Metropolitan Cases

Monterey II Cases: Central Delta Water Agency, et al. v. Department of Water Resources ("Central Delta I"); Rosedale-Rio Bravo Water Storage District, et al. v. Department of Water Resources ("Rosedale"); Central Delta Water Agency, et al. v. Kern County Water Agency ("Central Delta II")
(Sacramento County Superior Court)

These lawsuits brought by environmental organizations, two Delta water agencies, and two Kern County water storage districts challenge the Monterey Amendments to the State Water Project (SWP) contracts. At issue is CEQA compliance for DWR's May 2010 completion of a new Environmental Impact Report (EIR) for the project. The Monterey Amendments themselves were authorized some 17 years ago and the original EIR was invalidated by the Court of Appeal in 2000. This new round of litigation also included a reverse validation challenge to the validity of underlying contracts, but that challenge was dismissed by the court earlier this year as untimely.

After years of procedural wrangling and disputes over the administrative record, these cases are finally set for trial. Following a status conference on May 31, Sacramento Superior Court Judge Timothy Frawley set hearing dates for final pretrial motions regarding discovery and administrative record issues, a schedule for consolidated briefing on the merits, and a consolidated trial date. Trial is now set for January 31, 2014. (See General Counsel's December 2012 Activity Report.)

State and Federal QSA Cases

At the June meeting of the Legal & Claims Committee, Senior Deputy General Counsel John Schlotterbeck reported on the trial court ruling in the coordinated Quantification Settlement Agreement (QSA) cases pending in state court. The trial court's ruling was issued June 4 and rejected all challenges to the validity of the QSA agreements. Pursuant to court rules, the parties were allowed to file objections to the ruling by June 26.

Objections were filed by the parties challenging the QSA. Imperial County and Air Pollution Control District and Cuatro del Mar asserted that the court failed to decide some issues that they claimed to have been raised at trial. Metropolitan joined a pleading filed by the State of California, Coachella Valley Water District (Coachella), San Diego County Water Authority (San Diego), Escondido, and Vista Irrigation District, requesting that the court's ruling be adopted as its final statement of decision and requesting permission to prepare the final judgment. The court issued a statement that it will notify the parties whether a hearing on objections will be set and which party(ies) will be assigned to prepare the judgment.

Imperial Irrigation District (Imperial) did not file any response to the court's ruling, but instead filed a motion to stay further proceedings for 90 days while it pursues mediation. Metropolitan, Coachella, and San Diego advised Imperial that they would oppose the motion. A hearing is scheduled for July 19.

In the federal QSA case that is on appeal, the court ordered that final briefs be filed by August 1.

Terri Deskins v. Metropolitan, et al.
(Los Angeles County Superior Court)

As previously reported, on April 23, 2013, former Metropolitan probationary employee Terri Deskins filed a complaint for damages in Los Angeles County Superior Court against Metropolitan. Plaintiff alleges five causes of action: wrongful termination in violation of public policy; retaliation in violation of the Fair Employment and Housing Act; violation of Labor Code Section 970; defamation; and intentional infliction of emotional distress. Metropolitan accepted service of the summons and complaint on April 25. On May 27, Metropolitan filed a demurrer seeking a dismissal of the causes of action for wrongful termination in violation of public policy, violation of Labor Code Section 970, and intentional infliction of emotional distress. On June 12, the plaintiff conceded the demurrer had merit and filed a request for dismissal with prejudice concerning the challenged causes of action. Metropolitan will file an answer denying the allegations of the two remaining causes of action for retaliation and defamation. The Legal Department prepared and filed the

demurrer. (See General Counsel's April and May 2013 Activity Reports.)

***State Water Contractors, et al. v. Delta Stewardship Council* (Sacramento County Superior Court)**

On June 14, 2013, the State Water Contractors filed litigation in Sacramento County Superior Court challenging the validity of the Delta Plan under the Delta Reform Act of 2009, and challenging the adequacy of the Final Program EIR for the Delta Plan under CEQA. Metropolitan, along with Santa Clara Valley Water District, Alameda County Flood Control and Water Conservation District, Zone 7, Antelope Valley-East Kern Water Agency, Mojave Water Agency, and San Bernardino Valley Municipal Water District are named parties in the petition. Seven lawsuits with a total of 26 petitioners have been filed in Sacramento, San Francisco, and San Joaquin County Superior Courts alleging similar causes of action against the Delta Stewardship Council.

