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

Application of California-American Water
Company (U 210 W) 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)

**OPENING BRIEF OF LANDWATCH MONTEREY COUNTY REGARDING
GROUNDWATER RIGHTS AND PUBLIC OWNERSHIP**

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I. Introduction

LandWatch submits the following in response to the Administrative Law Judge’s Ruling of June 1, 2012, inviting briefing on 1) the adequacy of water rights to support the project and 2) whether the public ownership requirements of Monterey County Code Chapter 10.72 are preempted by state law.

II. Cal-Am Must Demonstrate That Whatever Groundwater Rights It Possesses Would Be Exercised Without Harm To Others’ Rights

Cal-Am proposes to pump brackish groundwater from the Salinas Valley Groundwater Basin (“SVGW”). Application, Appendix H, p. 10. Cal-Am’s application is silent as to whether Cal-Am has, or can secure, groundwater rights. LandWatch is concerned that the omission to address and resolve this issue may result in subsequent legal challenges that will derail the effort to secure a timely solution to the supply shortfall faced by Cal-Am and its customers. For example, Cal-Am is unlikely to be able to secure financing for a project that depends on groundwater rights that may be successfully challenged. And it would be pointless for the CPUC to approve a project that would be vulnerable to an immediate court challenge that the project lacked necessary groundwater rights.

A. Cal-Am's Right To Pump Groundwater Is Unclear

Cal-Am does not dispute that the SVGB is in overdraft. In an overdrafted, percolated groundwater basin, there is no surplus available for new groundwater appropriators. Any taking of groundwater for other than riparian or overlying uses is appropriation. *Katz v Walkinshaw* (1903) 141 Cal. 116, 135. An appropriator may not take non-surplus water. *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926. Any overlier property rights that Cal-Am may acquire would not provide Cal-Am with the right to appropriate groundwater for off-site usage. *City of Barstow v Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240. This basic analysis was acknowledged by proponents of the Regional Desalination Project.¹ Cal-Am has not explained why this analysis would not control the issue of groundwater rights and preclude the project.

Proponents of the Regional Desalination Project ("RDP") advanced a number of theories intended to address groundwater rights issues, including doctrines related to prescription, developed water, and salvage water.² It is not clear that any of these theories would be applicable to this project.

First, while the claim of prescriptive rights may have been relevant to Marina Coast Water District's ("MCWD's") participation in the RDP, prescription is not apparently relevant here. Cal-Am has not advanced such a claim and there appears to be no factual basis for it.

Second, the claim that the pumped groundwater could be accounted for as a permissible use of previously developed water rights does not appear to be relevant here, even if it might have been relevant to claims in the RDP that public agencies might have such rights in the SVGB. Such a claim would depend on a showing that Cal-Am operations have somehow already augmented the SVGB, *e.g.*, from another watershed. *See, e.g., City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 261 (right to developed water based on importation of foreign water); *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 76-77. We are not aware of any factual basis for such a

¹ Application 04-09-019, Revised Direct Testimony of Lloyd W. Lowrey, Jr., June 24, 2009, p.11:4-27, available at <http://www.friedumspring.com/cpuccdocs.htm>.

² *Id.*, pp. 11-13.

claim. Furthermore, the claim that the product water from the desalination project is developed water, even if true, appears to be irrelevant to the issue of whether CalAm has the right to pump the groundwater in the first instance. Even if Cal-Am were to return the same amount of product water to the aquifer as it pumps in freshwater, we are not aware of any authority for the proposition that an appropriator may bootstrap developed water rights by returning an otherwise unlawful appropriation.

Third, it is not clear that the salvage water rights doctrine applies. *Pomona Land and Water Company v. San Antonio Water Co.* (1908) 152 Cal. 618 generally holds that a water supply in a source may be augmented by artificial means. However, the claim that Cal-Am is entitled to pump SVGB groundwater pursuant to the doctrine of salvage water rights appears problematic. It is not clear how or why a desalination operation dependent on pumping brackish groundwater would be considered salvage. Unlike traditional salvage operations that depend on conservation (*e.g.*, of water that would otherwise be lost to evaporation or seepage), pumping brackish groundwater does not appear to result in saving water that would otherwise be lost. Again, it is not clear whether and how the doctrine of salvaged water would apply to bootstrap the appropriation of groundwater that was not otherwise permissible.

B. Regardless Of Rights, Cal-Am Must Demonstrate That It Will Not Injure Other Rights Holders

Even if the salvage water rights doctrine were relevant, the critical factual predicate in *Pomona Land and Water Company* was that the salvage operation caused no injury to other vested rights. *Id.* at 623, 629. Cases are clear that salvage is impermissible if it harms existing rights. *Wiggins v. Muscupiabe Land and Water Company* (1896) 113 Cal. 182, 196 (salvaging water lost by absorption or evaporation permitted only if no diminishment of others' rights); *Scott v. Fruit Growers Supply Co.* (1927) 202 Cal. 47, 51-55 (salvage may not diminish return flows available to lawful users). Here, Cal-Am has offered no factual support in this proceeding for the notion that pumping brackish groundwater would not impair groundwater rights. Common sense suggests that pumping additional groundwater from an overdrafted basin would impair these rights. Unless Cal-Am can demonstrate unequivocally that this will not occur, the

issue of necessary groundwater rights remains uncertain, and the project remains vulnerable to future legal challenges.

