

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates	Application 12-04-019 (Filed April 23, 2012)
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**OPENING BRIEF ON SELECTED LEGAL ISSUES OF
SALINAS VALLEY WATER COALITION**

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I. Introduction

Pursuant to Administrative Law Judge Weatherford’s Ruling dated June 1, 2012, the Salinas Valley Water Coalition (“Coalition”) files this Opening Brief on Selected Legal Issues that warrant early resolution.

II. Is the County ordinance Governing Desalination and Limiting Desal Plant Ownership and Operation to Public Agencies Preempted by Commission Authority?

California-American Water Company (“Cal-Am”) proposes a water supply project to deliver water to its service area (Seaside, Del Rey Oaks, Monterey, Pacific Grove, Carmel, and Carmel Valley). The main element of this project is to build a desalination facility (“Desal Facility”) along the Monterey Bay Coast in Marina, within the Salinas Valley Basin (“Basin”), and the County of Monterey. Cal-Am’s application calls for Cal-Am to own and operate the Desal Facility.

Monterey County Code of Ordinance (“Ordinance”), Title 10, Chapter 10.72, limits the ownership and operation of a desalination facility in the County to public agencies. Cal-Am contends the County’s Ordinance does not apply to it and is preempted by California Public Utilities Commission authority.

The Salinas Valley Water Coalition (“Coalition”) has reviewed the issue from a historical perspective in an effort to understand the consequences, intended and/or unintended of a ruling that the local ordinance is preempted, and the resulting impact to our members and others within the Salinas Valley Groundwater Basin; our comments are offered in that light.

It is clear that the Ordinance requires ownership by a public entity. Chapter 10.72.030¹ states all applications for an operation permit *shall* “Provide assurances that each facility will be owned and operated by a public entity.” [Emphasis added] The vital purpose of the Ordinance is to ensure that the public will have the opportunity to participate in and comment on decisions related to the operation of any desalination facility. Public input is particularly important because the groundwater basin is already in overdraft and critically impacted by seawater intrusion, a condition that could be exacerbated by additional pumping such as is proposed for Cal-Am’s Desal Facility. Innumerable private water rights and the public interest in protection of the aquifer that supplies drinking water to the county’s cities could be impacted by unwise operation of new wells.

While Cal-Am may be considered a ‘public utility’ because it provides a water supply to the public and it is regulated by a public entity, it is not itself a public entity. Thus it has no obligation to conduct its business in public, as does a public entity under the Brown Act,² or to disclose documents and information concerning actions that vitally affect the public it serves, as does a public entity.

¹ All references are to the Monterey County Code of Ordinances unless otherwise indicated in the text.

² Government Code §§ 54950 et seq.

The Coalition is concerned that if Cal-Am is allowed to move forward with its proposed project and own and operate the Desal Facility on its own, the public will not only be left out of the decision-making processes (except for those decisions that may come forward to the Public Utilities Commission)³, but will be entirely unaware of decisions that may critically affect them. Whether intentional or unintentional, the consequences are significant to the Salinas Valley. The public will have no control, or input, over the ongoing operations of the Desal Facility being built within the Salinas Valley and utilizing the overdrafted Basin (even if in a small portion) to provide a long-term water supply to an area outside the Basin.

As a private corporation, Cal-Am is not subject to the requirements of State of California's Brown Act (Gov. Code, § 54950 et seq.). The Brown Act governs meetings conducted by public bodies and balances the public's access to meetings with the need for confidential debate and information-gathering by the public body. In adopting the Brown Act, the California Legislature established a presumption in favor of public access, notice and input. In fact, the purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of the democratic process by secret meetings.

Cal-Am is not subject to the Brown Act and its opening meeting requirements. As a result, preemption of the Ordinance would mean that the public would be shut out of all decision making processes with regards to the operation and maintenance of the proposed Desal Facility. There would be no accountability to the public for Cal-Am's actions, with the possible exception of narrow opportunities through the CPUC process.

