



## Metropolitan Cases

### Delta Smelt Biological Opinion Litigation

On March 13, 2014, the Ninth Circuit issued its 168-page decision in the Delta Smelt Biological Opinion appeal. In a 2-1 decision, with Judge Arnold dissenting, the Ninth Circuit reversed the district court and upheld the 2008 Delta Smelt Biological Opinion. The Ninth Circuit majority refused to consider the expert testimony of the water contractors' expert witnesses on the ground that judicial review of the Biological Opinion should not include such extra-record testimony. The Ninth Circuit majority also accorded great deference to the scientific judgments of the U.S. Fish & Wildlife Service (FWS), despite being critical of the science investigations relied upon by the FWS. Dissenting Judge Arnold would have considered the expert testimony of the water contractors and would have found that the Biological Opinion restrictions on Old and Middle River flows and Fall X2 were based on flawed scientific analyses, and were arbitrary and capricious. In a 2-1 decision with Judge Rawlinson dissenting, the Ninth Circuit upheld the district court's ruling that the U.S. Bureau of Reclamation (Reclamation) should have, but failed to comply with the National Environmental Policy Act (NEPA) when Reclamation decided to implement the Biological Opinion. Metropolitan's

Legal Department is evaluating options for further appellate review in the case.

### Water Transfer Rule Litigation

As previously reported, there is ongoing litigation challenging the Environmental Protection Agency's regulation that exempts the transfer of water from one water body to another from the National Pollutant Discharge Elimination System. Metropolitan, along with other western water agencies, has intervened in consolidated cases pending in Federal District Court for the Southern District of New York. We are awaiting the court's ruling on cross-motions for summary judgment.

In addition, the Ninth Circuit Court of Appeals is hearing an appeal of an Oregon district court decision upholding the rule. On March 21, Metropolitan, the Imperial Irrigation District, San Diego County Water Authority, State Water Contractors, and 20 other western water agencies and water resource associations filed a joint amicus curiae brief in support of the district court's judgment. The brief was written by Peter Nichols of Berg, Hill, Greenleaf & Ruscitti of Boulder, Colorado, who represents the same western water providers in the New York litigation. (See General Counsel's October 2013 Activity Report.)

## Matters Involving Metropolitan

### ***Property Reserve, Inc. v. Superior Court (Cal. Dept. of Water Resources)*, Third District Court of Appeal**

California's Eminent Domain Law authorizes a public agency to obtain a court order to enter upon private property for purposes of investigating the site for public use. *Code of Civil Procedure* § 1245.010 *et seq.* The investigation activities may include "photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals" or similar activities. The Department of Water Resources (DWR) filed court proceedings in five northern California counties to obtain such orders for environmental and geological surveys on 240 parcels being

considered for the location of the tunnel facility being studied as part of the Bay Delta Conservation Plan. The trial court held that the geological borings constituted a taking or damaging of the property that could not be authorized because the statutory provisions did not comply with the procedural requirements of California's constitutional eminent domain clause. However, the trial court did authorize entry for environmental surveys, which the court found would not effect a taking of property. Both the property owners and DWR appealed.

On March 13, the court of appeal affirmed the trial court's denial of entry for geological work, but reversed the order allowing entry for environmental



work. The court held that the statutory provisions are facially unconstitutional to the extent that they allow a court to authorize a taking of private property without first following the procedures for bringing an eminent domain action. The court's ruling would require DWR to commence full eminent domain proceedings to acquire the right to conduct temporary, pre-acquisition investigations, and then file subsequent eminent domain proceedings for acquisition of those properties that are determined to be necessary for the project.

The Legal Department assisted counsel for the State Water Contractors in preparing an amicus brief in support of DWR before the court of appeal. The court's ruling would not only affect the Bay Delta Conservation Plan, but also would apply to Metropolitan's pre-acquisition investigations when it is pursuing its own public works projects. The General Counsel will consider what further action may be taken in response to the ruling.

#### **Payment of Debt for Hoover Dam Visitor Center**

As a contractor for power generated at Hoover Dam, Metropolitan pays a proportionate share of the capital costs of improvements at the facility. When Congress enacted the 1984 Hoover Power Plant Act extending the power contracts for 30 years, a provision was included that made the contractors responsible for reimbursing the federal

government for the cost of constructing the Hoover Dam Visitor Center. Additional debt was incurred to construct air slots in the dam spillways following damage from flood flows in 1983. The visitor center and air slot debt carried interest rates of 8.06% and 9.84%, respectively. The debts had remaining maturity periods of 31 and 23 years, and a total unpaid principal of about \$124 million.

In the current low-interest-rate environment, the power contractors decided to pursue prepayment of these debts to reduce the interest costs being incurred. The federal government would not accept partial payment of these debts, thus requiring the power contractors to negotiate arrangements for each to simultaneously pay their proportionate share of the principal owing. In August 2013, the Board authorized staff to pay Metropolitan's share of the principal amount of the debt totaling \$25.6 million. Although all power contractors in California were prepared to make payments out of their available funds, Arizona and Nevada required bond financing to fund their share of the prepayment. This resulted in delay of the payment. The bond financings closed and full repayment to the federal government was completed by wire transfers on March 12. The Legal Department assisted in negotiations for successfully retiring this high-interest debt.

