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

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)

**REPLY OF THE PUBLIC TRUST ALLIANCE TO OPENING BRIEFS ON
THRESHOLD LEGAL ISSUES OF FEASIBILITY DESCRIBED IN RULING DATED
JUNE 1 , 2012**

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Reply of The Public Trust Alliance on Threshold Legal Issues

I. Introduction

The Public Trust Alliance speaks from the non-profit sector with a voice dedicated to solving natural resource use debates in a manner consistent with long term public interests while at the same time defending the ecological capacity of the natural systems within which we live. Future generations of human beings will require a livable planet if we hope to survive. This concern for ecological sustainability is an essential element of the Public Trust Doctrine and the long term public interests for which we speak. Our experience is that the Public Trust Doctrine can be a valuable aid in clarifying viable development paths in situations where people want to know: what does "the law" require? When applied along with the more familiar legal structures with which it has co-existed for centuries, problem-solving is often measurably enhanced and outcomes are more closely aligned with long term public interests when increased attention is given to Public Trust concerns.

State Agencies such as the California Public Utilities Commission and the State Water Resources Control Board derive and exercise both additional responsibilities and broader authority through the Public Trust Doctrine.¹ As we advocate responsible conduct within the law, one of our missions is to raise the profile of the Public Trust and demonstrate its usefulness in assisting public decision-making processes where some of our most valuable public resources are at stake. History has shown that we have a lot to gain by such deliberation.²

Planning and implementing a public water supply system for the Monterey Peninsula in the face of global climate change, population and economic growth, and all of those dynamics combined with legal restrictions on potential sources and technologies is a complex affair indeed. But it is a process that has been going on for decades in Monterey County and has been exhaustively studied and debated. During this history, individuals and institutions have behaved pretty much as expected: they have taken steps to advance their interests by asserting their rights as they see them. The crisis seems to appear when other members of the community don't share similar perspectives and, at times, even dare to conduct their business as if living in another

¹ See, eg. *National Audobon Society v. Superior Court*, 33 Cal.3d 419 (1983)

² See, eg., Coastal States Organization, Inc., Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine To the Management of Lands, Waters and living Resources of the Coastal States, (with literally hundreds of citations) (Second Edition 1997)

reality. The drama has been unfolding for decades on an institutional stage comprising many dimensions.

In this Application, a regulated private corporation seeks a Certificate of Public Convenience and Necessity ("CPCN") on an accelerated basis in order to finance and construct a desalinization plant in time to be on line when State mandated restrictions are scheduled to be enforced. It seems that some kind of emergency action is needed so that a broad evaluation of alternatives is impossible and legal questions can only be engaged on a very narrow basis. The Public Trust Alliance did not file an Opening Brief because the Public Trust is not "our sword" that we can swing in an adversary battle, but rather it functions more like a collective "shield" that is raised by various parties (some with more direct constitutional responsibilities than others) to protect vulnerable public interests from being unnecessarily diminished or inappropriately "given away" in the course of adversarial decision-making processes. It has been used countless times in the past to clarify feasible development options and bring public action more in line with long term public interests. We intend to call attention to the law in this way and hope that it will be of assistance in solving what appears to be a very complex challenge.

II. This Is Not a Totally Novel Situation

"Pre-emption" and Private Water Rights Have Been Seen and Rejected Before

More than a hundred years ago, a water company brought its case all the way to the U.S. Supreme Court when it had a scheme to serve the water needs of a Borough in New York City and, familiarly enough, before the various contracts and permits had been executed with various cities and agencies during the years that the plan took form, the "threatened" jurisdiction passed a law, for the purpose of protecting the health and safety of residents, prohibiting the export of water.³ There weren't any cases right on point because nobody had yet proposed commercially laying pipes in that configuration. But everybody recognized that the competent problem solving institution was a court because of the implicated property rights. And because the Federal Constitution would be invoked due to impacts on interstate commerce (a large proportion of the flow of the Passaic River in New Jersey could be called upon if anticipated demands actually emerged), it naturally ended up on the desk of the U.S. Supreme Court.

