

1I. Groundwater Management Compliance

The area of benefit overlies a portion of the Salinas Valley Groundwater Basin (Groundwater Basin Number 3-4.01, a portion of the Carmel Valley Groundwater Basin (3-7), and the Seaside Groundwater Basin (Groundwater Basin Number 3-4.08). However, of the project sponsors, only MPWMD has statutory authority over groundwater management and this applies only to the Seaside Groundwater Basin (3-4.08) and the Carmel Valley Groundwater Basin (3-7). Project sponsors with projects that could affect the Salinas Valley Groundwater Basin do not have statutory authority to manage groundwater in that basin. That authority rests with the Monterey County Water Resources Agency, which is not a part of this application.

If the Proposal does not contain a groundwater project or other project that directly affect groundwater levels or quality, so indicate, and include in Attachment 1 the justification for such a conclusion.

N/A

Identification of projects in the Proposal that involve any groundwater projects or other projects that directly affect groundwater levels or quality AND the agencies that will implement such project(s).

City of Salinas Stormwater Diversion: Initially, this project would provide additional sourcewater water to the MRWPCA Regional Treatment Plant for treatment and reuse for agricultural irrigation purposes in the Castroville area in Basin 3-4.01. This project would be implemented by the City of Salinas. Use of recycled water offsets groundwater pumping in the 400-foot aquifer, which is the primary aquifer being pumped near the coast. Because saltwater continues to advance inland in this aquifer, a reduction in groundwater pumping near the coast due to additional delivery of recycled water would help maintain groundwater elevations and preserve water quality. The 180-foot aquifer near the coast in this basin is saltwater intruded and is not currently being pumped for agricultural or domestic use. The 400-foot aquifer is considered to be confined in the area of benefit, so impacts on groundwater levels as well as benefits can spread to a large number of wells.

Once the Seaside Basin Groundwater Replenishment (GWR) Project is completed (late 2016 or early 2017), this stormwater would become part of a portfolio of source water that is recycled to supply both tertiary-treated water for agricultural use in the Salinas Valley and advanced treated water for indirect potable reuse in the Seaside Basin (3-4.08). A reduction in extraction of native groundwater in the Seaside Groundwater Basin is required under an adjudication of the basin in order to prevent seawater intrusion into the two drinking water aquifers. The GWR Project would provide highly treated water for injection and eventual extraction in the Seaside Basin.

Lake El Estero Diversion: This project has similar effects to the City of Salinas diversion and would be implemented by the City of Monterey.

Pacific Grove Recycled Water Onsite Retrofits: Because the Seaside Groundwater Basin and the Carmel Valley Groundwater Basin (3-7) are both used to provide drinking water, this project would result in reductions in production in both basins. This project would be implemented by the City of Pacific Grove.

Attachment 1 – Authorizing and Eligibility Requirements

The primary problem in both basins is chronic overproduction, although the problem in the Carmel River Groundwater Basin is usually seasonal overproduction during the dry season (note that several dry years in a row do cause a cumulative effect); whereas the overproduction problem in the Seaside Basin is primarily the cumulative effect of overproduction over several years. Both basins are not considered water quality impaired. Therefore, the primary benefit is in helping to maintain groundwater levels or reduce the rate that the basins are depleted.

High Efficiency Applied Retrofit Targets (“HEART”) Pilot Program: Water conservation in the Monterey Peninsula region would have similar effects on groundwater basins as the City of Pacific Grove Project. This project would be implemented by the Monterey Peninsula Water Management District.

The status of the applicable GWMP compliance option as described below:

The applicant or participating agency has prepared and implemented a GWMP that is in compliance with CWC §10753.7.

N/A

The applicant or participating agency consents to be subject to a GWMP, basin-wide management plan, or other IRWM program or plan that meets the requirements of CWC §10753.7.

N/A

The applicant or participating agency conforms to the requirements of an adjudication of water rights in the subject groundwater basin.

The Seaside Groundwater Basin (3-4.08) was adjudicated in 2006. A copy is attached (Exhibit A). Water rights in the Carmel River Groundwater Basin were the subject of SWRCB Decision No. 1632 (copy attached, Exhibit B), SWRCB Order 95-10 ((copy attached, Exhibit C) and Cease-and-Desist Order 2009-0060 (copy attached, Exhibit D).

The applicant or participating agency is in the process of revising the GWMP to be compliant with CWC §10753. In which case, Attachment 1 must state the estimated date for adoption, which must be within one year of application due date (see the Schedule in Table 3).

N/A

Attachment 1 Components

- 1A. Authorizing Documentation
- 1B. Eligible Applicant Documentation
- 1C. Acknowledgement Form –
Submittal of Additional
Information
- 1D. Adopted IRWM Plan and Proof of
Formal Adoption
- 1E. Project Consistency with an
adopted IRWM Plan
- 1F. Urban Water Management
Compliance
- 1G. Agricultural Water Management
Compliance
- 1H. Surface Water Diverter
Compliance
- ✓ **1I. Groundwater Management
Compliance (this attachment)**
 - 1J. CASGEM Compliance
 - 1K. Water Conservation Programs and
Measures

California Department of Water Resources
Integrated Regional Water Management Grant Programs

**CERTIFICATION FOR GROUNDWATER MANAGEMENT PLAN COMPLIANCE
FOR THE
PROPOSITION 84, IMPLEMENTATION AND
PROPOSITION 1E, STORMWATER FLOOD MANAGEMENT
GRANT PROGRAMS**

Grant Program: Implementation SWFM
IRWM Region: Monterey Peninsula, Carmel Bay, and South Monterey Bay
Agency name: Monterey Peninsula Water Management District
Monterey Peninsula, Carmel Bay, and South
Monterey Bay Integrated Regional Water
Project Title (as shown on application form): Management 2014 Drought Grant Proposal

Please check one of the boxes below and sign and date this form.

- As the authorized representative for the agency, I certify under penalty of perjury under the laws of the State of California, that the agency has prepared and implemented a GWMP in compliance with CWC §10753.7.
- As the authorized representative for the agency, I certify under penalty of perjury under the laws of the State of California, that the agency participates or consents to be subjected to an existing GWMP, basin-wide management plan, or other IRWM program or plan that meets the requirements of CWC §10753.7(a).
- As the authorized representative for the agency, I certify under penalty of perjury under the laws of the State of California, that agency consents to be subjected to a GWMP that will will meet the requirements of CWC §10753.7 and be completed within 1-year of the grant application submittal date.
- As the authorized representative for the agency, I certify under penalty of perjury under the laws of the State of California that the agency conforms to the requirements of an adjudication of water rights in the subject groundwater basin.

I understand that the Department of Water Resources will rely on this signed certification in order to approve funding and that false and/or inaccurate representations in this Certification may result in loss of all funds awarded to the applicant for its project. Additionally, for the aforementioned reasons, the Department of Water Resources may withhold disbursement of project funds, and/or pursue any other applicable legal remedy.

Joseph W. Oliver
Name of Authorized Representative
(Please print)

Water Resources Manager
Title



Signature

7/18/2014
Date

FILED

MAR 27 2006

LISA M. GALDOS
CLERK OF THE SUPERIOR COURT
~~D. VALENZUELA~~ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MONTEREY

CALIFORNIA AMERICAN WATER,

Plaintiff,

vs.

CITY OF SEASIDE; CITY OF
MONTEREY; CITY OF SAND CITY;
CITY OF DEL REY OAKS; SECURITY
NATIONAL GUARANTY, INC.; GRANITE
ROCK COMPANY, INC.; D.B.O.
DEVELOPMENT COMPANY NO. 27,
INC.; MURIEL E. CALABRESE 1987
TRUST; ALDERWOODS GROUP
(CALIFORNIA), INC.; PASADERA
COUNTRY CLUB, LLC; LAGUNA SECA
RESORT, INC; BISHOP MC INTOSH &
MC INTOSH, a general partnership; THE
YORK SCHOOL, INC.; COUNTY OF
MONTEREY; and DOES 1 through 1,000,
Inclusive,

Defendants.

MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT,

Intervenor.

MONTEREY COUNTY WATER
RESOURCES AGENCY,

Intervenor.

AND RELATED CROSS-ACTIONS

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Case No. M66343

DECISION

Action Filed: August 14, 2003
Trial Date: December 13, 2005
Dept.: 21

(Assigned to Hon. Roger D. Randall, Ret.)

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I. INTRODUCTION

This Decision sets forth the adjudicated rights of the parties to this lawsuit (with certain exceptions noted in section I.D. below), including Plaintiff California American Water, and Defendants the City of Seaside, the City of Monterey, the City of Sand City, the City of Del Rey Oaks, Security National Guaranty, Inc., Granite Rock Company, D.B.O. Development Company No. 27, Muriel E. Calabrese 1987 Trust, Alderwoods Group (California), Inc., Pasadera Country Club, LLC, Laguna Seca Resort, Inc., Bishop, McIntosh & McIntosh, and The York School, Inc. (hereinafter "Water User Defendants") to use the water resources of the Seaside Groundwater Basin ("Seaside Basin" or "Basin") and provides for a physical solution for the perpetual management of the Basin, which long-term management will provide a means to augment the water supply for the Monterey Peninsula.

