

**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.

A.12-04-019
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**CALIFORNIA-AMERICAN WATER COMPANY REPLY BRIEF
ON LEGAL ISSUES FOR EARLY RESOLUTION**

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I. INTRODUCTION

Pursuant to Rule 13.1 of the Rules of Practice and Procedure of the California Public Utilities Commission (“CPUC”) and as directed by Administrative Law Judge (“ALJ”) Weatherford in his June 1, 2012 ruling on California-American Water Company (“CAW”) submits its reply brief on (1) whether Monterey County Code Chapter 10.72 (“Ordinance”) limiting the ownership and operation of a desalination facility to public agencies is preempted and (2) whether various water rights claims affect the feasibility of the Monterey Peninsula Water Supply Project (“MPWSP”). As CAW demonstrated in its opening brief and explains in more detail below, the Ordinance is invalid with respect to CAW and the water rights claims do not affect the MPWSP.

II. PREEMPTION

In its opening brief CAW proved that the Ordinance is preempted because it conflicts with and encroaches upon the CPUC’s exclusive jurisdiction over public utilities and water utility facilities.¹ The Division of Ratepayer Advocates (“DRA”) similarly concludes that State law preempts the Ordinance.² The Marina Coast Water District (“MCWD”), LandWatch Monterey County (“LandWatch”), Salinas Valley Water Coalition (“Salinas Valley”), and WaterPlus argued that the Ordinance is not preempted and that it applies to CAW. The Ordinance, however, is preempted under all three theories of preemption: express preemption, “field preemption,” and “conflicts preemption.”

A. The Legislature Has Granted the CPUC Regulatory Power

MCWD argues that there is no preemption, express or implied, because the CPUC’s jurisdiction does not include regulation of “sources of water supply” generally and desalination plants specifically.³ MCWD’s arguments ignore the plain language of Article XII, Section 8 of the Constitution, which states, “A city, county, or other public body may not regulate matters over which the Legislature grants **regulatory power** to the Commission.” The CPUC’s comprehensive regulatory authority over water utilities encompasses all potential sources of public utility water supply, including desalination facilities.

Sections 761 through 768 of the Public Utilities Code authorize and obligate the CPUC to regulate all aspects of utility facilities and infrastructure in order to ensure safe and reliable service. The CPUC is authorized to promulgate orders for the construction, maintenance and operation of utility plant and other facilities.⁴ Utilities must obtain a certificate of public convenience and necessity (“CPCN”) from the CPUC prior to commencing construction

¹ *California-American Water Company Opening Brief on Legal Issues for Early Resolution*, filed on July 11, 2012 (“CAW Opening Brief”), pp. 1-10.

² *Opening Brief of the Division of Ratepayer Advocates on Preemption and Water Rights Issues*, filed on July 11, 2012 (“DRA Opening Brief”), pp. 2-11.

³ *Marina Coast Water District’s Opening Brief on Legal Issues Regarding the Feasibility of the Application*, filed July 11, 2012 (“MCWD Opening Brief”), pp. 5-7.

⁴ Pub. Util. Code § 768.

of new facilities.⁵ In addition, the CPUC *is obligated to* order the extension of new facilities where the CPUC finds that it will promote the security and convenience of the public or ensure adequate service.⁶ “Water system” is defined broadly to include “structures . . . and fixtures . . . owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing...of water.”⁷ Desalination facilities are a form of a water treatment plant and meet the statutory definition of a water system.⁸ Accordingly, the CPUC has regulatory power over a desalination facility that would be owned and operated by a water corporation.

B. The Ordinance Conflicts with the CPUC’s Exclusive Jurisdiction

If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.⁹ A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.¹⁰ Local legislation is contradictory to general law when it is inimical thereto.¹¹ Local legislation enters into an area of general law when the Legislature has manifested an intent to “fully occupy” the area of regulation.¹² Here the Ordinance conflicts with state law because it both (1) encroaches upon the CPUC’s exclusive jurisdiction of public water utilities and water utility facilities, and (2) conflicts with the CPUC’s authority to permit and certificate water utility facilities.

1. The CPUC’s Jurisdiction Occupies the Field of Water Utility Regulation

Field preemption requires a comparative statutory analysis: what field of exclusivity does the general law define, what subject matter does the local ordinance regulate, and do the two overlap?¹³ The “field” of regulation at issue here is the regulation of public water utilities and water utility facilities. This area is fully occupied by the CPUC’s jurisdiction as defined in the California Constitution and the Public Utilities Code.¹⁴

WaterPlus, Salinas Valley, and LandWatch attempt to avoid any conflict with the CPUC’s expansive authority over water utilities and utility facilities by narrowly defining the subject matter regulated by the Ordinance. LandWatch argues, “the County has the authority to regulate local health, safety, and welfare where not in conflict

⁵ Pub. Util. Code § 1001.

⁶ Pub. Util. Code § 761.

⁷ Pub. Util. Code § 240.

⁸ Pub. Util. Code § 789.1 also recognizes that “the state’s limited water supply will require investment by water corporations in infrastructure, plant, and facilities to develop **new sources of supply**...and encourage and implement water conservation measures including reclamation and reuse.” (emphasis provided).

⁹ *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 897-898.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *California Grocers Assn. v. City of Los Angeles* (Cal. 2011) 52 Cal. 4th 177, 190.