The Water Company argued that the statute was pre-empted by Constitutional Law, and in any event, New Jersey could not interfere with the private contracts the water company had

³ *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908)

made. The eminent jurist, Oliver Wendell Holmes, Jr., a true master of common law, wrote the short but powerful majority opinion that is sometimes cited as a touchstone for recognizing important public rights in water in this country. Holmes is well known for his masterful dissents which later became milestones of our now "settled" civil rights law. But on this occasion, he led a majority of eight Supreme Court Justices in not over-turning the local statute and going on to say:

"few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots...The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."⁴

While the technical issues of relative rights and possible pre-emption had been seen as the "obvious" legal road map by the players, Holmes led the majority of our nation's highest Court on another tack (with only one dissenting vote):

"We will not say that the considerations that we have stated do not warrant the conclusion reached; and we shall not attempt to revise the opinion of the local court upon the local law, if, for the purpose of decision, we accept the argument of the plaintiff in error that it is open to revision when constitutional rights are set up. Neither shall we consider whether such a statute as the one before us might not be upheld even if the lower riparian proprietors collectively were the absolute owners of the stream...[citation omitted] But we prefer to put the authority, which cannot be denied to the State upon a broader ground than that which was emphasized below, since in our opinion it is independent of the more or less attenuated residuum of title that the State may be said to possess.

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves by what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance. But points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side."⁵

⁴ *Id.* at 356

⁵ *Id.* at 354-355

The 1908 U.S. Supreme Court did not allow the private ownership and operation of the New York water supply facilities because it was fundamentally incompatible with the public interest and public obligations of the States involved with regard to their stewardship of water resources for the benefit of the public. This was not a radical Court. With this ruling, the U.S. Supreme Court firmly recognized the existence of a protected public space upon which private property claims might intrude, but the public character of which, every State could and should preserve and protect by virtue of its sovereignty and its trust relationships with its inhabitants and their natural environment.

While many of the Opening Briefs addressing the Monterey Peninsula Water Supply Project describe the deferential history involved in pre-emption (eg. the skepticism of courts to find pre-emption when the intent of the "higher" authority is not express), none have recounted essential experience with application of independent public interest principles as institutional background of water rights or efforts to develop or market public trust resources such as the waters of California. Since the U.S. Supreme Court went that direction when looking at the New York water supply case a hundred years ago on its first impression, we urge a similar approach now in addressing legal issues in financing and constructing a proposed public water supply project for the Monterey Peninsula.

An extended technical exercise in anticipating the outcome of a hypothetical court case is speculative at best, but to use such a prediction as the basis for recommending Commission action in the face of vociferous opposition by potential litigants seems rather the height of folly. This is especially true in this case where it isn't even necessary due to substantial alternative proposals involving public actors who are in fact, actually capable of fulfilling the required public accountability.

The suggestion that the Commission should bend over backward to endorse the California-American Water Company in privately owning and operating the new public water supply in Monterey County "in the public interest" when so much ratepayer experience is to the contrary borders on the absurd. The residents of the town of Felton in Santa Cruz County had recent experience with how California-American would have treated them if the Company had been allowed to proceed with their plans for a desalinization plant at Moss Landing. When they were told what their new rates would be, they wisely went about the task of purchasing back their own utility services. They were able to do this partly because public water systems in California are governed by a Constitution, Codes and traditions of public ownership whereby such services cannot be sold for any premium above the value of the physical facilities and price originally paid for the franchise.⁶

⁶ See, Cal. Water Code Section 1392

III. A Tradition of Focused Legal Scrutiny

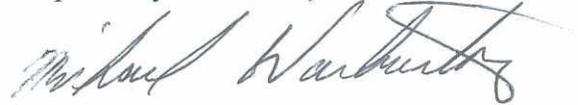
When the eminent Public Trust legal scholar Joseph Sax first published his seminal article, he wrote:

"When a State holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self interest of private parties."⁷

Yet this is exactly what the California Public Utilities Commission would be doing on a purely speculative basis if it took the radical step of endorsing private ownership and control of the proposed desalinization plant in Marina. As described in MCWD's opening brief, even absent any consideration of the above analysis, the CPUC is under long settled obligation to consider the proposals of public entities when they may be capable of providing cheaper or better service than a private applicant for a CPCN.⁸ While that particular strand of public interest authority may resonate more with the Commission, it can also be seen as one more addition on top of a veritable mountain of other public interest and environmental authority. We urge restraint in focusing on the project identified in the application.

Dated July 25, 2012

Respectfully Submitted,



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The Public Trust Alliance

⁷ Sax, Joseph L., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. R. 489-491 (1970)

⁸ *Ventura County Water Works v. Public Utilities Comm.*, 61 Cal.2d 462 (1964)