, similar to the appointment of court experts in the Delta smelt cases. The water contractors nominated two fisheries professors, one from the University of Alaska and the other from Simon Fraser University in British Columbia, as the possible court expert. The judge will take up this issue of appointing a court expert in the salmon cases at an upcoming hearing on May 12, 2010. (See General Counsel's January and February 2010 Monthly Activity Reports)

Colorado River QSA Coordinated Cases (Sacramento Superior Court)

As previously reported, the court issued a tentative ruling on December 10, 2009, in which it held that the Quantification Settlement Agreement Joint Powers Authority (QSA JPA) agreement was invalid because it violated California's constitutional debt limitation. 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 the State's obligation violated the debt limit. The court also

held that 11 other agreements, including the QSA itself, were invalid because they were inextricably linked to the QSA JPA agreement. Finally, in light of its ruling on the QSA JPA agreement, the court held that the CEQA and other environmental claims were moot and should be dismissed.

On January 13, 2010, the court issued a final statement of decision, which largely tracked its tentative ruling, and on February 11, the court entered a final judgment. On February 19, Metropolitan, IID, CVWD and SDCWA filed notices of appeal, the first step in the appellate process. Subsequently, the County of Imperial (County), Imperial County Air Pollution Control District (ICAPCD), Cuatro Del Mar (CDM) and other parties opposing the QSA filed cross-appeals. The parties are currently in the process of putting together the record that will be used on appeal. Once the record has been assembled, the parties will begin briefing the merits of the case. Given the complexity of this case, Metropolitan, IID, CVWD and SDCWA have requested an extended briefing schedule that would commence in November 2010 and continue through May 2011. The parties opposing the QSA are seeking a more compressed schedule, with all briefing completed by the end of 2010.

On March 1, 2010, Metropolitan, IID, CVWD and SDCWA filed a joint petition with the court of appeal 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 have filed oppositions to these petitions and have requested oral argument on the matter. On March 9, the court of appeal issued a temporary stay of the judgment, which applies until a final ruling on these petitions is issued.

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 and other QSA-related agreements. 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 less than one month ago. Pursuant to the court's order, the parties will participate in an early neutral evaluation conference on May 13, 2010, to explore whether there is any possibility of a settlement in this case. (See General Counsel's September, October and November 2009 Monthly Activity Reports)

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 Meyers-Milias-Brown Act (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. The motion 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 will oppose this motion. PERB has reserved July 2010 dates for a trial. The parties continue to engage in settlement discussions. The Legal Department represents Metropolitan. (See General Counsel's August 2009, February and March 2010 Activity Reports)

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

On April 20, 2010, Hearing Officer Kenneth A. Perea issued his decision sustaining a grievance lodged by AFSCME Local 1902. The grievance challenged the outcome of an individual job audit. The job audit, performed by Human Resources staff, concluded that an employee had been appropriately classified as an Engineer. In his decision, Mr. Perea determined the employee spent a majority of his time performing the significant duties of a Senior Engineer. Accordingly, the hearing officer directed Metropolitan to compensate the employee for performing Senior Engineer duties, and – on a going forward basis – to either reassign the higher-level duties or permanently promote the employee

into the Senior Engineer classification. The Legal Department represented Metropolitan in this matter.

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

On April 21, 2010, Hearing Officer Jonathon S. Monat, Ph.D., issued his decision in response to an appeal of Metropolitan's denial of a grievance. The AFSCME grievance challenged the outcome of an individual job audit. The job audit, performed by Human Resources staff, concluded that an employee had been appropriately classified as an Electronic Technician II. In his decision, the hearing officer determined that Human Resources properly adhered to the job audit process, and that the grievant has been appropriately classified. Accordingly, AFSCME failed to meet its burden of establishing a violation of the AFSCME MOU, and Mr. Monat upheld Metropolitan's denial of the grievance. The Legal Department represented Metropolitan in this matter.