A. Seaside Groundwater Basin.

The Seaside Basin is located in Monterey County and underlies the Cities of Seaside, Sand City, Del Rey Oaks, Monterey, and portions of unincorporated county areas, including the southern portions of Fort Ord, and the Laguna Seca Area. The boundaries of the Basin are depicted in Exhibit B of this Decision. Generally, the Seaside Basin is bounded by the Pacific Ocean on the west, the Salinas Valley on the north, the Toro Park area on the east, and Highways 68 and 218 on the south. The Seaside Basin consists of subareas, including the Coastal subarea and the Laguna Seca subarea in which geologic features form partial hydrogeologic barriers between the subareas.

B. The Parties.

1. Plaintiff California American Water ("Plaintiff" or "California American") is an investor-owned public utility incorporated under the laws of the State of California. (*See* Pub. Utilities Code, §§ 1001 et seq. and 2701 et seq.) California American produces groundwater from the Seaside Basin and delivers it for use on land within its certificated service area that both overlies portions of the Seaside Basin, and is located outside of the Seaside Basin Area, all within the County of Monterey.

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1 2. Defendant City of Seaside (“Seaside”) is a general law city situated in the
2 County of Monterey. Seaside produces groundwater from the Seaside Basin (1) for use on two
3 city-owned golf courses that overlie the Basin, and (2) for municipal water service to its residents.
4 (*See* Cal. Const., Art. XI, § 9; Gov. Code, § 38730.)

5 3. Defendant City of Sand City (“Sand City”) is a charter city situated in the
6 County of Monterey. Sand City produces groundwater from the Seaside Basin and delivers it for
7 use on private and publicly owned lands within its incorporated boundaries, all of which overlie
8 the Seaside Basin. (*See* Cal. Const., Art. XI, § 9; Gov. Code, § 38730.)

9 4. Defendant City of Del Rey Oaks (“Del Rey Oaks”) is a general law city situated
10 in the County of Monterey. Land within Del Rey Oaks’ incorporated boundaries overlies the
11 Seaside Basin. The two wells Del Rey Oaks presently operates for irrigation of public lands are
12 located outside the Seaside Basin area and are, therefore, excluded from this Stipulation. (*See*
13 Cal. Const., Art. XI, § 9; Gov. Code, § 38730.)

14 5. Defendant City of Monterey (“Monterey”) is a charter city situated in the
15 County of Monterey. Monterey owns and controls land that overlies the Seaside Basin area.

16 6. Defendant Security National Guaranty, Inc. (“SNG”) is a California corporation
17 with its principal place of business in the City and County of San Francisco. SNG’s primary
18 business activity is real estate development. As part of its operation, SNG and/or its
19 predecessors-in-interest have produced groundwater from the Seaside Basin. SNG also owns
20 land overlying the Seaside Basin.

21 7. Defendant Granite Rock Company (“Granite”) is a California corporation with
22 its principal place of business in the County of Santa Cruz. Granite’s primary business activity
23 is the production and sale of concrete aggregate and building materials. As part of its Seaside
24 concrete and building materials plant, Granite has produced groundwater from the Seaside Basin.
25 Granite also owns land overlying the Seaside Basin.

26 8. Defendant D.B.O. Development No. 27 (“D.B.O.”), erroneously sued herein as
27 D.B.O. Development Company, is a California limited liability company with its principal place
28 of business in the County of Monterey. D.B.O.’s primary business activity is the ownership and

1 development of real property for commercial, industrial, residential, and public uses. As part of
2 their ownership and development of land overlying the Seaside Basin, D.B.O. and/or its
3 predecessor in interest have produced groundwater from the Basin. D.B.O. also owns and
4 controls land overlying the Seaside Basin.

5 9. Defendant Muriel E. Calabrese 1987 Trust ("Calabrese") is an irrevocable trust
6 that holds property in the County of Monterey. Calabrese and/or its predecessor in interest have
7 produced groundwater from the Seaside Basin in relation to the operation of its paving, grading
8 and construction business and operation of a concrete batch plant in Sand City. Calabrese also
9 owns and controls land overlying the Seaside Basin.

10 10. Defendant Alderwoods Group (California), Inc. ("Alderwoods Group"), DBA Mission
11 Memorial Park ("Mission Memorial") is a California corporation with its principal place of
12 business in the County of Monterey. Mission Memorial's primary business activity is the
13 operation of a cemetery in the City of Seaside. As part of maintenance of the cemetery, Mission
14 Memorial has produced groundwater from the Seaside Basin. Mission Memorial also owns land
15 overlying the Seaside Basin.

16 11. Defendant Pasadera Country Club, LLC ("Pasadera") is a California limited
17 liability company with its principal place of business in the County of Monterey. Pasadera's
18 primary business activity is the operation of a private golf course. As part of its golf course
19 operations, Pasadera has produced groundwater from the Seaside Basin. Pasadera also owns
20 land overlying the Seaside Basin.

21 12. Defendant Bishop, McIntosh & McIntosh ("Bishop") is a general partnership,
22 with its principal place of business in the County of Monterey. Bishop owns land overlying the
23 Laguna Seca Subarea of the Seaside Basin. Defendant Laguna Seca Resort, Inc. ("Laguna
24 Seca") is a California corporation with its principal place of business in the County of Monterey.
25 Laguna Seca's primary business activity is the operation of a public golf course on land owned in
26 fee by Bishop. Laguna Seca operates the golf course pursuant to a lease with Bishop. As part of
27 the golf course's operations, groundwater is produced from the Laguna Seca Subarea of the
28 Seaside Basin for irrigation purposes. Laguna Seca filed a cross-complaint against California

1 American, and Bishop filed a cross-complaint against California American and all defendants
2 other than Laguna Seca Defendants Laguna Seca Resort, Inc. and Bishop, McIntosh & McIntosh
3 shall collectively be referred to as "Laguna Seca/Bishop." However, the pumping allocation
4 established in Section III.B., below, is held only by Bishop, as the overlying property owner.

5 Laguna Seca is a Water User Defendant now exercising Bishop's pumping allocation and
6 operating the golf course facilities. The damages provided for in Section III.G. shall be based on
7 the Average Gross Annual Income of the entity operating the golf course facilities, which is now
8 Laguna Seca (Bishop's lessee).

9 13. Defendant County of Monterey owns land on which is operates the Laguna Seca Park.
10 County of Monterey has produced groundwater from the Seaside Basin for use at Laguna Seca
11 Park. County of Monterey owns land overlying the Seaside Basin.

12 14. Intervenor Monterey Peninsula Water Management District ("MPWMD") is a
13 district formed pursuant to Water Code Appendix sections 118-1 et seq. MPWMD intervened
14 as a party defendant as against California American, cross-complained against the other parties as
15 a plaintiff, and is a defendant in a cross-complaint filed by Seaside and joined in by City
16 defendants.

17 15. Intervenor Monterey County Water Resources Agency ("MCWRA") is a duly
18 constituted Water Resources Agency created pursuant to California Water Code Appendix
19 section 52-3 et seq. MCWRA intervened in this action as a plaintiff as against all parties.

20 16. Defendant The York School, Inc. ("York" or "York School"), is a nonprofit
21 corporation, founded in 1959 as an independent day school providing college preparatory
22 education. Its primary activity is the operation of a school. York leases approximately 31.4 acres
23 of property from the United States, Department of the Army, on the former Fort Ord. This
24 property is located immediately north of the main campus, across York Road, and is a portion of a
25 larger parcel, approximately 107 acres in size, that is scheduled to be transferred as a public
26 benefit conveyance to York from the federal government. This parcel overlies the Seaside Basin
27 and is subject to this Decision. York has produced groundwater from the Seaside Basin. York
28 is not an agent of the United States, nor can York bind the United States to this Decision.

1 C. The Complaint.

2 On or about August 14, 2003, Plaintiff filed a complaint against Defendants and Does 1
3 through 1,000 requesting a declaration of Plaintiff's and Defendants' individual and collective
4 rights to groundwater and a mandatory and prohibitory injunction requiring the reasonable use
5 and coordinated management of groundwater within the Seaside Basin pursuant to Article X,
6 Section 2 of the California Constitution. The pleadings further allege that Plaintiff and
7 Defendants collectively claim substantially all rights of groundwater use, replenishment and
8 storage within the Seaside Basin area, that the Natural Safe Yield (as defined in Section III.A.) is
9 being exceeded, and that absent a physical solution and coordinated groundwater management
10 strategy, the Seaside Basin is in imminent risk of continued lowering of water levels, increased
11 pump-lifts, diminution of water supply and quality, seawater intrusion, and possible land
12 subsidence. Accordingly, Plaintiff requested: (1) a determination of the Seaside Basin's safe
13 yield; (2) an operating plan for the management of the Basin; (3) a declaration of the rights of the
14 parties named in this Complaint; (4) a declaration and quantification, as part of a physical
15 solution, of the parties' respective rights to make use of the Seaside Basin's available storage
16 space; and (5) the appointment of a Watermaster to administer the Court's Decision.
17 Subsequently, Plaintiff has twice amended its complaint and the operative complaint is now the
18 Second Amended Complaint, which sets forth the same general allegations as the original
19 complaint.