¹⁴ Indeed, the CPUC indicated its intent to fully occupy the field of California American Water’s water supply for Monterey nearly forty years ago, beginning with Case 9530. See e.g. D.81443, *Investigation on the Commission’s own motion into the operations, practices, service, equipment, facilities, rules, regulations, contracts, and water supply of the Monterey Peninsula District Of California-American Water Company*, 75 CPUC 231 (1973).

with state laws.”¹⁵ Similarly, WaterPlus asserts that the Ordinance was passed for the health, convenience and safety of the general public.¹⁶ Salinas Valley argues that the relevant field of regulation is the management of groundwater resources.¹⁷

The ultimate question in determining field preemption is not a law’s intended purpose but whether law *in effect* regulates in the same field of regulation occupied by the state.¹⁸ The promotion of health and safety may have been the intended purpose of the Ordinance.¹⁹ The *effect* of the Ordinance, however, is to regulate the ownership, permitting, construction and operation of water utility facilities. That the Ordinance is enrolled in the County Health and Safety Code does not change the fact that the subject falls within the exclusive jurisdiction of the CPUC.

The subject matter of the Ordinance and the subject matter of the CPUC’s jurisdiction are substantially identical.²⁰ The Ordinance establishes a certification process that must be followed prior to commencing construction and operations and requires that applicants submit contingency plans to ensure adequate service, demonstrate financial capability, and submit maintenance and operating plans prior to commencing operations.²¹ These requirements mirror the CPUC’s CPCN process and the requirements of GO 103-A. As such, the Ordinance encroaches on a field of regulation fully occupied by the CPUC. There is no room for local regulation and the Ordinance is therefore preempted.

Salinas Valley relies on *Baldwin v. County of Tehama* (“*Baldwin*”) in support of its position that because the Ordinance regulates groundwater resources it is not preempted.²² While *Baldwin* concerns water, it does not have any bearing on the jurisdiction of the CPUC over water utility infrastructure. The local ordinance at issue in *Baldwin* strictly regulated the extraction of groundwater for conservation purposes.²³ The Ordinance, on the other hand, includes only two references to groundwater in four pages. The subject of the Ordinance is not the regulation of groundwater but the regulation of the ownership, construction and operation of desalination plants within Monterey County. Therefore, *Baldwin* does not apply.

Other cases, however, make it clear that the CPUC’s jurisdiction is broad and exclusive.

Once the Commission has assumed jurisdiction over a public utility for the purpose of administering the law applicable to the activities of the utility, the commission has exclusive

¹⁵ *Opening Brief of LandWatch Monterey County Regarding Groundwater Rights and Public Ownership*, filed July 10, 2012 (“LandWatch Opening Brief”), p. 7.

¹⁶ *Opening Brief of WaterPlus Regarding Groundwater Rights and Public Ownership*, filed July 11, 2012 (“WaterPlus Opening Brief”), p. 7.

¹⁷ *Opening Brief on Selected Legal Issues of Salinas Valley Water Coalition*, filed July 11, 2012 (“Salinas Valley Opening Brief”), pp. 5-6.

¹⁸ *Id.*

¹⁹ Salinas Valley Growers provide no evidence that the intent of Section 10.72 is for adequate groundwater management. The County has only justified this ordinance as a public health and safety matter.

²⁰ *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal. App. 2d 16 (Invalidating County Ordinance on grounds of both conflict and field preemption where it interfered with CPUC’s comprehensive jurisdiction over utility facilities under Pub. Util. Code §§ 781, 798, 1001 and GO 103-A)

²¹ Monterey County Ordinance 10.72.020; 10.72.030

²² Salinas Valley Opening Brief, p. 5; *Baldwin v. County of Tehama* (1994) 31 Cal. App. 4th 166.

²³ *Baldwin v. County of Tehama* at 172.

jurisdiction over the regulation and control of such utility subject only to review by the Supreme Court.²⁴

Since 1998, the Commission has exercised jurisdiction regarding the need for CAW to construct new water supplies facilities to comply with State Water Resources Control Board (“SWRCB”) orders, and the provisions of the Public Utilities Code giving the CPUC such authority leave no room for local regulation. Accordingly, CPUC jurisdiction over the MPWSP preempts the Ordinance.

2. The Ordinance Conflicts with CPUC Jurisdiction Over Utility Facilities

The Ordinance is also invalid because (1) it conflicts with the CPUC’s authority under Public Utilities Code Sections 791, 798, 1001 and GO 103-A; and (2) ensuring adequate water supply is a matter of statewide concern.²⁵ As discussed above, the CPUC has comprehensive jurisdiction over water utility facilities and the obligation to ensure adequate supply. Public utilities must obtain a CPCN from the CPUC prior to commencing construction of any new plant or system and must adhere to standards for operation, maintenance, design and construction described in GO 103-A.²⁶ GO 103-A expressly prohibits local authorities from regulating utility facilities. The Ordinance, on the other hand, prohibits private companies such as CAW from owning and operating desalination plants within Monterey County. The Ordinance is therefore in direct conflict with the CPUC’s authority to certificate water utility facilities and in direct conflict with GO 103-A.

MCWD argues that the Ordinance would conflict with the CPUC’s authority only if the CPUC finds that the public convenience and necessity requires that CAW construct the desalination facility. MCWD further argues that the CPUC cannot find that the CAW proposed project is necessary so long as there is a public entity capable of constructing the project and supplying the water to CAW.²⁷ Relying on *Big Creek Lumber v. County of Santa Cruz* (“*Big Creek Lumber*”), MCWD argues that because the CPUC cannot issue a CPCN so long as an alternative to utility ownership exists, there is no direct conflict between the Ordinance and State law. MCWD’s argument on this point is circular and plainly incorrect.