As noted, Cal-Am's obligation to demonstrate that its proposed pumping would not harm others' exercise of their groundwater rights arises from its common law and statutory duties not to exercise any water rights it may have to the detriment of others. The obligation also arises from CEQA, and, independently, from Public Utilities Code § 1002(a)(4), which obliges the Commission to consider the project's influence on the environment regardless of CEQA. *Re Southern California Edison Co.* (1990) 37 CPUC 2d 413 ("However, our responsibility to respond to the health, safety and environmental concerns of those exposed to utility facilities is not limited to CEQA. As cited above, [PU Code Section 1002](#) provides us with responsibility independent of CEQA to include environmental influences and community values in our consideration of a request for a CPCN.")

Cal-Am must address a number of issues.

While the application assumes that 97% of the pumped water would be seawater, it acknowledges the need for a test well and further groundwater modeling. Application, Appendix H, p. 10; Direct Testimony of Richard C. Svindland, April 23, 2012, p. 10:8-11. One purpose of the test well and groundwater modeling will be to determine the actual amount of freshwater that would be pumped from the SVGB and the effects on other groundwater users. Impacts could well be greater than 3%, and could change over time. For example, the Monterey County Water Resources Agency ("MCWRA") has indicated that long-term modeling shows a recovery within the SVGB.³ Such a recovery may increase the percent of freshwater taken up by the project intake wells.

Cal-Am proposes to return product water to the SVGB in order to comply with the MCWRA Act, which bars export of Salinas Valley groundwater. Testimony of Richard C. Svindland, April 23, 2012, p. 36 and Attachment 3, p. 4. It proposes to do so either by injecting that water back into the aquifer or by providing it to irrigators through the Castroville Seawater Intrusion Project ("CSIP") system. There is legal uncertainty as

³ Curtis Weeks, MCWRA, letter to Tom Luster, California Coastal Commission, Aug. 10, 2011. The document is available at <http://www.coastal.ca.gov/meetings/mtg-mm11-8.html>, see link to additional correspondence under August 12, 2011 item 6a, Application No. E-11-019 (Monterey County Water Resources Agency, Marina Coast Water District, California-American Water Company, Monterey Co.)

to whether Cal-Am must return an amount equal to the source water pumped from the SVGB or just equal to the product water realized from that source. However, even if Cal-Am demonstrates that its desalination program would return an appropriate amount of freshwater, or that there would be no net harm to the water balance of the SVGB, that may not be sufficient to show that there would be no harm to any of the particular groundwater rights holders, *e.g.*, those in the immediate vicinity of the intake wells or those in North County whose groundwater may be particularly vulnerable. Cal-Am must show that its pumping would not impair *any* groundwater rights. Again, this calls for a technical showing that has not been made.

For example, LandWatch has previously and repeatedly objected that the environmental review contained in the Coastal Water Project EIR failed adequately to analyze and mitigate impacts to the aquifer in North Monterey County from pumping groundwater for a desalination project.⁴ LandWatch pointed out that the available hydrogeologic study indicates that the North County aquifer is hydrologically connected to the aquifer in the coastal pumping area and is up-gradient. Coastal pumping would impact the North County aquifer by inducing flows away from North County, moving seawater intrusion toward North County, and further concentrating nitrate contaminants in a rapidly depleting aquifer. These disproportionate impacts to North County groundwater rights holds must be evaluated. Similarly, impacts to groundwater rights holds in the immediate vicinity of the project and to the SVGB generally must be evaluated.

Also by way of example, the Division of Ratepayer Advocates objected that the groundwater modeling presented in the Coastal Water Project EIR was not adequate, because it failed to recognize density-driven effects.⁵ In particular, the North Marina groundwater model did not reflect the fact that seawater is denser and heavier than

⁴ Amy White, LandWatch, letter to Andrew Barnsdale, CPUC, Nov. 24, 2009; Amy White, LandWatch, letter to California Coastal Commission, August 4, 2011. Both documents are available at <http://www.coastal.ca.gov/meetings/mtg-mm11-8.html>, see link to additional correspondence under August 12, 2011 item 6a, Application No. E-11-019 (Monterey County Water Resources Agency, Marina Coast Water District, California-American Water Company, Monterey Co.)