20 D. Defendants' Responses.

21 Water User Defendants in this action have all responded to the Complaint pursuant to
22 Answers. In addition, they have all joined in a motion seeking Court approval of a Stipulated
23 Judgment. The Monterey Peninsula Water Management District and the County of Monterey,
24 including the Monterey County Water Resources Agency, did not join in the Stipulation.

25 On or about September 24, 2003, Intervenor MPWMD filed a complaint in intervention
26 against the defendants named in the Complaint. Defendants to that complaint responded to the
27 cross-complaint pursuant to an Answer, containing a general denial and affirmative defenses.

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1 Seaside, on or about January 9, 2004, filed a cross-complaint against MPWMD.
2 MPWMD responded to the cross-complaint by filing an Answer, containing a general denial and
3 affirmative defenses.

4 Laguna Seca, on or about April 23, 2004, filed a cross-complaint against California
5 American. California American responded to the cross-complaint pursuant to an Answer,
6 containing a general denial and affirmative defenses.

7 Bishop, on or about September 23, 2004, filed a cross-complaint against California
8 American and against all defendants other than Laguna Seca. California American, Granite, Sand
9 city, Alderwoods Group, York School, D.B.O., Monterey, MPWMD, Seaside, and Pasadera
10 responded to the cross-complaint pursuant to Answers containing general denials and affirmative
11 defenses.

12 SNG, on or about July 26, 2005, filed a cross-complaint against MPWMD. MPWMD
13 responded to the cross-complaint by filing an Answer, containing a general denial and affirmative
14 defenses.

15 At the conclusion of argument on December 22, 2005, the various defendant cross-
16 complainants agreed that the relief they had sought via their cross-complaints had been subsumed
17 in the litigation of the complaint and complaints in intervention, the answers thereto, and the
18 Settlement Agreement and General Mutual Release executed by all parties save the intervenors
19 and the County of Monterey.

20 E. Joint Motion for Entry of Judgment.

21 Plaintiff and Water User Defendants filed a Motion for the Entry of Judgment along with
22 a Stipulation for Entry of Judgment, which was opposed by both intervenors. The Motion for
23 Entry of Judgment requested that the Court approve the Stipulation and enter the Judgment. The
24 motion was heard by this Court on December 12, 2005. At the request of the moving parties, it
25 deferred its ruling until it had taken evidence in the trial of this matter.

26 Having now received the evidence, and having considered written and oral argument from
27 the various parties, the Court denies the Motion for Entry of Judgment. The Court accepts the
28 stipulation of certain of the parties entitled "Settlement Agreement and General Mutual Release"

1 filed with the Court during trial insofar as the stipulation does not conflict with the ruling set forth
2 herein.

3 F. Jurisdiction. This Court has jurisdiction to enter a Judgment declaring and adjudicating
4 Plaintiff's and Water User Defendants' rights to the reasonable and beneficial use of
5 groundwater in the Seaside Basin Area, including the imposition of a physical solution, pursuant
6 to Article X, Section 2 of the California Constitution.

7 II. FINDINGS

8 A. Importance of Groundwater. Groundwater is an important water supply source for
9 businesses, individuals and public agencies that overlie or Extract groundwater from the Seaside
10 Basin. The overwhelming majority of the groundwater appropriated from the Seaside Basin has
11 been and continues to be dedicated to a public use in accordance with the provisions of the
12 California Constitution, Article X, Section 5. The Plaintiff and the Water User Defendants rely
13 upon continued availability of groundwater to meet their demands. The intervenors, MPWMD
14 and MCWRA, have a legislatively mandated interest in the preservation and enhancement of
15 groundwater in the Basin.

16 B. Status of the Groundwater Basin.

17 1. Perennial Natural Safe Yield. The Perennial Natural Safe Yield (as defined in
18 Section III.A. and hereinafter referred to as "Natural Safe Yield") of the Seaside Basin is solely
19 the result of natural percolation from precipitation and surface water bodies overlying the Basin.
20 The Court finds that the Natural Safe Yield of the Basin as a whole, assuming no action is taken
21 to capture subsurface flow exiting the northern boundary of the Basin, is from 2,581 to 2,913 acre
22 feet per year. The Natural Safe Yield for the Coastal Subarea is estimated from 1,973 to 2,305
23 acre feet per year, and the Natural Safe Yield for the Laguna Seca Subarea is 608 acre feet per
24 year.

25 2. Groundwater Production. Production records demonstrate that the cumulative
26 annual groundwater production of the Parties from the Seaside Basin area in each of the five (5)
27 years immediately preceding the filing of this action has been between approximately 5,100 and
28 6,100 acre feet. Therefore, the Court finds that groundwater production has exceeded the Natural

1 Safe Yield during the preceding five (5) years throughout the Seaside Basin and in each of its
2 subareas. While no one can predict with precision when it will occur, all parties agree continued
3 indefinite production of the Basin Groundwater in excess of the Natural Safe Yield will
4 ultimately result in seawater intrusion, with deleterious effects on the Basin. The evidence
5 demonstrates that the stage is set for such an occurrence in the foreseeable future.

6 C. Legal Claims.

7 1. Groundwater Rights. Certain Parties allege that they have produced groundwater
8 openly, notoriously, continuously, and without interruption in excess of the Natural Safe Yield of
9 the Basin for more than five (5) years. As a result, these Parties allege that they have accrued
10 prescriptive rights as articulated by the California Supreme Court in *City of Pasadena v. City of*
11 *Alhambra* (1948) 33 Cal.2d 908. In defense of these claims, other Parties deny that the elements
12 of prescription have been satisfied, and further allege the affirmative defense of “self help” as
13 recognized in *Pasadena, supra*, 33 Cal.2d at pp. 932-32. Those Parties responsible for public
14 water service also raise Civil Code section 1007 as an affirmative defense against prescription.

15 The Court finds that there is merit to the claim that certain prescriptive rights have accrued,
16 but also finds that there is merit to the aforementioned affirmative defenses. Accordingly, the
17 Court finds that the Parties collectively possess a variety of rights based in prescription and other
18 original rights (including overlying and appropriative rights). Each Party’s right to produce
19 naturally occurring groundwater from the Seaside Basin therefore reflects the amount of their
20 historical production from the Basin, and respects the priority of allocations under California law.
21 The physical solution set forth by this Decision is intended to ultimately reduce the drawdown of
22 the aquifer to the level of the Natural Safe Yield; to maximize the potential beneficial use of the
23 Basin; and to provide a means to augment the water supply for the Monterey Peninsula.

24 2. Storage Rights. The Court finds that the public interest is served by augmenting
25 the total yield of the Seaside Basin through artificial groundwater recharge, storage, and recovery.
26 It is well established that an entity which artificially recharges a groundwater basin with the intent
27 to later recapture that water maintains an exclusive right to recapture that quantity of water by
28 which said recharge augments the retrievable water supply of the groundwater basin, so long as

1 such recharge and recapture (i.e., storage) does not materially harm the groundwater basin or any
2 other entity's prior rights associated with the groundwater basin. (*City of Los Angeles v. City of*
3 *San Fernando* (1975) 14 Cal.3d 199, 264; *City of Los Angeles v. City of Glendale* (1943) 23
4 Cal.2d 68, 76-77; see also Water Code, § 7075.) The Court finds, therefore, that the right to store
5 and recover water from the Seaside Basin shall be governed by the provisions of the Decision,
6 and the rules and regulations promulgated by the Seaside Basin Watermaster, the basic
7 provisions of which are described in Section III.H.

8 3. De Minimis Production. The Court finds that production of groundwater by any
9 person or entity less than five (5) acre feet per year is not likely to significantly contribute to a
10 Material Injury (as defined in Section III.A.) to the Seaside Basin or any interest related to the
11 Seaside Basin. Accordingly, this Decision is not intended to govern the production of
12 groundwater by any person or entity that produces a total quantity of groundwater that is less
13 than five (5) acre feet per year. However, to the extent the Court determines in the future that
14 this exemption has contributed to or threatens to contribute to a Material Injury to the Seaside
15 Basin or any interest related to the Seaside Basin, including any contribution caused by
16 production subject to this exemption in combination with all other production from the Seaside
17 Basin, the Court will modify or eliminate this exemption as it deems prudent pursuant to its
18 reserved jurisdiction provided in Section III.O.