The CPUC is not precluded from issuing a CPCN simply because a feasible alternative may exist. Contrary to MCWD’s assertions, the CPUC is not required to consider every possible alternative prior to approving a CPCN.²⁸ The cases cited by MCWD, *Northern California Power Agency v. Public Utilities CPUC* and *Ventura County Waterworks v. Public Utilities Commission*, do not stand for the proposition that the CPUC cannot issue a CPCN where an alternative is present.²⁹ These cases place no substantive limitations on the CPUC’s ability

²⁴ *Citizens Utility Company v. Superior Court* (1976) 56 Cal.App.3d 399, 407.

²⁵ *California Water & Telephone Co. v. County of Los Angeles* (Cal. App. 2d Dist. 1967) 253 Cal. App. 2d 16 (“If the local legislation conflicts with general law or is a matter of state-wide rather than strictly local concern, the Water Ordinance is void whether or not the general law totally occupies the “field,” however defined.)

²⁶ Pub. Util. Code § 1001.

²⁷ MCWD Opening Brief, p. 9.

²⁸ See *Utility Consumers’ Action Network v. Public Utilities Com.* (2010) 187 Cal. App. 4th 688, 705.

²⁹ *Northern California Power Agency v. Public Utilities Commission* (1971) 5 Cal.3d 370 (Finding that the CPUC must consider every

approve a CPCN where alternatives have been presented.

Big Creek Lumber also does not support MCWD's position. The Court in *Big Creek Lumber* found that State forestry laws did not preempt a local zoning ordinance that regulated the location of timber harvesting.³⁰ The primary factors the Court considered in reaching its conclusion were the narrow scope of the state forestry laws, municipalities' traditional authority over land use zoning, and the fact that the zoning ordinance did not prohibit timber harvesting altogether but simply restricted harvesting temporarily to certain designated parcels.³¹ None of the factors that were present in *Big Creek Lumber* apply here: the CPUC's authority over the regulation of public utilities and public utility facilities is expansive; municipalities have no traditional authority over the regulation of public utility facilities; and the Ordinance would not simply constrain where in CAW could site the facility but would prohibit CAW from constructing, owning and operating the plant altogether. Accordingly, *Big Creek Lumber* is inapplicable.

The conflict presented here is more analogous to the conflicts in *Harbor Carriers, Inc. v. City of Sausalito* ("*Harbor Carriers*") (holding a city ordinance preempted by the CPUC's authority to the extent that it applied to prevent the establishment a ferry terminal), and *California Water & Telephone Co. v. The County of Los Angeles* ("*California Water & Telephone*") (holding a municipal water ordinance preempted by CPUC authority over utility facilities.)³² In both *Harbor Carriers* and *California Water & Telephone*, the ordinances at issue were invalidated based on conflict preemption.³³ As in the instant case, both cases concerned ordinances that regulated public utility facilities. The Ordinance is most similar to the invalid Sausalito ordinance in *Harbor Carriers* insofar as it prohibits a public utility from owning and operating a certain class of facilities. Here, however, the ordinance conflicts with both the CPUC's CPCN process and General Order 103-A, which expressly prohibits local authorities from regulating public water utility facilities. "In any conflict between action by a municipality and a lawful order of the CPUC, the latter prevails."³⁴

Finally, the Ordinance is invalid because ensuring adequate water supply is a matter of statewide concern.³⁵ MCWD concedes this point: "regulation of desalination plants is an issue of statewide concern, not a purely local issue."³⁶ Relying on *Leslie v. Superior Court* ("*Leslie*"), MCWD argues, however, that because the

element of public interest affected by proposed facilities); *Ventura County Waterworks v. Public Util. Com.* (1964) 61 Cal.2d 462 (noting that the CPUC was obliged to consider alternatives proposed by competitor).

³⁰ *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal. 4th 1139.

³¹ *Id.*, at pp. 1160-1161.

³² *Harbor Carriers v. City of Sausalito* (1975) 46 Cal. App. 3d 773; *California Water & Telephone Co. v. County of Los Angeles*, *supra*, 253 Cal. App. 2d 16.

³³ *Harbor Carriers v. City of Sausalito*, 46 Cal. App. 3d at 775; *California Water & Telephone Co. v. County of Los Angeles*, *supra*, 253 Cal. App. 2d at 30 ("No profound exegesis of the contents of the Water Ordinance and the utilities manual and the contents of the cited sections of the Public Utilities Code and the commission's regulations promulgated pursuant thereto is necessary to conclude that the Water Ordinance as applied to respondents conflicts with general law.")

³⁴ *Harbor Carriers v. City of Sausalito*, 46 Cal. App. 3d at 775.

³⁵ *California Water & Telephone Co. v. County of Los Angeles*, *supra*, 253 Cal. App. 2d 16. .