⁵ DRA, Comments of the Division of Ratepayer Advocates on the Proposed Settlement Agreement, April 30, 2010, pp. 54-56, Application 04-09-019, available at <http://docs.cpuc.ca.gov/EFILE/CM/117212.htm>.

freshwater. DRA asked that additional modeling be done that would incorporate density-dependent groundwater flow and solute-transport. These issues were not resolved in the RDP proceedings.⁶

LandWatch remains concerned that Cal-Am may lack necessary groundwater rights. However, if there is some basis in law to permit Cal-Am to pump groundwater from an overdrafted basin without possessing any prior appropriative rights, Cal-Am should surely be required to show that this would not injure other rights holders, and this demonstration should be based on the best available science.

C. Cal-Am Must Demonstrate No Injury And The Forum For This Showing Should Be Clarified

The Commission may not be the final authority as to the sufficiency of Cal-Am's water rights because this issue may ultimately have to be addressed in court. However, the Commission should ensure that the rights are sufficiently certain that a challenge would be very unlikely to succeed. Alternatively, or in addition, the Commission may need to require a contingency plan to provide adequate source water (or a water supply not dependent on desalination) in the event that groundwater rights are successfully challenged, or in the event that Cal-Am reaches a capacity limit on the legal exercise of its rights.

If the project is to proceed, LandWatch asks that Cal-Am be required to make an unequivocal showing of the sufficiency of its water rights, including a showing that exercise of those rights will not harm others' rights. This showing could be made either through the CPCN evidentiary process or its associated CEQA review, or both. LandWatch asks that the procedure for this showing be made clear so that parties are not prejudiced by failing to raise concerns in the correct forum. To begin this process, LandWatch suggests that the issues related to groundwater rights impacts be fully explored at the forthcoming technical workshop.

⁶ DRA's briefing on this issue was stricken because its concerns were not raised in the CEQA process. Administrative Law Judge's Ruling Granting In Part And Denying In Part Monterey County Water Resources Agency Motion To Strike Comments Of The Division Of Ratepayer Advocates, May 24, 2010, available at <http://docs.cpuc.ca.gov/efile/RULINGS/118406.pdf>.

III. Public Ownership

Monterey County Code § 10.72.030.B provides that desalination facilities be owned and operated by a public entity. Public ownership ensures responsiveness to public health issues, *e.g.*, loss of critical water capacity due to the commercial failure of private owners. Public ownership also promotes local control and governance that is more responsive to local concerns with environmental, economic, and growth issues.

While a very general argument has been advanced that the County's public ownership requirement may be preempted by state law, the argument has not been advanced in any detail. Clearly the County has the authority to regulate local health, safety, and welfare where not in conflict with state laws. Cal.Const., Art. 11, § 7; *People ex rel. Deukmejian v County of Mendocino* (1984) 36 Cal.3d 476. LandWatch notes that the California Supreme Court has repeatedly held that there is a presumption against preemption unless the legislature has clearly indicated its intent to preempt local law. *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149-1150; *IT Corp. v. Solano Board of Supervisors* (1991) 1 Cal.4th 81, 93.

LandWatch does not brief the preemption issue in detail here for two reasons. First, the burden of demonstrating preemption falls on the party claiming that state law preempts a local ordinance. *Big Creek Lumber Co., supra*, 38 Cal.4th at 1149. Accordingly, LandWatch reserves the right to reply to any arguments advanced on this issue. Second, news reports indicate that the County may seek declarative relief on the issue, potentially removing the debate from this forum.

However, even if the courts were to find that the County ordinance is preempted, the Commission has the authority to order Cal-Am to work with a public partner. Public Utility Code § 1005(a) provides that the Commission may “attach to the exercise of the rights granted by the certificate such terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and all works constructed or maintained by authority thereof, as in its judgment the public convenience and necessity require.” The Commission should carefully examine reasons that may justify requiring public ownership in this case.

These issues include the requirement to honor community values. Public Utility Code, § 1002(a)(1). The fact that the County Code requires public ownership, and that

the Board of Supervisors has chosen to defend this ordinance, must be taken as strong evidence of community values. *In re Lodi Gas Storage, LLC*, 2000 WL 1022005, Cal.P.U.C., May 18, 2000, (NO. 00-05-048, 98-11-012) (“considerable weight” given to views of elected representatives because they speak on behalf of constituents); *Application of Wild Goose Storage, LLC*, 2010 WL 5650661, Cal. P.U.C., December 16, 2010 (NO. 09-04-021, D. 10-12-025).

In addition to honoring community values, public ownership may have other advantages for this project, including financing, responsive governance, and avoidance of environmental and growth impacts. LandWatch intends to address these issues in the proceedings and to encourage public partnership.

In sum, the Commission need not reach the issue of preemption here if it determines that a public partner is required for this project.

Dated: July 10, 2012

M. R. WOLFE & ASSOCIATES, P.C.

A handwritten signature in blue ink, appearing to be 'MRW', is written over a light blue rectangular background.

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