19 4. Transferability of Seaside Basin Rights. The Court finds that maximum
20 beneficial use of the Seaside Basin's resources is encouraged by the ability to sell and lease
21 production allocations. Such transferability will also provide necessary flexibility to satisfy
22 future water supply needs. Accordingly, the Court finds that production allocations should be
23 assignable, subject to the rules and regulations promulgated by the Watermaster, and subject to
24 certain Parties' participation in the Alternative Production Allocation, described in Section III.B.3,
25 which election will restrict their transfers of water.

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1 **III. DECISION**

2 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

3 A. Definitions.

4 1. "Administrative Year" is the twelve (12)month period from January 1 through
5 December 31.

6 2. "Alternative Production Allocation" is the amount of Groundwater that a
7 Producer participating in this allocation method may Produce from a Subarea of the Seaside
8 Basin as provided in Section III.B.3.

9 3. "Artificial Replenishment" means the act of the Watermaster, directly or
10 indirectly, engaging in or contracting for Non-Native Water to be added to the Groundwater
11 supply of the Seaside Basin through Spreading or Direct Injection to offset the cumulative Over-
12 Production from the Seaside Basin in any particular Administrative Year pursuant to
13 Section III.L.3.j.iii. It shall also include programs in which Producers agree to refrain, in whole
14 or in part, from exercising their right to produce their full Production Allocation where the intent
15 is to cause the replenishment of the Seaside Basin through forbearance in lieu of the injection or
16 spreading of Non-Native Water.

17 4. "Base Water Right" is the percentage figure or the fixed amount assigned to
18 each Party as provided in Section III.B.2, which is used to determine various rights and
19 obligations of the Parties as provided in Sections III.B.2, III.B.3, III.L.3.c, and III.L.3.j.iii.

20 5. "Brackish Water" means water containing greater than 1,000 parts of chlorides
21 to 1,000,000 parts of Water.

22 6. "Carryover" means that portion of a Party's Production Allocation that is not
23 Extracted from the Basin during a particular Administrative Year. Each acre-foot of Carryover
24 establishes an acre-foot of Carryover Credit.

25 7. "Carryover Credit(s)" means the quantity of Water established through
26 Carryover, that a Party is entitled to Produce from the Basin pursuant to Section III.F.

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1 8. “Coastal Subarea” means those portions of the Seaside Basin that are west of
2 North-South Road, and further as shown on the Basin map attached as Exhibit B to this
3 Decision.

4 9. “Direct Injection” means a method of Groundwater recharge whereby Water is
5 pumped into the Basin through wells or other artificial channels.

6 10. “Extraction,” “Extractions,” “Extracting,” “Extracted,” and other variations
7 of the same noun or verb, mean pumping, taking, diverting or withdrawing Groundwater by any
8 manner or means whatsoever from the Seaside Basin.

9 11. “Feasible” means capable of being accomplished in a successful manner within
10 a reasonable period of time, taking into account economic, environmental, social, and
11 technological factors.

12 12. “Groundwater” means all Water beneath the ground surface in the Seaside
13 Basin, including Water from Natural Replenishment, Artificial Replenishment, Carryover, and
14 Stored Water.

15 13. “Laguna Seca Subarea,” or “Laguna Seca Area,” means those portions of the
16 Basin that are east of the Southern Coastal Subarea and south of the Northern Inland Subarea, as
17 shown on the Seaside Basin map attached as Exhibit B to this Decision.

18 14. “Landowner Group” means all Producers that own or lease land overlying the
19 Seaside Basin and Produce Groundwater solely for use on said land, except California American,
20 Seaside (Municipal), Monterey, Del Rey Oaks, and Sand City.

21 15. “Material Injury” means a substantial adverse physical impact to the Seaside
22 Basin or any particular Producer(s), including but not limited to: seawater intrusion, land
23 subsidence, excessive pump lifts, and water quality degradation. Pursuant to a request by any
24 Producer, or on its own initiative, Watermaster shall determine whether a Material Injury has
25 occurred, subject to review by the Court as provided for in Section III.N.

26 16. “Natural Replenishment” means all processes by which Water may become a
27 part of the Groundwater supply of the Seaside Basin without the benefit of the Physical Solution
28 and the coordinated management it provides. Groundwater that occurs in the Seaside Basin as a

1 result of the Physical Solution, which is not Natural Replenishment, includes, but is not limited to
2 Storage, Carryover, and Artificial Replenishment.

3 17. "Natural Safe Yield" or "Perennial Natural Safe Yield" means the quantity of
4 Groundwater existing in the Seaside Basin that occurs solely as a result of Natural
5 Replenishment. The Natural Safe Yield of the Seaside Basin as a whole, assuming no action is
6 taken to capture subsurface flow exiting the northern boundary of the Basin, is from 2,581 to
7 2,913 acre feet per year. The Natural Safe Yield for the Coastal Subareas is from 1,973 to 2,305
8 acre feet per year. The Natural Safe Yield for the Laguna Seca Subarea is 608 acre feet per year.

9 18. "Non-Native Water" means all Water that would not otherwise add to the
10 Groundwater supply through natural means or from return flows from surface applications other
11 than intentional Spreading.

12 19. "Overdraft" or "Overdrafted" refers to a condition within a Groundwater
13 basin resulting from long-term depletions of the basin over a period of years.

14 20. "Operating Safe Yield" means the maximum amount of Groundwater resulting
15 from Natural Replenishment that this Decision, based upon historical usage, allows to be
16 produced from each Subarea for a finite period of years, unless such level of production is found
17 to cause Material Injury. The Operating Safe Yield for the Seaside Basin, as a whole, is 5,600
18 acre feet. The Operating Yield is 4,611 acre feet for the Coastal Subarea and 989 acre feet for the
19 Laguna Seca Subarea. The Operating Yield established here will be maintained for three (3)
20 years from the date of this Decision or until a determination is made by the Watermaster,
21 concurred in by this Court, that continued pumping at this established Operating Yield will cause
22 Material Injury to the Seaside Basin or to the Subareas, or will cause Material Injury to a
23 Producer due to unreasonable pump lifts. In either such event the Watermaster shall determine
24 the modified Operating Yield in accordance with the Principles and Procedures attached hereto as
25 Exhibit A, and through the application of criteria that it shall develop for this purpose.

26 21. "Over-Production" and other variations of the same term means (1) with regard
27 to all Production from the Seaside Basin, that quantity of Production which exceeds an initially
28 assumed Natural Safe Yield of 3,000 afy (or such adjusted calculation of Natural Safe Yield as

1 further study of the Basin by the Watermaster shall justify); or (2) with regard to each Producer,
2 that quantity of Water Produced in any Administrative Year in excess of that Producer's Base
3 Water Right, as applied to an initially assumed Natural Safe Yield of 3,000 afy (subject to
4 adjustment as further study shall justify). For a Party producing under the Alternative Production
5 Allocation, the calculation shall be based upon the Base Water Right assigned to them in Table 1,
6 infra, only to the extent that Party has elected to convert all or part of an Alternative Production
7 Allocation into a Standard Production Allocation, pursuant to Section III.B.3.e.

8 22. Operating Yield Over-Production means pumping of Native Water by Producers
9 in excess of their Standard Production Allocation or Alternative Production Allocation, as
10 discussed in Section III.L.3.j.iii.

11 23. "Person" or "Persons" includes individuals, partnerships, associations,
12 governmental agencies and corporations, and any and all types of entities.

13 24. "Physical Solution" means the efficient and equitable management of
14 Groundwater resources within the Seaside Basin, as prescribed by this Decision, to maximize the
15 reasonable and beneficial use of Water resources in a manner that is consistent with Article X,
16 Section 2 of the California Constitution, the public interest, and the basin rights of the Parties,
17 while working to bring the Production of Native Water to Natural Safe Yield.

18 25. "Produce," "Produced," or "Production" means (1) the process of Extracting
19 Water or (2) the gross amount of Water Extracted.

20 26. "Producer" means a Party possessing a Base Water Rights.

21 27. "Production Allocation" is the amount of Groundwater that a Producer may
22 Produce from a Subarea of the Seaside Basin based on the Parties' election to proceed under
23 either the Standard Production Allocation or the Alternative Production Allocation set forth in
24 Sections III.B.2 and III.B.3, respectively.

25 28. "Replenishment Assessment" means an assessment levied by the Watermaster
26 per each acre-foot of Over-Production against each party Over-Producing Groundwater in the
27 previous Administrative Year. The amount of the assessment shall be sufficient to cover the cost
28 of Artificial Replenishment in an amount necessary to off-set that Producer's Over-Production,

1 and levied as provide in Section III.L.3.j.iii. The assessment must of necessity be initially
2 determined based upon the estimated cost of providing Non-Native water to replenish the Basin,
3 as determined by the Watermaster.

4 29. "Seaside Basin" is the underground water basin or reservoir underlying the
5 Seaside Basin Area, the exterior boundaries of which are the same as the exterior boundaries of
6 the Seaside Basin Area.