³⁶ MCWD Opening Brief, pp. 6-7.

ordinance is “not purely local” in nature it should be upheld.³⁷ *Leslie* upheld a local building code on the grounds that the ordinance was enacted pursuant to State Housing Law regulatory framework that was of equal stature to the Public Utilities Code.³⁸ MCWD points to the “SWRCB” integrated regional water plans, which may soon include desalination as a potential source of supply; a California Coastal Commission newsletter concerning desalination plants; and recently introduced draft legislation that would amend the Public Resources Code to provide for development of a desalination plant permitting process to be managed by the regional boards as evidence that desalination plants are an issue of state-wide concern.³⁹ MCWD implies that these items somehow legitimize the County Ordinance and states that they may imply that regulatory authority over desalination plants may “lie elsewhere than with the Commission.”⁴⁰

Unlike in *Leslie*, Monterey County did not adopt the County Ordinance pursuant to State law. Neither MCWD nor any other party even asserts that the Ordinance was enacted as part of a broader, statewide regulatory framework. Accordingly, *Leslie* is irrelevant. In addition, none of the items relied upon by MCWD divest the CPUC of its exclusive authority over utility facilities. Draft legislation and agency newsletters, in particular, should be accorded little to no weight. While the SWRCB may consider desalination as a potential source of supply, MCWD points to nothing in the Water Code that would give SWRCB authority over public utilities or public utility facilities. To the contrary, State agencies have concurrent jurisdiction and must work cooperatively in the regulation of public utilities.⁴¹

C. A Desalination Plant is Not a Wastewater or Sewer System

WaterPlus argues the CPUC has reserved to local agencies the authority to regulate wastewater. WaterPlus specifically argues that because a desalination plant produces waste it is a wastewater system subject to the requirements of General Order 103-A, including the requirement that it comply with County Health Department permit regulations.⁴² A desalination plant does not meet the definition of wastewater or “sewer system” simply because it may, as part of its operations, produce waste. To qualify as a sewer system a facility must be necessary and convenient for the “collection and disposal” of waste. A desalination plant is necessary and convenient for treatment and production of potable water, not for the collection and disposal of industrial waste.

Notwithstanding the provisions regarding wastewater and sewer systems, General Order 103-A explicitly states that “local agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution, or other facilities (including the location of such facilities) constructed

³⁷ *Leslie v. Superior Ct.*, 73 Cal. App. 4th 1042 (1999).

³⁸ *Id.*

³⁹ MCWD Opening Brief, p. 8.

⁴⁰ *Id.*

⁴¹ See *Orange County Air Pollution Control District v. Public Utilities Commission* (1971) 4 Cal.3d 945 and D.11-03-048, *In the Matter of the Application of California-American Water Company (U210W) for an Order Authorizing and Imposing a Moratorium on Certain New or Expanded Water Service Connections in its Monterey District*, 2011 Cal. PUC LEXIS 181, *28.

⁴² WaterPlus Opening Brief, p. 8.

or installed by water or wastewater utilities subject to the Commission's jurisdiction."⁴³ This provision eliminates any question that GO 103-A might permit a municipality to regulate a desalination plant or any other water production facility as a wastewater system.

D. The CPUC Process Allows Public Input

Several parties recommended that the CPUC order CAW to partner with a public agency to develop a long-term water supply solution.⁴⁴ These parties argue that a public partner is necessary to provide public input and oversight. As an initial matter, these parties ignore the fact that if the Groundwater Replenishment Project is timely constructed, CAW will obtain a portion of its water supply from a public agency. Additionally, as CAW has explained previously, it has evaluated its options and believes that the MPWSP, owned and operated by CAW, is the best way to meet the SWRCB 2016 deadline.⁴⁵ Finally, the CPUC's regulation of CAW and its facilities, including the MPWSP, provides ample opportunity for public participation and oversight, as this proceeding demonstrates.

E. The CPUC Should Address Preemption

The County of Monterey ("County") and Monterey County Water Resources Agency ("MCWRA") state that the CPUC does not have to address the Ordinance, because the County has filed a Superior Court complaint for declaratory relief.⁴⁶ While CAW does not dispute the Superior Court's ability to provide declaratory relief, it still believes that it is important for the CPUC to address this threshold issue. As ALJ Weatherford correctly noted, "this issue of preemption is critical to this proceeding."⁴⁷ As such, the CPUC should make its own finding regarding preemption so that it may move forward with its review of the MPWSP. As discussed above, the Ordinance limiting the ownership and operation of a desalination facility to public agencies is preempted and therefore is not an obstacle to the MPWSP. With the SWRCB December 2016 deadline looming, CAW requests that the CPUC confirm this finding and proceed with its timely review of the MPWSP.

III. SALINAS VALLEY GROUNDWATER BASIN

In their opening briefs several parties discussed (1) whether appropriative rights are available for the MPWSP based on the availability of "surplus" water, (2) whether appropriative rights are available for the MPWSP based on the availability of "salvaged" water, and (3) the sufficiency of the record regarding adverse impacts or

⁴³ General Order 103-A, Sec. I(9).

⁴⁴ *Opening Brief on Various Legal Issues of Monterey County Farm Bureau*, filed July 10, 2012 ("Farm Bureau Opening Brief"), Section III; *LandWatch Opening Brief*, pp. 7-8; *Opening Brief on Various Legal Issues by Citizens for Public Water* (Citizens Opening Brief), filed July 11, 2012, pp. 15-16; *Salinas Valley Opening Brief*, pp. 7-10.

⁴⁵ *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*, filed April 23, 2012 ("Application"), p. 12; *California-American Water Company Reply to Protests*, filed June 4, 2012, p. 10.

⁴⁶ *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*, filed July 11, 2012 ("Monterey, MCWRA Opening Brief"), pp. 1-2.

⁴⁷ *Administrative Law Judge's Ruling*, filed June 1, 2012 ("June 1 Ruling"), p. 3.

injuries to other water right holders associated with pumping water from the Salinas Valley Groundwater Basin (“SVGB”). MCWD also argued that its Annexation Agreement limits the water available to CAW. CAW will address these issues below.