Andrew James Ellsworth, Jr. v. Metropolitan, et al. (Los Angeles County Superior Court)

In a case management conference on April 26, 2010, the Los Angeles County Superior Court scheduled a jury trial commencing February 14, 2011. The court also scheduled a mandatory settlement conference on January 26, 2011 and ordered the parties to mediation to be completed by August 19, 2010. Plaintiff filed a supplemental complaint on March 12, 2010, and served the supplemental complaint and summons on Metropolitan and the other defendants on March 18, 2010. On April 15, 2010, defendants filed an answer with a general denial.

Plaintiff, a Metropolitan employee, filed his initial complaint against Metropolitan and four employees on September 8, 2009. Plaintiff alleges seven causes of action: discrimination based on race, national origin, ancestry, and age in violation of the Fair Employment and Housing Act (FEHA); harassment based on race, national origin, ancestry, and age in violation of FEHA; retaliation for opposing discrimination and harassment in violation of FEHA; disability discrimination and failure to accommodate in violation of FEHA; failure to engage in the interactive process in violation of FEHA; failure to prevent harassment, discrimination, and retaliation in violation of FEHA; and defamation. All causes of action are asserted against Metropolitan, and the harassment and



defamation causes of action are also asserted against the individual defendants. Metropolitan successfully demurred to an eighth cause of action for wrongful failure to promote in violation of public policy, and it was dismissed on February 1, 2010. The parties are engaged in discovery. Metropolitan's Legal Department is providing legal representation for all defendants. (See General Counsel's December 2009 and January 2010 Activity Reports)

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 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. Metropolitan's Legal Department is providing legal

representation for Metropolitan. (See General Counsel's August and October 2009 Activity Reports)

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

As previously reported, on January 21, 2010, Hearing Officer Robert Bergeson issued his decision sustaining a former Team Manager's discharge from employment, following an appeal hearing pursuant to the Supervisors Association MOU. On April 22, 2010, plaintiff Susan Robinson filed a petition for writ of mandate and complaint for declaratory relief 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 January 2010 Activity Report under *Supervisors Association, et al. v. Metropolitan* (MOU Hearing Officer Appeal))

Cases to Watch

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

On April 22, 2010, the Central Delta Water Agency, South Delta Water Agency and six individual plaintiffs who are members of those agencies filed this action in the Sacramento Superior Court. Plaintiffs' complaint seeks an order prohibiting the State Water Resources Control Board (SWRCB) from pursuing its current Cease and Desist proceeding against the six individual plaintiffs.

In late 2009 SWRCB filed cease and desist proceedings against a number of diverters in the South Delta alleging that those diverters are taking water from the Delta without a valid water right or in excess of their rights. The proceedings were prompted, in part, by investigations of diversion rights on two islands in the South Delta by State and federal water contractors and the San Joaquin

River Tributary Association. Those investigations 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 diversions under appropriative rights appeared to be in excess of the claimed rights. SWRCB issued the proposed cease and desist orders and the plaintiffs in this action requested hearings before SWRCB, which are scheduled to begin on May 5, 2010.

Plaintiffs have filed this complaint and announced their intention to make an ex parte request on May 4, 2010 seeking an order prohibiting SWRCB from taking further action in the cease and desist proceedings. The complaint alleges SWRCB does not have the jurisdiction to issue cease and desist orders against the six individual plaintiffs' use of water because they divert water under riparian or "pre-1914" appropriative rights, and SWRCB only has jurisdiction over "post-1914" appropriative



rights. Water users with legitimate riparian rights may divert water based on their ownership of riparian land alone and need no permission from the State. Prior to 1914, water users could establish appropriative rights simply by posting notice of their appropriation and subsequently putting the water to beneficial use, and were not required to obtain an appropriative permit from the State. While riparian and pre-1914 diverters do not need a permit from the State to divert water, their use of water is still subject to regulation by the State. The question raised by plaintiffs is whether SWRCB may exercise that regulatory authority or whether it must be exercised by the courts.

The State Water contractors, who had filed a notice of intent to participate in the SWRCB hearings, are named as a “real party in interest” in the complaint and are reviewing how to participate in the litigation.