7 30. "Seaside Basin Area" is the territory depicted in Exhibit B to this Decision.

8 31. "Spreading" means a method of introducing Non-Native Water into the Seaside
9 Basin whereby Water is placed in permeable impoundments and allowed to percolate into the
10 Seaside Basin.

11 32. "Standard Production Allocation" is the amount of Groundwater that a Producer
12 participating in this allocation method may Produce from a Subarea of the Seaside Basin as
13 provided in Section III.B.2, which is determined by multiplying the Base Water Right by the
14 Operating Yield.

15 33. "Storage" means the existence of Stored Water in the Seaside Basin.

16 34. "Storage Allocation" means that quantity of Stored Water in acre feet that a
17 Party is allowed to Store in the Coastal Subarea or the Laguna Seca Subarea at any particular
18 time.

19 35. "Storage Allocation Percentage" means the percentage of Total Usable Storage
20 Space allocated to each Producer proceeding under the Standard Production Allocation.
21 Producers proceeding under the Alternative Production Allocation are not allocated Storage rights
22 and, consequently, their share of the Total Usable Storage Space is apportioned to the Producers
23 proceeding under the Standard Production Allocation. Pursuant to the terms of Section III.B.3,
24 Parties proceeding under the Alternative Production Allocation enjoy a one-time right to change
25 to the Standard Production Allocation. Due to the recalculation of the Storage Allocation
26 Percentage necessitated when a Party changes to the Standard Production Allocation, the
27 Watermaster will maintain the up-to-date Seaside Basin Storage Allocation Percentages.

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1 36. “Storage and Recovery Agreement” means an agreement between Watermaster
2 and a Party for Storage pursuant to Section III.L.3.j.xx.

3 37. “Store” and other variations of the same verb refer to the activities establishing
4 Stored Water in the Seaside Basin.

5 38. “Stored Water” means (1) Non-Native Water introduced into the Seaside Basin
6 by a Party or any predecessors-in-interest by Spreading or Directly Injecting that Water into the
7 Seaside Basin for Storage and subsequent Extraction by and for the benefit of that Party or their
8 successors-in-interest; (2) Groundwater within the Seaside Basin that is accounted for as a
9 Producer’s Carryover; or (3) Non-Native water introduced into the Basin through purchases by
10 the Watermaster, and used to reduce and ultimately reverse Over-Production.

11 39. “Stored Water Credit” means the quantity of Stored Water augmenting the
12 Basin’s Retrievable Groundwater Supply, which is attributable to a Party’s Storage and further
13 governed by this Decision and a Storage and Recovery Agreement.

14 40. “Subarea(s)” means either the Laguna Seca Subarea or the Coastal Subarea.

15 41. “Total Useable Storage Space” means the maximum amount of space available
16 in the Seaside Basin that can prudently be used for Storage as shall be determined and modified
17 by Watermaster pursuant to Section III.L.3.j.xix, less Storage space which may be reserved by
18 the Watermaster for its use in recharging the Basin.

19 42. “Transfer” and other variations of the same verb refers to the temporary or
20 permanent assignment, sale, or lease of all or part of any Producer’s Production Allocation,
21 Storage Allocation, Carryover Credits, or Stored Water Credits. Pursuant to Section III.B.3.,
22 Transfer does not include the use of Water on properties identified in Exhibit C for use under an
23 Alternative Production Allocation.

24 43. “Water” includes all forms of Water.

25 44. “Watermaster” means the court-appointed Watermaster pursuant to Section
26 III.L. of this Decision for the purpose of executing the powers, duties, and responsibilities
27 assigned therein.

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1 45. “Watermaster Rules and Regulations” means those rules and regulations
2 promulgated by the Watermaster consistent with the terms of this Decision.

3 B. Physical Solution.

4 1. Groundwater Rights. The Parties have Produced Groundwater from the Seaside
5 Basin openly, notoriously, continuously, and without interruption, which Production has been
6 determined to be in excess of the Natural Safe Yield of the Seaside Basin and each of its
7 Subareas for more than five (5) years. Accordingly, Parties have accrued mutual prescriptive
8 rights and/or have preserved their overlying, appropriative, and prescriptive rights against further
9 prescription by self-help. These individual and competitive rights, whether mutually prescriptive,
10 appropriative or overlying rights, can be most efficiently exercised and satisfied by the
11 implementation of this Physical Solution and in the manner expressly set forth herein.

12 2. Standard Production Allocation. Each Producer is authorized to Produce its
13 Production Allocation within the designated Subarea in each of the first three Administrative
14 Years. Except for those certain Parties electing to proceed under the Alternative Production
15 Allocation, as set forth in Section III.B.3., each Producer’s Production Allocation for the first
16 three Administrative Years shall be calculated by multiplying its Base Water Right, as set forth in
17 Table 1 below, by that portion of the Operating Yield which is in excess of the sum of the
18 Alternative Production Allocations. The Operating Yield for the Seaside Basin, as a whole, is set
19 at 5,600 acre feet annually (“afa”). The Operating Yield for the Coastal Subarea is 4,611 afa,
20 with 743 afa committed to Alternative Production Allocations and 3,868 afa committed to
21 Standard Production Allocations. The Operating Yield for the Laguna Seca Subarea is 989 afa,
22 with 644 afa committed to Alternative Production Allocations and 345 afa committed to Standard
23 Production Allocations. The Operating Yield established here will be maintained for three (3)
24 Administrative Years from the date Judgment is granted or until a determination is made by the
25 Watermaster, concurred in by this Court, that continued pumping at this established Operating
26 Yield will cause Material Injury to the Seaside Basin or to the Subareas or will cause Material
27 Injury to a Producer due to unreasonable pump lifts. In the event of such Material Injury the
28 Watermaster shall determine the modified Operating Yield in accordance with the Principles and

1 Procedures attached hereto as Exhibit A, and through the application of criteria that it shall
2 develop for this purpose.¹

3 Commencing with the fourth Administrative Year, and triennially thereafter the Operating
4 Yield for both Subareas will be decreased by ten percent (10%) until the Operating Yield is the
5 equivalent of the Natural Safe Yield unless:

- 6 a. The Watermaster has secured and is adding an equivalent amount of Non-Native
7 water to the Basin on an annual basis; or
- 8 b. The Watermaster has secured reclaimed water in an equivalent amount and has
9 contracted with one or more of the Producers to utilize said water in lieu of their
10 Production Allocation, with the Producer agreeing to forego their right to claim a
11 Stored Water Credit for such forbearance; or
- 12 c. Any combination of a and b which results in the decrease in Production of Native
13 Water required by this decision; or
- 14 d. The Watermaster has determined that Groundwater levels within the Santa
15 Margarita and Paso Robles aquifers are at sufficient levels to ensure a positive
16 offshore gradient to prevent seawater intrusion.

17 **TABLE 1²**

18 **Standard Production Allocations**

19

Party:	Percentage of Operating Yield Coastal Subarea
California American Water	77.55%
City of Seaside (Municipal)	6.36%
City of Seaside (Golf Courses)	10.47%
City of Sand City	0.17%

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23 ¹ If the Operating Yield changes, Standard Production Allocations will be calculated by multiplying the
24 portion of the changed Operating Yield committed to Standard Production Allocations by the Standard Producers'
25 Base Water Rights. This calculation will result in a remaining quantity of water already committed to Standard
26 Production Allocations (due to the Base Water Right percentages assigned to Alternative Producers but which are
27 not used to calculate the Standard Production Allocations), which will be further allocated to the Standard Producers
28 in proportion to their Base Water Rights until no quantity remains unallocated.

² Certain Parties including Seaside (Golf Courses), Sand City, SNG, Calabrese, Mission Memorial,
Pasadena, Bishop and York School hold an Alternative Production Allocation in the fixed amount shown in Table
2. If any of these Parties subsequently elects to convert to the Standard Production Allocation, then the Base
Water Right shown in Table 1 for such converting Party will be used to determine that Party's Standard Production
Allocation consistent with the terms provided in Section III.B.3.e.

Granite Rock Company	0.60%
SNG	2.89%
D.B.O. Development No. 27	1.09%
Calabrese	0.27%
Mission Memorial Park	0.60%

Producer:	Percentage of Operating Yield for Laguna Seca Sec area
California American Water Company	45.13%
Pasadera Country Club	22.65%
Bishop	28.88%
York School	2.89 %
Laguna Seca County Park	0.45%*

* Because the County of Monterey has not joined in the Settlement Agreement and General Mutual Release, its right to Produce water will be governed by the provisions made for those Producers selecting Alternative Production Allocations.

3. Alternative Production Allocation. The following Parties, which all assert overlying Groundwater rights, have chosen to participate in an Alternative Production Allocation: Seaside with regard to the Groundwater that it Produces for irrigation of its golf courses; Sand City, SNG, Calabrese, Mission Memorial, Pasadera, Bishop, York School, and Laguna Seca.