Additionally, as CAW noted in its opening brief, it is important to emphasize that there is no State, County, or other permit or entitlement requirement for development of groundwater in the proposed location of the MPWSP.⁴⁸ Unlike surface water rights, there is no established State, County or local application or permitting requirement for initiating or developing a “groundwater right”; rather, in most unadjudicated groundwater basins such as the SVGB, a groundwater right is established by pumping and beneficially using groundwater from the groundwater basin.

A. The Groundwater Can Properly Be Characterized as “Surplus”

As CAW explained in its opening brief, the water that it will pump from the SVGB is “surplus” “because it can be pumped without adversely impacting other users or groundwater elevations and conditions in the SVGB.”⁴⁹ Several parties asserted that the SVGB is in overdraft and there is no surplus available for new groundwater appropriators.⁵⁰ An examination of the definition of “surplus” however, reveals that this assertion is incorrect.

“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.”⁵¹ The prior right holder’s “right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus.”⁵² The court in *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351 discussed this principle in the context of surface water:

[I]s there then water wasted or unused or not put to any beneficial use? If so, the supply or product of the stream may be said to be ample for all, a surplus or excess exists, no injunction may issue against the taking of such surplus or excess [Citation], and the appropriator may take the surplus or excess without compensation.⁵³

Here, the small amount of water that CAW may pump from the SVGB is “surplus” and available for appropriation. That highly-contaminated brackish water is unusable by other pumpers and SVGB right holders and is thus not “needed for the reasonable beneficial use of those having prior rights.”⁵⁴ Stated differently, the rights of

⁴⁸ CAW Opening Brief, p. 12.

⁴⁹ CAW Opening Brief, p. 15.

⁵⁰ LandWatch Opening Brief, p. 2; Salinas Valley Opening Brief, p. 10; Citizens Opening Brief, p. 5.

⁵¹ *City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1241 (emphasis provided); see also, *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-926; *Stevinson Water District v. Roduner* (1950) 36 Cal.2d 264, 270 (“whenever water in a natural stream or watercourse. . . is **not reasonably required for beneficial use by the owners of paramount rights**, whether the water is foreign or part of the natural flow, such owners cannot prevent use of the waters by other persons, and the water must be regarded as surplus water subject to appropriation by those who can beneficially use it” (emphasis provided)).

⁵² *Katz v. Walkinshaw* (1903) 141 Cal. 116, 135-136.

⁵³ *Id.* at 368-369.

⁵⁴ *City of Barstow*, 23 Cal. 4th at 1241.

prior right holders do not extend to the subject water because the water is “not necessary” for use on their land.⁵⁵ The water cannot be used on their land. Because the brackish water cannot be used by prior right holders, it is necessarily “wasted or unused or not [being] put to any beneficial use.”⁵⁶ By definition, the small amount of water that CAW will pump from the SVGB as part of the MPWSP is “surplus” and subject to appropriation. Moreover, CAW’s pumping of this water will contribute to the retardation and reversal of seawater intrusion to the SVGB, and therefore will actually contribute to an **increase** in the usable quantity of groundwater available to existing pumpers and other right holders in the SVGB.

The cases generally stating as a rule that there is no surplus water available for appropriation in an overdrafted groundwater basin are distinguishable from this case because those cases involve situations where the water to be appropriated is needed for the beneficial use of a prior right holder and the prior right holder is complaining of injury because it could and would put the appropriated water to reasonable beneficial use. For example, in *Corona Foothill Lemon Co. v. Fisher* (1937) 8 Cal.2d 522, the plaintiffs overlying groundwater right holders alleged that the defendants appropriated large quantities of water from an overdrafted basin and pumped the water outside of the basin.⁵⁷ The trial court found that there was no surplus water in the basin because the amount of water in the basin was not more than the amount necessarily required for domestic and irrigation uses on overlying lands. It also found that the defendants’ operations had substantially lowered the water table in the basin and in the plaintiffs’ wells – resulting in irreparable loss and injury to the plaintiffs.⁵⁸ On appeal, the reviewing court found that there was no surplus for appropriation because “the *overlying owners* were putting *all* water in the field to *reasonable beneficial use*.”⁵⁹ Through the operation of the MPWSP, CAW may pump SVGB groundwater that currently is unusable by other right holders, and may do so without adversely affecting the SVGB or the other existing pumpers and right holders. Under these unique circumstances, it cannot be accurately asserted that all of the safe yield of the SVGB is being put to reasonable beneficial use by overlying pumpers, nor could it be fairly argued that CAW’s development of small quantities of brackish groundwater will affect any reasonable beneficial use being made by those pumpers. Under these circumstances, such “surplus” groundwater may be appropriated by CAW.

Finally, a finding that the unusable brackish water is “surplus” water available for appropriation serves the policy set forth in Article X, Section 2 of the California Constitution to foster the beneficial use of water and avoid waste.⁶⁰ Here, the brackish water cannot otherwise be used by other overlies or potential appropriators, because

⁵⁵ *Katz*, 141 Cal. at 135-136.

⁵⁶ *Peabody*, 2 Cal.2d at 368.

⁵⁷ *Id.* at 523-524.

⁵⁸ *Id.* at 525.

⁵⁹ *Id.* at 531 (original emphasis).