It is not only the lack of input into the Desal Facility operational decisions that would be affected by a ruling that the Ordinance is preempted. California statutes also assure the availability of public information to the public. California's

³ Whose process itself, offers limited public participation opportunities.

Public Records Act (Government Code §6450 et seq.), requires that public entities disclose the documents and information on which they rely in making their decisions. This additional safeguard of the public welfare would not be available if the Ordinance is held to be preempted.

The Coalition believes that public access to the Desal Facility's owner and operator is an essential ingredient in good decision-making about the facility. The two statutes discussed above (and many others that govern public entities, but not privately owned public utilities) would ensure that participation. For that reason, the Ordinance should not be ruled to be preempted.

At the very least the wells required for this project should be publically owned. This would provide a vehicle for at least a modicum of public participation in the decision-making processes, along with public over-sight of the on-going operation and utilization of the wells. Because of the public interest in protecting the critically impacted groundwater, as well as the countless individuals' interests in protection of individually held groundwater rights, the utilization by the Desal Facility of the groundwater wells providing its source water is a matter of local concern that cannot be held to have been preempted by the state in enacting the laws creating the Public Utility Commission.

As the court found in the landmark preemption case of *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, proper management of groundwater is a matter of local concern, and even where the legislature has adopted laws related to the subject matter, the operation of local police power is not necessarily preempted.

Among the persuasive arguments against preemption was the fact that

“More the point, there is no expression in these statutes [relating to groundwater] that local authority over groundwater is preempted. The fact that a matter is of statewide concern does not oust municipal governments of police power.”

(*Baldwin*, at 31 Cal.App.4th at 175.)

Similarly, there is no expression in the Public Utilities Code that local police power authority over projects proposed by investor-owned public utilities was intended to be preempted. Where preemption of zoning ordinances has been found, for example, it has been supported by specific legislative language providing the exemption. (See Government Code sec. 53091; *Topsail Court Homeowners Assn. v. County of Santa Cruz* (2002) 116 Cal.Rptr.2d 145.) To find preemption, the finding must be made that

“the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern [or that] the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.”

(*Baldwin*, *supra*, at 31 Cal.App.4th 182; emphasis added.)

No such complete coverage of the field of utilities was provided in the general law, and in fact, a major segment of California’s utilities – public entities – is not regulated by the Public Utilities Commission.

The Public Utilities Commission was not created to manage water resources, but to protect the public’s interest in fair rates and ensure that utilities are managed to provide reliable supplies. Nothing in the Public Utilities Code gives the Commission the authority to dictate the identity of the provider of a utility; nothing in the Code conflicts with Monterey’s Ordinance which does so; and nothing in the Code seeks to regulate the sources of water available to investor owned public utilities.

In *Baldwin*, the court found that regulation and protection of groundwater -- the same issue that prompted Monterey County’s Ordinance here -- was a matter of local concern. In that case, even though the legislature had also enacted a myriad

of statutes and a comprehensive water rights system, Tehama County's ordinance was found not to have been preempted.

If the wells serving the Desal Facility are publically owned and operated, then in the event there are issues surrounding the manner in which the wells are operated, the level of groundwater pumped, the manner in which the groundwater is used and/or the need to construct new and/or additional wells in the future, there will be a clear process for notice, participation, over-sight and accountability to the public. The public will be assured of an opportunity to have their concerns expressed and considered. Without public ownership of the Desal Facility, and/or at a minimal, the wells, the public will be shut out of the entire decision-making process, and there would be no accountability of Cal-Am decisions or subsequent actions except to its shareholders.

The CPUC should find that the Monterey County Ordinance has not been preempted, and should allow its implementation to require public ownership of the Desal Facility and/or the slant wells to be utilized for the Desal Facility.