The Alternative Production Allocation provides the aforementioned Parties with a prior and paramount right over those Parties Producing under the Standard Production Allocation to Produce the amount set forth in Table 2 in perpetuity, and said Alternative Production shall not be subject to any reductions under Section III.B.2 or at such times as the Watermaster determines to reduce the Operating Yield in accordance with Section III.L.3.j.ii., subject to the following terms:

a. The Alternative Production Allocation may not be transferred for use on any other property, but shall be limited to use on the respective properties (including subdivisions thereof) identified in Exhibit C;

b. The Party electing the Alternative Production Allocation may not establish Carryover Credits or Storage rights;

c. The Party electing the Alternative Production Allocation is obligated to adopt all reasonably Feasible Water conservation methods, including methods consistent with generally accepted irrigation practices;

Producer:	Alternative Production Allocation
Pasadera	251 afa
Bishop	320 afa
York School	32 afa
Laguna Seca County Park	41 afa*

* The County of Monterey possesses certain water rights based upon its use of water from the aquifer for maintenance of Laguna Seca Park. Its historic Production of Groundwater has averaged 41 afy. It has not joined in the stipulation of the other Producers, but is entitled to draw up to 41 afy from the Laguna Seca Subarea as if it were a party to the Alternative Production Allocations.

At any time prior to the expiration of the initial three-year operating period of this Decision, as designated in Section III.B.2, any of the aforementioned Parties, except the County of Monterey, may choose to change all or a portion of their Alternative Production Allocation to the Standard Production Allocation method set forth in Section III.B.2 and shall be entitled to all of the privileges associated with said Production Allocation as set forth herein (e.g., transferability, Storage rights, and Carryover rights). A Party choosing to change to the Standard Production Allocation shall do so by filing a declaration with the Court, and serving said declaration on all other parties. Once a Party chooses to change to the Standard Production Allocation method set forth in Section III.B.2, that Party shall not be allowed to thereafter again choose to participate in the Alternative Production Allocation. The Parties under the Standard Production Allocation shall not be allowed at any time to change from the Standard Production Allocation to the Alternative Production Allocation.

C. Production of Brackish Water. Sand City shall have the right to Produce Brackish Water from the brackish Groundwater aquifer portion of the Coastal Subarea of the Seaside Basin for the purpose of operating its proposed desalinization plant, said Production being limited to the Aromas Sands Formation, so long as such Production does not cause a Material Injury. Upon receiving a complaint supported by evidence from any Party to this Decision that the Production of Brackish Water by Sand City is causing a Material Injury to the Seaside Basin or to the rights of any Party to this Decision as set forth herein, the Watermaster shall hold a noticed hearing. The burden of proof at such hearing shall be on the Party making the complaint to show, based on substantial evidence, that the Production of Brackish Water by Sand City is causing a Material

1 Injury. If the Watermaster determines, based on substantial evidence, that the Production of
2 Brackish Water by Sand City is causing a Material Injury to the Seaside Basin or to the rights of
3 any Party to this Decision as set forth herein, the Watermaster may impose conditions on such
4 Production of Brackish Water that are reasonably necessary to prevent such Material Injury.

5 D. Injunction of Unauthorized Production. Each Producer is prohibited and enjoined from
6 Producing Groundwater from the Seaside Basin except pursuant to a right authorized by this
7 Decision, including Production Allocation, Carryover, Stored Water Credits, or Over-Production
8 subject to the Replenishment Assessment. Further, all Producers are enjoined from any Over-
9 Production beyond the Operating Yield in any Administrative Year in which Watermaster has
10 declared that Artificial Replenishment is not available or possible.

11 E. No Abandonment. It is in the interest of reasonable beneficial use of the Seaside Basin
12 and its Water supply, that no Producer be encouraged to take and use more Water in any
13 Administrative Year than is actually required, Therefore, failure to Produce all of the Water to
14 which a Producer is entitled hereunder for any amount of time shall, in and of itself, not be
15 deemed to be, or constitute an abandonment of such Producer's Base Water Right or Production
16 Allocation, in whole or in part. The Water unused by any Party (either as Production or
17 Carryover) will otherwise contribute to the ongoing efficient administration of the Decision and
18 the Physical Solution.

19 F. Right to Carryover Unused Production Allocation; Carryover Credits. Except for those
20 certain Parties electing to proceed under the Alternative Production Allocation, as set forth in
21 Section III.B.3., for the first three Administrative Years each Producer who, during a particular
22 Administrative Year, does not Extract from the Basin a total quantity equal to such Producer's
23 Standard Production Allocation for the particular Administrative Year may establish Carryover
24 Credits, up to the total amount of that Producer's Storage Allocation; provided, however, in no
25 circumstance may the sum of a Producer's Storage Credits and Carryover Credits exceed that
26 Producer's available Storage Allocation. Use (Extraction) of Carryover Credits shall be governed
27 as otherwise provided in this Decision and the Watermaster Rules and Regulations. In

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1 consideration of the Seaside Basin's hydrogeologic characteristics, the Watermaster may
2 discount the quantity of Water that may be Extracted pursuant to a Carryover Credit.

3 G. Damages and Prohibition on Enjoining Municipal Pumping. The Parties recognize that
4 California American's pumping is for municipal purposes, including drinking Water supplies for
5 most of the Monterey Peninsula, including within all of the Defendant Cities and to all of the
6 Defendant landowners. In this context, if California American's Groundwater pumping causes
7 an "Intrusion" upon a Water User Defendant's Production Allocation, then it shall compensate
8 the Water User Defendant for damages caused by this Intrusion. An "Intrusion" occurs when a
9 Water User Defendant exercising an Alternative Production Allocation is directed by the
10 Watermaster, this Court or any other competent governmental entity to reduce its Groundwater
11 pumping to a level below that Water User Defendant's Alternative Production Allocation, while
12 California American continues pumping Groundwater from the same subarea. This damages
13 provision does not alter the priority of the Alternative Production Allocation over the Standard
14 Production Allocation pursuant to Section III.B.3, and is intended to address potential exigent
15 circumstances that might arise regarding California American's municipal water service.

16 1. Damages from an Intrusion shall be calculated based upon the losses incurred by
17 the Water User Defendant that are caused by the Intrusion. These losses may include the loss of
18 crop yield and associated income, measured against the average achieved over the preceding five
19 (5) years from the date of the loss. Where an Intrusion occurs with respect to a Water User
20 Defendant's exercise of an Alternative Production Allocation for golf course irrigation (i.e., an
21 Intrusion to a "Golf Course Water User"), the Intrusion may cause discoloration, thinning and
22 damage to the golf course turf and may require replacement of golf course turf and other golf
23 course landscaping. Such conditions may, in turn, cause the loss of income from reduced golf
24 course facilities usage and loss of good will. It may be difficult to quantify such damages to a
25 sum certain. Accordingly, where a Golf Course Water User demonstrates that an Intrusion
26 caused discoloration, thinning or loss of golf course turf, the following criteria shall be utilized to
27 determine damages for an Intrusion to a Golf Course Water User.

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a. Lost Income.

i. The Golf Course Water User's "Average Gross Annual Income" shall be determined by summing its gross annual income from each of the five (5) years preceding the year of the Intrusion and dividing that sum by five, except where a Golf Course Water User (Pasadera) has not been in operation for seven (7) years at the time of the Intrusion, the Average Gross Annual Income shall be determined by summing the gross annual income from each of the three years preceding the year of the Intrusion and dividing that sum by three;

ii. The Golf Course Water User's gross annual income during the year of an Intrusion shall be subtracted from its Average Gross Annual Income, with the resulting difference constituting the amount of lost income damages for that year of Intrusion; and

iii. If an Intrusion occurs in two or more years within a five-year period, damages shall be calculated using an Average Gross Annual Income based on the last consecutive five-year period preceding the first year of Intrusion, or if a Golf Course Water User (i.e., Pasadera) has not been in operation for a full seven (7) years at the time of the Intrusion, damages shall be calculated using an Average Gross Annual Income based on the last consecutive three-year period proceeding the first year of Intrusion. Gross Annual Income shall not be calculated based upon a year in which an Intrusion occurred.

iv. Water User Defendants shall make Feasible efforts to mitigate damages caused by an Intrusion (e.g., including use of evapotranspiration rates to schedule turf grass irrigation).

b. Property Damage/Out-of-Pocket Repair Costs.

i. Actual costs of repairing and/or replacing golf course turf and/or other golf course landscaping and associated labor costs shall be added to the lost income damages calculated as set forth in subparagraph (1), above.

ii. The Golf Course Water User shall make Feasible efforts to mitigate damages by employing the best irrigation practices, including use of evapotranspiration rates to schedule turf grass irrigation.