⁶⁰ See, *Pasadena*, 33 Cal.2d at 926 (“It is the policy of the state to foster the beneficial use of water and discourage waste, and when there is a surplus, whether of surface or ground water, the holder of prior rights may not enjoin its appropriation”); *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 436 (“It is not the policy of the law to permit any of the available waters of the country to remain unused, or to

of its degraded quality, and its use by CAW will not injure the SVGB or other right holders. Small quantities of SVGB groundwater may incidentally be developed as part of the MPWSP. The majority of water pumped by the proposed slant wells will be delivered to CAW's service area for municipal uses, less an amount of water equal to the percentage of water determined to originate from the SVGB. The SVGB water will be treated and delivered for overlying agricultural uses in the SVGB as part of the Castroville Seawater Intrusion Project, in lieu of a like volume of groundwater pumped from the SVGB by those users or the MCWRA. The small amount of brackish groundwater that may be pumped by the MPWSP is "surplus" to the needs of other SVGB pumpers and is available for appropriation by CAW as part of the MPWSP. The MPWSP involves the potential development of a small amount of otherwise unusable water from the SVGB, in order to create a substantial water supply for the Monterey Peninsula, while also **increasing** the amount of usable groundwater supply in the SVGB. The MPWSP is fully consistent with and in furtherance of the "maximum beneficial use of water" mandated by Article X, Section 2 of the California Constitution; indeed, the failure to implement the MPWSP due to "water rights" concerns, in these particular circumstances, may be contrary to the constitutional mandate.

B. The Groundwater Can Properly Be Characterized as "Salvaged"

In its opening brief, CAW demonstrated that the MPWSP "is also consistent with salvaged and developed water doctrines and statutes encouraging the use of desalinated and reclaimed waters."⁶¹ LandWatch's opening brief asserts, "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."⁶² The subject water is "salvaged" water, however, because the MPWSP will make use of brackish water that is otherwise "lost" to the SVGB and its right holders.

"Salvaged water refers to water that is created by efforts to make existing water use practices more efficient or otherwise to add to the amount of water that was previously available."⁶³ As discussed in LandWatch's brief, salvaged water is available for use by the salvager if no injury results to other lawful users. Given the unique nature of the MPWSP, the cases addressing appropriation of salvaged water are not factually similar to CAW's situation. However, the principles discussed in those cases support the assertion that the brackish water that CAW may incidentally pump as part of the MPWSP is "salvaged" water.

In *Wiggins v. Muscupiabe Land and Water Company* (1896) 113 Cal.182, the court addressed a situation where a stream flowed through a portion of the defendant's property to the plaintiff's property and then again entered the defendant's property. The defendant constructed and maintained a dam across the stream above the

allow one having the natural advantage of a situation which gives him a legal right to water to prevent another from using it, while he, himself, does not desire to do so"); *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 370-371 (same).

⁶¹ CAW Opening Brief, p. 18.

⁶² LandWatch Opening Brief, p. 2.

⁶³ 1 Slater, California Water Law and Policy, § 2.08[10], at p. 2-20.

plaintiff's property and diverted all of the water from the stream onto its land. The plaintiff sued for damages and to enjoin the defendant's further interference with the flow of the stream. As part of its judgment, the trial court ruled that the defendant may provide a means for carrying to the plaintiff's land, without diminution, all of the waters of the stream in excess of one-hundred inches, and that if the defendant elected to take this action, it had the right to appropriate the one-hundred inches.⁶⁴ The basis for this portion of the trial court's judgment was a finding that one-hundred inches of water in the stream was lost by absorption and evaporation between the time that the stream entered the defendant's property and before it reached the plaintiff's property.⁶⁵ The appellate court approved the trial court's decision and noted that it "accord[ed] with the simplest principles of equity."⁶⁶

The plaintiff could under no circumstances be entitled to the use of more water than would reach his land by the natural flow of the stream, and, if he receives this flow upon his land, it is immaterial to him whether it is received by means of the natural course of the stream or by artificial means. On the other hand, if the defendant is enabled by artificial means to give to the plaintiff all of the water he is entitled to receive, no reason can be assigned why it should not be permitted to divert from the stream where it enters its land and preserve and utilize the one hundred inches which would otherwise be lost by absorption and evaporation.⁶⁷

In *Pomona Land and Water Co. v. San Antonio Water Co.* ("Pomona") (1908) 152 Cal. 618, the court addressed a situation where the plaintiff and defendant had entered into an agreement allocating the natural flow of a creek at a point where it reached a dam. The plaintiff conveyed its water rights to the defendant and the defendant agreed to make a distribution of the natural flow of the creek at the dam pursuant to the agreed allocation. The defendant, who owned land riparian to the creek above the dam,⁶⁸ measured the natural flow of the creek at a point two and a half miles above the dam and again at the dam and determined that the creek was losing nineteen percent of its surface flow to seepage, percolation and evaporation between those two points.⁶⁹ Under the belief that its only obligation was to distribute to the plaintiff its allocation of the natural flow at the dam, as agreed, the defendant impounded the water of the creek in a thirty-two inch pipeline and carried it down above the dam, delivering the agreed amount to the plaintiff and retaining the salvaged water and its allocation of the natural flow. Additionally, after the natural flow of the creek had been impounded in the pipeline and the creek bed dried up, the defendant laid a pipeline in the saturated gravel and salvaged another twenty-five to fifty inches of water that it also used as its own. The plaintiff objected to the defendant's practice and argued that the salvaged water should also be allocated pursuant to its agreement with the defendant. With regard to the salvaged water, the court stated:

It may not successfully be disputed that if, in fact, all the water to which plaintiffs were entitled was

⁶⁴ *Wiggins v. Muscupiabe Land and Water Company* (1896) 113 Cal.182 at 195-196.

⁶⁵ *Id.* at 196.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The water at issue was diverted and used under claims of appropriation. (*Pomona*, 152 Cal. at 624.)