III. Does or Will Cal-Am, or another Entity Participating Possess Adequate Rights to the Slant Well intake Water?

Cal-Am's application does not include any discussion or information as to whether Cal-Am has, or intends to secure, water rights for groundwater associated with the slant wells. It is because of the lack of discussion and information, in part, that the issue of water rights for the proposed project has been raised, and ALJ Weatherford has requested briefs in an effort to resolve these issues early in the process. Without having any information in the present record regarding the water rights, it is difficult to adequately address all of what may be the appropriate basis in law. The following comments are based on information that has been presented in other forums, presented to the some segment(s) of the public, and/or are assumptions that could be raised as to the need and adequacy of water rights for the

slant well component of the proposed project; that are based on the following are facts pertaining to this issue:

1. The CPUC has no authority over water rights and cannot grant or approve such rights.
2. Cal-Am proposes to use a series of slant wells to draw ocean water and potentially a small amount of groundwater.
3. Cal-Am has not identified any water rights associated with the slant wells' intake water.
4. Cal-Am proposes to operate the Desal Facility so that, on an annual average basis, the plant will return desalinated water to the Basin in an amount equal to the freshwater amount in the water extracted from the slant wells.
5. Although the Project Description assumes that the average annual amount of water to be returned to the Salinas Valley is eight percent, it is our understanding that the modeling used by Cal-Am to make this assumption also showed that over time, there will be an increasing proportion of freshwater in the water extracted from the slant wells.
6. Cal-Am's application admits that its groundwater modeling results indicate that, even at the outset, feedwater pumped from the slant wells would include a small amount of intruded groundwater from the Basin.
7. Monterey County Water Resources Agency Legislative Act, Sec. 21 states:

“... For the purpose of preserving that balance, no groundwater from that basin may be exported for any use outside the basin, except that use of water from the basin on any part of Fort Ord shall not be deemed such an export. If any export of water from the basin is attempted, the Agency may obtain from the superior court, and the court shall grant, injunctive relief prohibiting that exportation of groundwater.” (Emphasis added.)

Based on these facts, Cal-Am does not hold valid water rights to take any portion of groundwater via the proposed slant wells and use that groundwater in any manner other than, perhaps, as an overlying landowner on the same site as the well(s). Use of the groundwater in any other manner would be an illegal appropriation of groundwater from the overdrafted Basin, and would result in an illegal taking of groundwater from overlying landowners.

California groundwater law was summarized by the California Supreme Court in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241-42:

Courts typically classify water rights in an underground basin as overlying, appropriative, or prescriptive. (*California Water Service Co., supra*, 224 Cal. App. 2d at p. 725.) fn. 10 An overlying right, "analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto." (*California Water Service Co., supra*, 224 Cal. App. 2d at p. 725.) One with overlying rights has rights superior to that of other persons who lack legal priority, but is nonetheless restricted to a reasonable beneficial use. Thus, after first considering this priority, courts may limit it to present and prospective reasonable beneficial uses, consonant with article X, section 2 of the California Constitution. (*Jordan v. City of Santa Barbara* (1996) 46 Cal. App. 4th 1245, 1268.) . . . Any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed. . . . As between overlying owners, the rights, like those of riparians, are correlative; [i.e.,] each may use only his reasonable share when water is insufficient to meet the needs of all []. As between appropriators, however, the one first in time is the first in right, and a prior

appropriator is entitled to all the water he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any [].

As previously stated, to date, Cal-Am has not presented any documentation of a claim to valid water rights for this purpose. In order to claim valid water rights for the Desal Facility, it would need to initiate an appropriative right – which in itself, would most likely trigger a basin-wide water rights adjudication. Such an adjudication could take years and be very costly to Cal-Am, its rate-payers and the Salinas Valley water right holders, and have significant impacts. Given the overdrafted nature of the Basin, there is no surplus water available for appropriation.

The Coalition believes the lack of valid water rights for the proposed use is a fatal flaw of the project. The previously considered project, the Regional Water Supply Project (RWSP), included public partners that held certain water rights – that is what made that project feasible. The Marina Coast Water District (MCWD) was annexed into the Salinas Valley Groundwater Zones. As part of its annexation, conditions and limits were placed on the amount of water it could pump from the Basin and use within the Basin. However, in return for accepting these limitations, it was assured the right to pump a certain amount of groundwater for use within the Basin. The Coalition was informed that MCWD was willing to use a portion of its own limited water rights for the RWSP, and to provide assurances and guarantees that any groundwater component would not be exported out of the Basin, since export of water is contrary to MCWRA's legislative act. Without a similar partner and/or scenario pertaining to water rights for the proposed slant wells, the proposed project is fatally flawed.