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1 2. A damages Claim with all substantiating gross annual income data shall be
2 provided to California American within 120 days after December 31 of the year in which the
3 Intrusion occurred. California American shall accept or reject the Claim within 30 days
4 thereafter. If within 35 days after receipt of a Claim, California American fails to notify the
5 claimant of California American's acceptance or rejection of that Claim, such Claim is deemed
6 accepted. If the Claim is affirmatively accepted, payment will be made at the time of Claim
7 acceptance. If the Claim is deemed accepted by California American's failure to timely accept or
8 reject the Claim, payment will be made within 30 days after the date the Claim is deemed
9 accepted. If the Claim is rejected, all or in part, the Water User Defendant may proceed to a
10 hearing before the Court to determine the appropriate damages, considering the above referenced
11 criteria. The hearing shall be by motion with all supporting documentation and contest thereto
12 submitted and supported by declaration.

13 H. Allowed Storage.

14 1. Public Resource. Underground Storage within the Seaside Basin is and shall
15 remain a public resource. Subject to this paramount public right, the Parties hereto shall be
16 permitted to utilize available Storage space for bona fide Groundwater Storage projects. This use
17 shall be subject to the supervision of the Watermaster and this Court and shall be governed by the
18 following more specific provisions.

19 2. In General. Except for those certain Parties electing to proceed under the
20 Alternative Production Allocation as set forth in Section III.B.3., each Producer is entitled to
21 Store Water in the Basin as provided for in this Decision and Watermaster's Rules and
22 Regulations up to the amount of their Storage Allocation. Each Producer's Allowed Storage
23 Allocation in each Subarea shall be calculated by multiplying its Storage Allocation Percentage by
24 the Total Useable Storage Space, less space reserved by the Watermaster as herein below set
25 forth. The initial Storage Allocation Percentages are equal to the Base Water Rights, Table 1, less
26 Storage reserved for the Watermaster and certain public agencies. Parties with an Alternative
27 Production Allocation are entitled to their Storage Production Allocation when they elect to
28 change to Standard Production Allocation

1 3. California American Storage Allocation. All Storage Allocation held by
2 California American shall be held in trust by California American: (i) first for the benefit of
3 California American's retail Water service customers within its service territory on the Monterey
4 Peninsula and the County of Monterey and cities within its service territory which it serves; and
5 (ii) then for other purposes as California American deems appropriate. In the event of a reduction
6 in service from the Seaside Basin, California American will allocate service, including that which
7 is associated with its Storage Allocation, in a manner that is consistent with and proportionate to
8 its historic deliveries to all then current customers. Further, to the extent that California American
9 has excess Storage Allocation available after meeting its responsibilities to its retail Water service
10 customers within its service territory on the Monterey Peninsula and the cities which it serves,
11 upon request by the County of Monterey, Monterey, Seaside, Sand City, or Del Rey Oaks,
12 California American shall make available portions of its Storage Allocation within the Coastal
13 Subarea for use by the requesting city in the Coastal Subarea as provided herein. Specifically, the
14 city's request shall be made in writing and generally describe the public purpose and proposed
15 use of the Storage Allocation by the requesting city. California American shall not deny the
16 request unless making the requested portion of the Storage Allocation available to the city would
17 unreasonably interfere with California American's ability to operate its system or to otherwise
18 provide service to its customers. Should California American not be able to accommodate all
19 requests by all cities without unreasonably interfering with its operations and service
20 responsibilities, first priority to excess Storage Allocation shall be given to each respective city
21 requesting the use of a portion of the Storage Allocation up to an amount equal to the percentage
22 that the total quantity of Water delivered by California American for retail service to the
23 requesting city bears to the total quantity of Water delivered to all cities at the date the Decision
24 is entered. Notwithstanding the paramount rights of each city described in this section, 5 percent
25 of any Storage Allocation held in trust by California American will be reserved for *de minimis*
26 Storage opportunities and made available for the benefit of any requesting city on the basis of
27 first in time, first in right. Additionally, provision of Storage Allocation by California American
28 to a requesting city shall not be construed as a waiver of California American's rights under

1 section 1501 et seq. of the California Public Utilities Code or consent to duplication of its retail
2 Water service. Moreover, California American shall not charge any fee for use of its Storage
3 Allocation by Monterey, Seaside, Sand City, or Del Rey Oaks. However, the capital or other
4 value of California American's Storage Allocation shall belong to California American. Finally,
5 no city may request use of California American's Storage Allocation unless it has first used all of
6 its own Storage Allocation as provided herein.

7 4. Determination of Total Useable Storage Space. Watermaster shall determine and
8 declare the Total Useable Storage Space in the Basin, and may annually adjust the Total Useable
9 Storage Space pursuant to Section III.L.3.j.xix of this Decision. If and when Watermaster
10 adjusts the Total Useable Storage Space in the Basin, each Producer's Storage Allocation shall be
11 adjusted accordingly.

12 Each Storage Allocation is of the same legal force and effect, and each is without priority
13 with reference to any other Producer's Storage Allocation. Watermaster shall, however, consider
14 each proposal to Store Water independently pursuant to Section III.L.3.j.xx.

15 5. Carryover. Each Producer operating under the Standard Production Allocation
16 shall have the right to use their respective Storage Allocation to Store any Carryover Water
17 subject to the provisions of this Decision. Unused (not Extracted) Stored Water Credits and
18 Carryover Credits shall be carried over from year to year for the first three Administrative Years.
19 Thereafter Carryover Water withdrawal is subject to a percentage decrease consistent with
20 percentage decreases in the Operating Yield, according to the terms of this Decision. Due to the
21 hydrogeologic characteristics of the Seaside Basin, naturally occurring losses of stored Water
22 may require Watermaster to discount the percentage of Stored Water that may be Extracted.
23 Watermaster shall study the efficiencies of Storage in the Seaside Basin and set a uniform
24 percentage for withdrawals of Stored Water.

25 6. Injection and/or Spreading. Each Producer operating under the Standard
26 Production Allocation, and the Watermaster, and certain public agencies, shall have the right to
27 Store Water by Direct Injection, Spreading, or other artificial means so long as such Storage does
28 not cause Material Injury to any other Party. Except as provided in Section III.H.5., no Producer

1 herein granted a Storage Allocation may Store Water in the Seaside Basin without first executing
2 a Storage and Recovery Agreement with Watermaster, pursuant to Section III.L.3.j.xx. Each
3 Storage and Recovery Agreement shall further define the terms and conditions by which a
4 Producer may exercise its Storage Allocation and associated Stored Water Credits.

5 I. Injunction Against Unauthorized Storage. Each Producer is enjoined and restrained from
6 Carrying Over or Storing any quantity of Water in the Seaside Basin greater than that Producer's
7 Storage Allocation. Further, each Producer is enjoined from Storing any Water in the Seaside
8 Basin except as provided in Section III.H.5. (establishment of Carryover Credits) or as
9 authorized by a Storage and Recovery Agreement issued by Watermaster pursuant to Section
10 III.L.3.j.xx.

11 J. Measurement of Extractions and Storage. All Producers shall install, maintain, and use
12 adequate measuring devices on all Groundwater Production facilities as directed by Watermaster
13 and report accurate measurements of all Groundwater Produced from the Seaside Basin in the
14 manner required by Watermaster's Rules and Regulations. Such measuring devices shall not
15 conflict with any monitoring devices required by MPWMD. All Producers shall comply with the
16 provisions for measurement of any Storage of Water in the Seaside Basin, as provided in
17 Watermaster's Rules and Regulations, and as may be further provided for in a Storage and
18 Recovery Agreement issued by Watermaster for such Storage.

19 K. Order of Accounting for the Production of Groundwater. Unless otherwise requested by
20 a Producer in writing to Watermaster, Watermaster shall account for all Production of Water
21 from the Seaside Basin by a Producer in any Administrative Year as follows: Production shall
22 first be deemed Production of that Producer's Production Allocation up to that Producer's total
23 Production Allocation, and thereafter shall be deemed Production of that Producer's Carryover
24 Credits, if any, and thereafter shall be deemed Production of that Producer's Stored Water
25 Credits, if any. So long as consistent with this section, Watermaster may prescribe
26 administrative rules within its Rules and Regulations concerning the method and manner of
27 accounting for the Production of Groundwater.

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1 L. Appointment of Watermaster; Watermaster Administrative Provisions.

2 1. Establishment of Watermaster. A Watermaster shall be established for the
3 purposes of administering and enforcing the provisions of this Decision and any subsequent
4 instructions or orders of the Court. The Watermaster shall consist of thirteen (13) voting
5 positions held among nine (9) representatives. California American, Seaside, Sand City,
6 Monterey, and Del Rey Oaks shall each appoint one (1) representative to Watermaster for each
7 two-year term of Watermaster. The Landowner Group shall appoint two (2) representatives to
8 Watermaster for each two-year term of Watermaster. The MPWMD shall have one (1)
9 representative and the MCWRA shall have one (1) representative. The representatives elected to
10 represent the Landowner Group shall include one (1) representative from the Coastal Subarea and
11 one (1) representative from the Laguna Seca Subarea. The California American representative
12 shall possess three (3) voting positions; the Seaside, MPWMD, and MCWRA representatives
13 shall each possess two (2) voting positions; and every other representatives shall possess one (1)
14 voting position. Each representative from the Landowner Group shall carry one-half of the
15 Landowner Representative vote. Each representative under the Landowner Group may also act as
16 an alternate for the other.