⁶⁹ This work was actually completed by a power company to which the defendant granted permission to conduct certain work and erect necessary structures for developing power from the dam. However, the court agreed with the parties that the power company was simply an agent of the defendant and the power company was dropped from the case. For ease of reference, the power company's acts are attributed to the defendant herein.

the one half of the natural flow of the stream as it reached the division dam, and that if in fact they receive this water, then the nineteen, or any other percentage, which was saved by the economical method of impounding the water above, and the twenty-five inches, more or less, which were rescued as developed water from the bed of the stream, were essentially new waters, the right to use and distribute which belonged to defendant.

So here, if plaintiffs get the one half of the natural flow to which they are entitled delivered, unimpaired in quantity and quality, through a pipe-line, they are not injured by the fact that other water, which otherwise would go to waste, as merely supporting the surface flow, was rescued. Nor can they lay claim to any of the water so saved.⁷⁰

The salvaged water doctrine thus supports CAW's position that an appropriator may appropriate water (through improved efficiency, conservation or other special measures) that is unavailable or unusable to other right holders (i.e., is "lost" to them), to the extent other right holders do not hold an entitlement or right to the salvaged water and are not injured by the salvage operation.

The brackish water that CAW may incidentally pump as part of the MPWSP is unusable by other right holders and is thus "lost" to other pumpers as it flows seawater to the ocean. The area of the SVGB that is contaminated by the landward movement of seawater into the SVGB is not currently used or usable by overlying pumpers in the SVGB, because the quality of this water is not suitable for agricultural uses. CAW's potential incidental development of the contaminated groundwater that is captured in this transition zone with the ocean will not adversely affect other pumpers in the SVGB, and could incidentally benefit such other pumpers by retarding or reversing seawater intrusion that currently limits other pumpers ability to use non-contaminated SVGB groundwater. CAW is aware of no legitimate claim or argument by other pumpers that this brackish water is being or will be put to a beneficial use before it wastes to the ocean. By virtue of the MPWSP and the technology it will employ, CAW will be able to recover (salvage) the brackish water, desalt and treat it to a quality suitable for irrigation, and return the water to public agencies to distribute for beneficial uses in the SVGB in lieu of overlyers pumping that volume of water. The proposed operation of the slant wells has not been shown by any party to adversely affect the SVGB or any pumpers in the SVGB. Under these circumstances, the salvaged water doctrine informs analysis of the proposed MPWSP, and furthers the policy set forth in Article X, Section 2 of the California Constitution.

C. The Project Will Not Adversely Affect the SVGB

LandWatch's opening brief asserts that "CAW must show that its pumping would not impair *any* groundwater rights."⁷¹ CAW's opening brief addressed the question of potential impacts from the proposed slant well, and recognized that "[t]he slant well program in the similar North Marina project was extensively analyzed in the CPUC's 2009 Final Environmental Impact Report ("FEIR"), and the CPUC concluded that it would not adversely affect other groundwater users or groundwater elevations and conditions in the SVGB."⁷²

⁷⁰ *Id.* at 623, 631.

⁷¹ *Id.* (original emphasis).

⁷² CAW Opening Brief, p. 15; see A.04-09-019, Reference Exhibit B, *Final Environmental Impact Report*, dated October 30, 2009 ("FEIR")

Specifically, with respect to the North Marina project slant wells, the CPUC found: (1) the drawdown effects and localized groundwater levels and conditions in the vicinity of the proposed slant wells will not cause damage to neighboring water supply wells;⁷³ (2) operation of the slant wells would not contribute to an imbalance of recharge and extraction in the SVGB and would not disrupt the balance of recharge and extraction from the SVGB;⁷⁴ (3) the quantity of contaminated groundwater that actually originates from the SVGB would be fully offset by the proposed return of desalinated water to the SVGB in an amount equal to the volume of SVGB-groundwater extracted from the slant wells;⁷⁵ (4) seawater intrusion in the SVGB would not increase and water quality conditions would not degrade over the long-term as a result of the slant well program, and during some periods and in certain areas of the SVGB, the slant well program would actually cause seawater intrusion in the SVGB to recede at a faster rate than without the slant well program;⁷⁶ (5) “Because the rate of regional seawater intrusion would be reduced over time and groundwater quality would improve, the [slant well program] would not contribute to groundwater degradation” in the SVGB;⁷⁷ and (6) operation of the slant wells would not adversely impact surface or groundwater resources outside of the Project area.⁷⁸

CAW need not specifically address the lack of harm to every other pumper in the SVGB, on an individual basis, in order to demonstrate overall effects (or lack thereof) relating to implementation of the MPWSP. The best available science supports the conclusion that there will be no adverse effect to the SVGB or pumpers, and no information has been produced to the contrary.

D. The Annexation Agreement Does Not Affect the MPWSP

In its opening brief, MCWD repeats its claim that the 1996 *Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands* (“Annexation Agreement”) limits CAW’s proposed use of water for the MPWSP on the CEMEX property. As CAW explained in its opening brief, despite, any limitations and restrictions that the Annexation Agreement may have with respect to the use of groundwater on the CEMEX property, they have no application to the MPWSP because overlying or contractual groundwater rights, and associated uses and limitations, are legally distinct from appropriative groundwater rights and uses.⁷⁹ Assuming CAW can establish an appropriative groundwater right in connection with the MPWSP, as discussed above, that right would be legally distinct from the overlying or contractual groundwater rights (and any limitations thereon) that may be appurtenant

§ 5.2.2.1.

