



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

**FILED**

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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)

**OPENING BRIEF OF  
THE COUNTY OF MONTEREY AND  
MONTEREY COUNTY WATER RESOURCES AGENCY  
ON LEGAL ISSUES IN ACCORDANCE WITH  
ADMINISTRATIVE LAW JUDGE'S RULING  
DATED JUNE 1, 2012**

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Dated: July 11, 2012

## **INTRODUCTION**

Monterey County (“County”) and Monterey County Water Resources Agency (“Agency”) submit this briefing in response to Judge Weatherford's 6/1/2012 Ruling requesting legal authorities on two issues: (1) the application of Monterey County Code of Ordinance, Title 10, Chapter 10.72, subsection 10.72.030(B) (Public Ownership of Desalination Plants) to the Monterey Peninsula Water Supply Project (“CalAm Project”); and (2) water rights issues implicated by the Project.

### **The Commission Need Not Address the Desal Project Ordinance**

In recognition of the urgent need for a water supply project and the enormous time constraints under which CalAm is currently working pursuant to the State Water Resources Control Board's Cease and Desist Order, on June 26, 2012, the County filed a declaratory relief action in San Francisco County Superior Court seeking a judicial interpretation of whether the Desal Project Ordinance applies to the CalAm Project. A copy of the complaint is attached hereto as Exhibit "A." CalAm and the County firmly agree, and will promptly inform the court, concerning how important the underlying water supply issue is, and the County is confident the parties can make clear to the court how quickly this issue must be decided. An application has already been filed with the court to designate the case “complex,” which ensures it will proceed in an expedited fashion, both on that basis and as required under the declaratory relief statute.

A judicial resolution of this issue ensures the certainty and efficiency called for in these circumstances. Not only is Commission preemption uncertain, the County and the Agency respectfully submit as well that the Commission lacks authority to determine either the enforceability (the issue presently before the Superior Court) or validity of the Desal Project Ordinance. California Constitution Article III, Section 3.5 provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Although this provision applies on its face to statutes, rather than to ordinances, no legal or policy reason indicates a basis for distinguishing the two. Indeed, for interpretive purposes, at least, courts have frequently classified statutes and ordinances interchangeably (*e.g.*, *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 137; *Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 865), though no case has been found that directly applies Article III, section 3.5, to an ordinance. Nevertheless, in view of what can best be described as uncertain Commission authority, both as to its decisional power and as to the preemption question, the County and the Agency urge that the Commission allow the pending lawsuit to run its course as the surest and most effective means of dealing with the Desal Ordinance issue, and as the most efficient use of the Commission's resources.

### **Water Rights Issues**

First and foremost among the principles that must govern the Project is Monterey County Water Resources Agency Act ("Agency Act") section 21, which requires that "no groundwater from [the Salinas Valley Groundwater Basin] may be exported for any use outside the basin, except that the use of water from the basin on any part of Fort Ord shall not be deemed an export." *See also* Agency Act § 9(u) (granting the Agency authority to prevent the export of groundwater). CalAm's Project description appears consistent with this restriction.

To the extent the Project's slant wells extract seawater only, no water right issues appear to arise. Ultimately, however, the legal character of the Project's extractions will depend on how the Project is finally configured; that configuration has yet to be determined. The County and the Agency understand that CalAm is, appropriately, undertaking an in-depth water rights analysis for the Project, and the Agency will closely review that analysis, provide comments and, consistent with its water management responsibilities under the Agency Act, exercise its

regulatory authority to ensure that the Project complies with the law. CalAm's application, as well as its response to protests, give every indication that CalAm intends such compliance. While water rights questions inevitably emerge early and sometimes forcefully in projects of this nature, a complete analysis – and certainly any conclusions – concerning water rights are, for these reasons, probably premature.

One open question relates to that portion of the Project's planned supply to be purchased from the Monterey Regional Water Pollution Control Agency's ("PCA") Groundwater Replenishment Project. It is not clear that the PCA's supply is uninterrupted, and this would need to be confirmed as the supply may have an impact on the Project's sizing. This would appear to require agreement among the parties with rights to the replenishment supply.

### **CONCLUSION**

For all the above reasons, the County and the Agency request that the Commission concentrate its resources on the merits of the Project by deferring the enforceability of the ordinance to the court, and that it continue to seek input on water rights questions as these proceedings, and the Project's configuration, continue to evolve.

Dated: July 11, 2012

Respectfully submitted,  
DOWNEY BRAND LLP

By: /s/ Steven P. Saxton  
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