***Tehama-Colusa Canal Authority v. United States Department of the Interior* (U.S. Court of Appeals, Ninth Circuit)**

On July 1, 2013, the United States Ninth Circuit Court of Appeals issued an important opinion clarifying the scope of California's "area of origin" laws that is consistent with Metropolitan's position asserted in an amicus curiae brief filed in support of the United States Bureau of Reclamation (USBR). Plaintiff in this case is a joint powers authority comprised of 16 water districts holding contracts with USBR for Central Valley Project (CVP) water. Plaintiff districts alleged that since they are located in the area of origin of CVP water, they are entitled to first priority for water over CVP export contractors and cannot be subjected to reduced contract deliveries in shortage years. The trial court (Judge Oliver Wanger) granted summary judgment in favor of defendant USBR, which the Ninth Circuit has now affirmed.

The so-called area of origin laws provide that in the construction and operation of the State Water Project (SWP) and CVP "the watershed or area wherein the water originates . . . shall not be deprived by [DWR or USBR] directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area or any of the inhabitants or property owners therein." USBR, DWR and their contractors have long argued that this language provides water users in the areas of origin a right to file a water right application with the State Water Resources Control Board (SWRCB) and, if the applicant qualifies under all of the statutory requirements and complies with all SWRCB terms and conditions, the area of origin applicant's petition will be granted and considered senior to the rights of the CVP and SWP. Advocates in the areas of origin, however, have claimed that in addition to this reserved priority to seek a water right, the law also granted water project contractors in the areas of origin a priority to contract water supplies. In effect they asserted an entitlement to 100 percent of their demands in every year irrespective of any shortage provisions in their contracts and without the necessity to seek a SWRCB right.

Based primarily on CVP contract language and contracting history, federal statutes dealing with the CVP and the language of SWRCB permits issued to USBR for CVP water, the Ninth Circuit agreed with USBR that the area of origin laws did not insulate plaintiff districts from the shortage provisions of their contracts. However, the Ninth Circuit also did consider the application of California's area of origin laws. It held that the area of origin laws have no application to water previously diverted and stored by the SWP and CVP for the use of their contractors, which is governed by the terms of their water supply contract, specifically including any shortage provisions. "Water users [in the areas of origin] simply cannot assert any superior right to that stored water under area of origin principles. Rather, water rights to previously diverted and stored water are governed by water permits and water contracts."

The issues in this case closely parallel *Solano County Water Agency, et al. v. Department of Water Resources*, in which SWP contractors in the area of origin assert that they are not subject to the SWP contract Article 18(a) shortage provision. For this reason, Metropolitan and other SWP export contractors (as did DWR and SWRCB) filed amicus curiae opinions supporting USBR asserting our view of California law that prevailed in the Ninth Circuit opinion. The parties in the *Solano* case have been negotiating a settlement and dismissal agreement in that case that is consistent with our view of the application of the area of origin statutes.

***Los Angeles Unified School District v. County of Los Angeles, et al.* (California Court of Appeal, Second District)**

On June 26, 2013, the Court of Appeal ruled that the County of Los Angeles (County) had improperly calculated the amount of redevelopment project mitigation or "passthrough" payments owed to the Los Angeles Unified School District under Health and Safety Code section 33607.5. The court held that the County should have included monies diverted from the Educational Revenue Augmentation Fund in its calculation of LAUSD's property tax allocation base, which would in turn cause an increase in LAUSD's share of passthrough payments.

Although Metropolitan was named as a "real party in interest" in the lawsuit along with other Los Angeles County taxing agencies, the impact of the decision is expected to be immaterial from an accounting perspective because of the nominal amounts at issue. Nonetheless, Legal Department staff will continue to monitor this litigation and any implementation of the court's ruling. These activities will be coordinated with the Legal Department's representation of Metropolitan in the related case of *Los Angeles Community College District v. County of Los Angeles, et al.* (Los Angeles County Superior Court), in which Metropolitan was also named as a real party in interest.