## Other Activities

#### ***Mingo Logan Coal Company v. United States Environmental Protection Agency (United States Supreme Court)***

On March 24, 2014, the United States Supreme Court denied Mingo Logan Coal Company's (Mingo Logan) petition for *writ of certiorari* (cert petition). The Supreme Court's denial means that the appellate court's ruling stands as the final decision and will not be reviewed. As previously reported, Mingo Logan filed a cert petition on November 13, 2013, asking the U.S. Supreme Court to review an appellate court decision that allowed the U.S. Environmental Protection Agency (EPA) to withdraw portions of a Clean Water Act Section 404 permit four years after it had been issued by the U.S. Army Corps of Engineers. On December 13, Metropolitan, along with the Association of California Water Agencies and six other *amici*, filed an *amici curiae* brief in support of Mingo Logan's cert petition. The Department of

Justice filed an opposition brief on February 14, 2014, and Mingo Logan filed a reply brief on March 4. The case will now go back to the district court, where the court will rule on Mingo Logan's alternative argument that EPA acted arbitrarily and capriciously in withdrawing portions of the permit. (See General Counsel's February 2014 Activity Report.)

#### **Finance**

Metropolitan priced its \$95,935,000 Water Revenue Refunding Bonds, 2014 Series A, \$10,575,000 Water Revenue Refunding Bonds, 2014 Series B (taxable), and \$30,335,000 Water Revenue Refunding Bonds, 2014 Series C-1, C-2 and C-3 on February 12, 2014 and closed the transactions on March 14. The 2014 Series A, B and C Bonds were issued to refund various series of Water Revenue Bonds that were originally issued in 2004, 2008 and 2010. In addition,



approximately \$15.5 million of bond proceeds were used to pay swap counterparties to terminate two interest rate swaps and to partially terminate three interest rate swap transactions. The Official Statements describing the 2014 Series A, B and C Bonds are available on the Municipal Securities Rulemaking Board's Electronic Municipal Market Access web page at <http://emma.msrb.org/> and on the Finance page of Metropolitan's website, <http://www.mwdh2o.com/mwdh2o/pages/finance/finance01.html>, under "Financial Documents." Legal Department attorneys prepared Appendix A to the Official Statements and assisted outside bond counsel with the bond documents and closing.

**CLE International's 10<sup>th</sup> Annual NEPA Conference**

Robert Horton participated on a panel presentation and discussion of the challenges facing NEPA practitioners preparing environmental impact statements for habitat conservation plans in the context of water diversions at the 10<sup>th</sup> Annual NEPA Conference held in San Francisco on March 6 and 7.

**16<sup>th</sup> Annual National Conference of the Law of the Colorado River**

Michael Hughes participated in discussing the evolving law of the Colorado River at the 16<sup>th</sup> Annual Law of the Colorado River Conference held in Las Vegas on March 13 and 14. Michael has made Colorado River presentations on several Directors' Inspection Trips.

**Matters Received by the Legal Department**

| Category                              | Received   | Description  |           |                     |                                  |  |                            |   |                 |  |                                       |  |                     |   |
|---------------------------------------|--|--|-----------|---------------------|----------------------------------|--|----------------------------|---|-----------------|--|---------------------------------------|--|---------------------|---|
| Actions in which MWD is a party       | 2  | Complaint filed by Endeavor Advanced Solutions against contractor Steiny & Company, Safeco Insurance Company of America and MWD, for lack of payment relating to plaintiff's installation and furnishing of materials for emergency notification system at Weymouth<br>First Amended Complaint filed by Holy Hill Community Church against MWD and others relating to the Sunset property  |           |                     |                                  |  |                            |   |                 |  |                                       |  |                     |   |
| Subpoenas to MWD                      | 1  | Subpoena issued by the California Department of Industrial Relations to produce certified payroll records submitted by DiDonna's Masonry for work at Diemer  |           |                     |                                  |  |                            |   |                 |  |                                       |  |                     |   |
| Public Records Act Requests           | 10   | <table border="1"> <thead> <tr> <th>Requestor</th> <th>Documents Requested</th> </tr> </thead> <tbody> <tr> <td>East Los Angeles College Student</td> <td>Water sales to member agencies and maps of MWD's distribution system and areas served by its member agencies</td> </tr> <tr> <td>Greg Moran of UT San Diego</td> <td>MWD's email retention policy and emails from/to Jeffrey Kightlinger in June 2013 and March 2014</td> </tr> <tr> <td>Private citizen</td> <td>Documents relating to potential contaminants leaching near MWD pipeline in Glen Avon, CA</td> </tr> <tr> <td>Cal State Long Beach Graduate Student</td> <td>Information relating to how MWD maintains its infrastructure</td> </tr> <tr> <td>Former MWD Employee</td> <td>Second follow-up request for additional Work Tech records</td> </tr> </tbody> </table> | Requestor | Documents Requested | East Los Angeles College Student | Water sales to member agencies and maps of MWD's distribution system and areas served by its member agencies | Greg Moran of UT San Diego | MWD's email retention policy and emails from/to Jeffrey Kightlinger in June 2013 and March 2014 | Private citizen | Documents relating to potential contaminants leaching near MWD pipeline in Glen Avon, CA | Cal State Long Beach Graduate Student | Information relating to how MWD maintains its infrastructure | Former MWD Employee | Second follow-up request for additional Work Tech records |
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|---------------|---|--|---|
|               |   | Mitch Blacher of ABC 10 San Diego  | Expenses related to MWD's office in San Diego and staff expense reports relating to work in San Diego |
|               |   | Private Citizen  | Expenses and emails of Director John Murray   |
| Other Matters | 2 | Wage garnishment and Petition for Writ of Mandate (CEQA) filed by Protect Wine Country against County of Riverside |   |