Cal-Am recently made a public presentation to the MCWRA and was asked why it just didn't move the location of the proposed Desal Facility so it was outside the Basin and it wouldn't have to deal with the water rights issue in the

overdrafted Basin. Its response was the ‘availability of land’. The Coalition was very surprised at this response, but if relocation of the Desal Facility and its wells truly is a matter of availability of land, then the Coalition suggests Cal-Am start looking outside of the Basin for other lands where it can acquire water rights to support its proposed Desal Facility. Without such a move, the proposed project is without water rights to support pumping from the slant wells.

Cal-Am has failed to identify valid appropriative water rights that can be utilized in the manner it proposes. Identification of such rights would need to include a discussion of future impacts when the project wells start pumping greater percentages of freshwater than the 3% assumed within the current project description. Even if Cal-Am could identify valid appropriative water rights to 3% of the pumped water, it would still need to show a valid basis for the greater amount of Basin water when the proportion of seawater being pumped and processed, suddenly decreased and the Basin’s freshwater increased. How would the increased freshwater pumped at that point in time then be returned to the Basin, and what would be the impacts of the resulting reduction in water supply to the Monterey Peninsula?

Without providing adequate evidence of valid appropriative water rights to an increasing amount of Basin groundwater, Cal-Am’s proposed project is fatally flawed and it should consider alternative projects and/or locations. Cal-Am has come into the Basin and the Salinas Valley residents, businesses and agricultural landowners are being asked to trust that it will not take actions contrary to its promises -- actions that could adversely impact the Salinas Valley. This is one of the reasons that the public participation is critical in decisions concerning the Desal Facility and its operation – public participation that can only be assured by the sunshine laws governing public entities.

Cal-Am has said it needs to move forward with the test well as it will provide the data needed to determine what water rights are needed for the slant wells. The Coalition cannot accept Cal-Am's assurances on this. No pumping test will alter the overdrafted nature of the Basin in which new appropriative water rights are unavailable. Cal-Am needs to substantiate existing valid appropriative water rights upfront, prior to the test well; otherwise its money will have been wasted, and the Basin needlessly subjected to further degradation. The water rights demonstrated must be shown to meet Cal-Am's short-term needs and its potential long-term needs, and an explanation should be provided concerning how these rights will be utilized. Cal-Am should not be allowed to proceed forward unless and until such valid appropriative water rights are identified.

IV. Does or Will Cal-Am, or another Entity Participating, Possess Adequate Rights to the Groundwater Replenishment Water?

: As part of their application, Cal-Am includes a component that relies on groundwater replenishment from the Monterey Regional Pollution Control Agency's (Pollution Control Agency) reclaimed water plant. However, their application does not include any discussion or information whether Cal-Am or another participating entity (the Pollution Control Agency) has or will secure rights to the wastewater associated with the groundwater replenishment component.

To date, neither Cal-Am nor the Pollution Control Agency has shown that it possesses "adequate" rights to the groundwater replenishment water. There are many different, and often over-lapping, water rights agreements that control the wastewater flows into, and out of the reclamation plant, that it makes it difficult to determine exactly which entity has what rights and under what conditions.

We do know that the Pollution Control Agency's tertiary treatment plant was built with monies it and the MCWRA borrowed. The growers of the Salinas Valley pay the entire debt for the capital cost and pay the annual operation and

maintenance costs. The growers were given a contractual right/entitlement to utilize up to 19,450 acre-ft/yr of wastewater on annual basis. MCWD also holds certain rights to the wastewater believed to be for approximately 2,240 acre-ft/year. The combined rights of the Salinas Valley growers and MCWD total approximately 21,690 afy of the current plant inflow of approximately 22,400 acre-ft/yr.