Settlement of Western Center Claims for Shared Facilities Construction, Maintenance, Operation and Improvement Costs and Paleontological and Archaeological Material Storage and Curation Expenses

At the end of June 2013, Metropolitan reached a settlement with the Western Center Community Foundation (Foundation) to resolve ongoing disputes over joint site maintenance and other shared expenses at the Diamond Valley Lake Visitors Center and the Western Science Center in Riverside County, and the costs of storing and curating paleontological and archaeological finds from the DVL area and other sources. Under the settlement, both sides have agreed to release one another from their cross-claims and to split in half shared facility costs, including electricity, gas, irrigation and landscaping maintenance expenses. Metropolitan and the Foundation have also agreed to a notice and cost reimbursement process for special events that impact common areas and respective party facilities. Joint funding for installation of artificial turf in a common courtyard is also provided for by the settlement.

Cases to Watch

***Tarrant Regional Water District v. Herrmann, et al. (*United States Supreme Court)**

On June 13, the United States Supreme Court issued a ruling interpreting an interstate compact governing the allocation of Red River water supplies between Texas and Oklahoma. The case was brought by a Texas water agency seeking to enjoin Oklahoma state officials from enforcing their state laws that prohibit export of water supplies out of the state.

The Red River constitutes the border between Texas and Oklahoma, before flowing into Arkansas and then turning south through Louisiana to its confluence with the Mississippi River. In 1955, Congress authorized the states to negotiate a compact to resolve longstanding disputes over the river. It took more than 20 years before the Red River Compact was finally signed by the states in 1978 and approved by Congress in 1980. The compact allocates water supplies in each reach of the river and includes a further provision that these allocations do not impair the rights of each state to regulate the appropriation and use of water within its boundaries.

The Tarrant Water District provides water supplies to the Fort Worth-Arlington area of north Texas. It sought to divert Red River water supplies, to which it was entitled, from the Oklahoma side of the river. Oklahoma's legislature passed state laws prohibiting the export of any of the state's water outside its boundaries. Texas argued that these statutes were preempted by provisions of the compact granting it "equal" water rights in that reach of the river and further violated the Interstate Commerce Clause by restricting export of water across state lines.

Texas' arguments were rejected by the Tenth Circuit Court of Appeals. That court ruled that state laws were not preempted by the compact because there was no inherent conflict between the two. The court rejected the Commerce Clause argument because Congress had approved the

compact, which gave approval for the limits imposed by Oklahoma on waters within its boundaries. The Solicitor General joined Texas in arguing that the Supreme Court should reverse that decision. The Solicitor argued that the appellate court had wrongly applied the preemption doctrine and that the Oklahoma laws should properly be preempted to allow Texas to access its water rights within that state.

Texas requested Metropolitan's support for its position in the Supreme Court through an amicus curiae brief. Metropolitan's Legal Department declined to participate because the issues do not impact its water rights. Metropolitan's rights in the Colorado River are not governed directly by an interstate compact, but rather by the Boulder Canyon Project Act, which allocates the Lower Basin's apportionment among the Lower Division States. The 1922 Colorado River Compact among the seven Basin States only allocates the river between the Upper and Lower Basins. Article VI of the compact provides that the states will work together to resolve disputes over the construction and operation of works in one state for the benefit of another state. For example, the water for the Yuma Reclamation Project in Arizona is diverted through the Imperial Dam into California and delivered back into Arizona through a siphon under the river. More importantly for Metropolitan, its diversion facilities on Lake Havasu are wholly within California. The issue of whether transboundary diversions are allowed on the Colorado River simply does not apply to Metropolitan's water supplies.

The Supreme Court's unanimous decision rejected the arguments of Texas and the Solicitor. The Court interpreted the compact as a contract among the state parties and concluded that the absence of an express transboundary provision left Texas with no rights to cross into Oklahoma to exercise its water rights. By comparison, the Court cited numerous other compacts—including the Upper Colorado River Basin Compact—that expressly authorize such transboundary diversions. Since Texas had no compact rights to divert water in Oklahoma, its preemption argument against the Oklahoma state laws failed. Similarly, Texas had no rights under the Commerce Clause because Oklahoma's laws applied to the waters within its own boundaries and did not discriminate against Texas in the allocation of the river.

Items of Interest

Finance

Metropolitan issued its $104,820,000 Special Variable Rate Water Revenue Refunding Bonds, 2013 Series E on July 2, 2013. Legal Department staff attorneys prepared Appendix A to the Official Statement and assisted outside bond counsel with bond documents.