⁷³ FEIR, at 4.2-47, E-27 – E-28 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

⁷⁴ FEIR, at 4.2-50 -51, E-27 –E-28 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

⁷⁵ FEIR, at 4.2-50.

⁷⁶ FEIR, at 4.2-52, E-27 – E-28 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

⁷⁷ FEIR, at 4.2-52.

⁷⁸ FEIR, at E-30 (Appendix E: Geoscience, North Marina Ground Water Model Evaluation of Potential Projects, July 25, 2008).

⁷⁹ CAW Opening Brief, pp. 16-17; see *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 (“Appropriation” refers “to any taking of water other than riparian or overlying uses”); *Corona Foothill Lemon Company v. Lillibridge* (1937) 8 Cal.2d 522.

to the use of groundwater on the CEMEX property.

IV. OUTFALL CAPACITY

In its opening brief, MCWD claims, without citing to any support, that there is not sufficient capacity available in the outfall for Monterey Regional Water Pollution Control Agency ("MRWPCA") to ensure the exercise of MCWD's full rights and to simultaneously serve the MPWSP.⁸⁰ As CAW discussed in its opening brief, however, it had a technical analysis performed that confirmed that the outfall has sufficient capacity to accommodate MRWPCA average daily wastewater flows, the brine discharge from the MPWSP desalination facility, and the original MCWD Regional Desalination Project ("RDP") brine discharge (even though the RDP will not be constructed).⁸¹ Moreover, since the purpose of the Outfall Agreement was to negotiate the use of the outfall for MCWD's assumed participation in the RDP, it is likely that performance of the contract will be excused because (1) an implied condition of the contract is not met, (2) performance of the contract is impossible, and (3) the purpose of the contract has been frustrated.⁸²

V. GROUNDWATER REPLENISHMENT PROJECT

Several parties raised water rights issues related to the Groundwater Replenishment Project.⁸³ In its opening brief, CAW expressed its strong support for Groundwater Replenishment Project, which could be highly beneficial to the Monterey Peninsula.⁸⁴ It is important to keep in mind, however, that if for some reason the Groundwater Replenishment Project does not go forward, CAW will still be able to proceed with the MPWSP.

The parties involved in the Groundwater Replenishment Project are currently working to address water rights and other project development matters. California American Water is simply seeking the ability to enter into a contract to purchase water from the Groundwater Replenishment Project; there is no need for the CPUC to make a finding with respect to water rights in this area. Nonetheless, MRWPCA thoroughly addressed water rights and the Groundwater Replenishment Project in its opening brief. California American Water continues to defer to MRWPCA on this issue.

VI. OTHER ISSUES RAISED BY PARTIES

Despite the clear delineation of the issues to be briefed in the June 1 ruling, several parties raised additional issues in their opening briefs. MCWD was most egregious in this regard. Although MCWD's request to address additional issues in its brief⁸⁵ has not been granted, MCWD's brief went well beyond the two issues identified in the June 1 ruling. Without permission from the ALJ, MCWD briefed issues regarding the environmental

⁸⁰ MCWD Opening Brief, p. 15.

⁸¹ *Direct Testimony of Richard C. Svindland*, served April 23, 2012 ("Svindland Direct"), Attachment 5, p. 2.

⁸² CAW Opening Brief, pp. 20-24; see *Habitat Trust for Wildlife, Inc. v. City* (2009) 175 Cal.App.4th 1306, 1335– 1336.

⁸³ DRA Opening Brief, pp. 11-14; MCWD Opening Brief, pp. 12-15; LandWatch Opening Brief, pp. 1-6; Farm Bureau Opening Brief, Section II; LandWatch Opening Brief, pp. 1-6; Monterey, MCWRA Opening Brief, pp. 2-3; Citizens Opening Brief, pp. 3-7; Salinas Valley Opening Brief, pp. 7-14.

⁸⁴ CAW Opening Brief, p. 23.

⁸⁵ See *Marina Coast Water District's Motion to Modify and Clarify Assigned Commissioner's Scoping Memo and Ruling*, filed July 6, 2012.

review process, State Revolving Fund financing, and land acquisition, among others. Contrary to the ALJ's instructions, MCWD used its opening brief to repeat the same arguments that it has made in other pleadings and in other proceedings. Since the majority of this material is recycled from other pleadings, and because it is beyond the scope of the ruling, CAW will not address MCWD's additional issues in this reply brief. In addition to MCWD, other parties raised issues beyond the scope of the June 1 ruling such as cost recovery,⁸⁶ technical specifications,⁸⁷ contingency plans,⁸⁸ and the CEQA review process.⁸⁹ As with MCWD's additional issues, CAW will not be addressing these issues because they are beyond the scope of the June 1 ruling. Moreover, the issues these parties raised will be addressed during the course of the CPCN and/or CEQA review process.

VII. CONCLUSION

As discussed above, the claims of certain parties as to the validity of the Ordinance are contrary to law and fact. The Ordinance is invalid with respect to CAW and is not an obstacle to the implementation of the MPWSP. The claims regarding water rights are equally without merit and do not affect the feasibility of the MPWSP. CAW urges the CPUC to proceed with its review and authorize CAW to implement the MPWSP in time to meet the SWRCB 2016 deadline.

July 25, 2012

Respectfully submitted,

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⁸⁶ Citizens Opening Brief, pp. 14-16.

⁸⁷ LandWatch Opening Brief, pp. 4-6.

⁸⁸ DRA Opening Brief, pp. 11-14.

⁸⁹ WaterPlus Opening Brief, pp. 9-13.