Not all of the allocated rights to the wastewater are currently being used, and based on existing agreements, there could be an opportunity for the Pollution Control Agency and/or others to utilize the ‘unused’ portion. The utilization of the ‘unused’ portion is dependent on the agreement of the right holders (MCWRA and its growers and ratepayers, and MCWD). It would be considered an ‘interruptible’ source of wastewater because the MCWRA growers and/or MCWD have first right to use all of the current plant inflow if they choose. In other words, while a certain amount may be unused one year, MCWRA or MCWD could claim, and use, that same unused amount the following year. Hence, the source would be ‘interruptible’ and could not be relied upon for a firm supply indefinitely. We believe such an ‘interruptible’ supply of wastewater would make it difficult, if not impossible, to obtain financing.

If Cal-Am is to partner with the Pollution Control Agency in pursuing the groundwater replenishment component, other considerations must be recognized and accounted for in addition to the amount of wastewater available. These issues include the basis on which an allocation of wastewater for M&I use could be made and the cost of the supply. Two of the outstanding loans for the tertiary treatment plant and the distribution system to the growers, are held by the United States Department of the Interior Bureau of Reclamation, with an outstanding balance of approximately \$46 million. The Bureau Loans have very strict terms and conditions that prohibit the use of any of the wastewater from the reclamation plant

project for M&I purposes without prior approval by the Bureau. Any such approval would require environmental review.

Any attempt by Cal-Am or the Pollution Control Agency to utilize wastewater from the reclamation plant for reuse to the Monterey Peninsula could violate the agreements that give others priority to the wastewater, as well as violate the loan requirements for the Bureau of Reclamation. These issues need to be fully reviewed and reconciled among all wastewater right holders prior to further development of this as a feasible component for Cal-Am's proposed water supply to the Monterey Peninsula.

Neither the Pollution Control Agency nor any other Participating Party, possesses adequate rights to the groundwater replenishment water. Unless, and until, there is agreement among all of the existing wastewater right holders as to the potential availability and use of the 'unused' portion, this component of the project is fatally flawed.

V. Conclusion

The Commission has recognized that there are certain legal issues that warrant early resolution in order for the proposed project to move forward. The Coalition agrees that these issues need to be resolved early. However, it is difficult to provide an opinion on these legal issues when the Cal-Am and/or another Entity Participating in the project, has failed to provide any information supporting a claim of valid water rights and how it intends to proceed. The Coalition is further hindered in achieving early resolution of these issues, even if the valid water right information is provided, until there has been a completed environmental analysis. Unless, and until the potential impacts associated with the 'perceived/envisioned' water rights for the slant wells and the groundwater replenishment project are disclosed, there can be no early resolution. Resolution can only be obtained after a

full review and consideration of any claimed water rights and completed environmental impact report.

While water rights are not considered to be an environmental issue by some, the potential impact to Salinas Valley communities and Salinas Valley agricultural lands because of impacts to existing water rights would be a significant adverse environmental impact. Therefore, their water rights and legal uses of water within the Salinas Valley Groundwater Basin and any impact to these rights and use, must be fully reviewed and considered before any resolution can occur.

The environmental document will need to include adequate monitoring and a contingency plan with trigger points so that protection for the Basin is initiated in the event, at some point in the future, the continued and extended pumping of some level of groundwater from the Basin creates an impact from seawater intrusion and/or to the Salinas Valley Groundwater Basin. The needs of the Peninsula cannot be met at the expense of degradation to the Salinas Valley Groundwater Basin and those who steward it because of our reliance upon it.

Finally, all of these issues concerning water right entitlements and intertwined relationships of those holding rights to water from the Basin clearly illustrate the overriding local concerns that supported Monterey County's enactment of the Ordinance, and the reasons why the Commission's jurisdiction cannot be found to preempt the Ordinance's protection of the community's interests.

Dated: July 11, 2012

Respectfully submitted,

/s/ Nancy Isakson
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