17 The right to assign a representative to Watermaster and the representative's respective
18 voting power shall only transfer upon permanent sale of 51 percent or more of the Party's Base
19 Water Right, but not upon the lease of any portion of the member's Base Water Right.

20 2. Quorum and Agency Action. A minimum of six (6) representatives shall be
21 required to constitute a quorum for the transaction of Watermaster affairs. Unless otherwise
22 provided herein, the affirmative vote of seven (7) voting positions shall be required to constitute
23 action by Watermaster.

24 3. Qualification, Nomination, Election, and Administrative Procedures.

25 a. Qualification. Any duly authorized agent of the entities or groups
26 provided for in Section III.L.1. is qualified to serve as a representative on the Watermaster board.

27 b. Term of Office. Each new Watermaster board shall assume office at the
28 first regular meeting in January of every second year. Each Watermaster board member shall

1 serve for a two-year term, subject to the retained jurisdiction of the Court. Should a vacancy arise
2 on the Watermaster board for any reason, the respective entity or group from which that vacancy
3 arises shall appoint a replacement representative in the manner prescribed by Watermaster Rules
4 and Regulations. Such replacement shall complete the remainder of the term of the vacated
5 office. Within 30 days of the appointment of any new Watermaster board member, any Party
6 may file a motion with the Court challenging the appointment. The Court, acting *sua sponte*, may
7 reject any Watermaster board appointment within the 30-day period. Challenges shall be based
8 on allegations that the appointed board member does not possess the requisite skills necessary to
9 effectively serve as a member of the Watermaster board.

10 c. Nomination and Election of Landowner Representative. The nomination
11 and election of the Landowner Group representatives shall occur in November of every second
12 year in the manner designated by Watermaster Rules and Regulations. The nomination and
13 election of the Landowner Group representatives shall be by cumulative voting with each member
14 of the Landowner Group entitled to one (1) vote for each acre-foot of annual entitlement under
15 the member's Alternative Production Allocation. Voting rights may only be transferred upon
16 permanent sale of 51 percent or more of the Landowner Party's Base Water Right.

17 d. Organization. At the first meeting of each newly comprised Watermaster
18 board, the Watermaster shall elect a chairman and a vice-chairman from its membership. It shall
19 also select a secretary, a treasurer and such assistant secretaries and assistant treasurers as may be
20 appropriate, any of whom may, but need not, be representatives appointed to Watermaster.

21 e. Minutes. Minutes of all Watermaster meetings shall be kept and shall
22 reflect a summary of all actions taken by the Watermaster. Copies thereof shall be furnished to
23 all Parties and interested Persons as provided for in Section III.P.2. Copies of minutes shall
24 constitute notice of any Watermaster action therein reported.

25 f. Regular Meetings. The Watermaster shall hold regular meetings at places
26 and times to be specified in the Watermaster Rules and Regulations. Its first meeting must be
27 held within 15 days from the date Judgment is granted in this case. Notice of the scheduled or

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1 regular meetings of the Watermaster and of any changes in the time or place thereof shall be
2 mailed to all Parties and interested Persons as provided for in Section III.P.2.

3 g. Special Meetings. Special meetings of the Watermaster may be called at
4 any time by the chairman or vice chairman or by any three (3) representatives appointed to
5 Watermaster by written notice delivered personally or mailed to all Parties and interested Persons
6 as provided for in Section III.P.2., at least twenty-four (24) hours on a business day before the
7 time of each such meeting in the case of personal delivery, and five (5) days' notice prior to such
8 meeting in the case of mail if the special meeting is being called under urgent circumstances. If a
9 special meeting is called and no urgent circumstance exists, then at least ten (10) days' notice
10 must be provided to all Parties. The notice shall specify the time and place of the special meeting
11 and the business to be transacted at such meeting.. No other business shall be considered at such
12 meeting.

13 h. Meeting Procedures. Watermaster shall designate the procedure for
14 conducting meetings within its Rules and Regulations. Rules and regulations for conducting
15 meetings shall conform to the procedures established for meetings of public agencies pursuant to
16 the California Open Meetings Law ("Brown Act"), California Government Code section 54950
17 et seq., as it may be amended from time to time.

18 i. Appointment of the Initial Watermaster Board. The initial Watermaster
19 board, which shall take office immediately from the date Judgment is granted, shall be composed
20 of the duly authorized representatives of California American, Seaside, Sand City, Del Rey Oaks,
21 Monterey, MCWRA, MPWMD, and two individuals to be designated by the landowners as the
22 initial representatives of the Landowner Group for the Coastal and Laguna Seca Subareas,
23 respectively.

24 j. Duties, Powers and Responsibilities of the Watermaster. To assist the
25 Court in the administration and enforcement of the provisions of this Decision, the Watermaster
26 shall have and is limited to the following duties, powers, and responsibilities:

27 i. Preparation of Monitoring and Management Plan. Within sixty
28 (60) days from the date Judgment is granted, Watermaster will prepare a comprehensive

1 monitoring and management plan for the Seaside Basin (“Monitoring and Management Plan”).
2 The Monitoring and Management Plan must be consistent with the criteria set forth in Exhibit A.

3 ii. Declaration of Operating Yield. Based upon the evidence at trial
4 concerning historic Production in the Basin, the Court sets the Operating Yield for the Seaside
5 Basin, as a whole, as 5,600 acre feet. The Operating Yield for the Coastal Subarea is 4,611 acre
6 feet and 9889 acre feet for the Laguna Seca Subarea. The Operating Yield established here will
7 be maintained for three (3) years from the date Judgment is granted, or until a determination is
8 made by the Watermaster, concurred in by this Court, that continued pumping at this established
9 Operating Yield will cause Material Injury to the Seaside Basin or to the Subareas or will cause
10 Material Injury to a Producer due to unreasonable pump lifts. In that event, the Watermaster shall
11 determine the modified Operating Yield in accordance with the Principles and Procedures
12 attached hereto as Exhibit A, and through the application of criteria that it shall develop for this
13 purpose.

14 iii. Artificial Replenishment and Replenishment Assessments. Each
15 Administrative Year, the Watermaster will determine a Replenishment Assessment for Artificial
16 Replenishment of the Seaside Basin necessary to offset the cumulative Basin Over-Production
17 (as defined in Section III.A.21.), and levy a Replenishment Assessment. Said Replenishment
18 Assessment does not apply to Production under an Alternative Production Allocation so long as
19 such Production is within the fixed amount established for that Producer in Table 2 of Section
20 III.B.3. Funds so generated may be accumulated for multiple Administrative Years, if necessary,
21 and shall be utilized solely for replenishment of the Basin Groundwater supply with Non-Native
22 water.

23 An additional Watermaster Replenishment Assessment shall be levied after the close of
24 each Administrative Year against all Producers that incurred Operating Yield Over-Production
25 during the Administrative Year. Said assessment shall be in addition to the Replenishment
26 Assessment addressed in Section III.A.21. The Replenishment Assessment based upon
27 Operating Yield Over-Production shall be levied against the Parties participating in the Alternative
28 Production Allocation for only such Production that exceeds the Parties’ respective fixed

1 Alternative Production Allocation identified on Table 2. In the event Watermaster cannot procure
2 Artificial Replenishment Water to offset Operating Yield Over-Production during the ensuing
3 Administrative Year, the Watermaster shall so declare in December and no Operating Yield Over-
4 Production then in effect may occur during the ensuing Administrative Year. Funds generated
5 by the Operating Yield Over-Production Assessment shall be utilized by the Watermaster to
6 engage in or contract for Replenishment of the Operating Yield Over-Production occurring in the
7 Preceding Administrative Year as expeditiously as possible.

8 Replenishment Assessments based on Over-Production and on Operating Yield
9 Over-Production shall be assessed on a per acre-foot basis on each acre-foot, or portion of an
10 acre-foot, of Over-Production. The per acre-foot amount of the Replenishment Assessments
11 shall be determined and declared by Watermaster in January of each Administrative Year in order
12 to provide Parties with advance knowledge of the cost of Over-Production in that Administrative
13 Year.

14 Payment of the Replenishment Assessment shall be made by each Producer incurring a
15 Replenishment Assessment within 40 days after the mailing of a statement for the Replenishment
16 Assessment by Watermaster. If payment by any Producer is not made on or before said date, the
17 Watermaster shall add a penalty of 5 percent thereof to such Producer's statement. Payment
18 required of any Producer hereunder may be enforced by execution issued outside of this Court,
19 by order of this Court, or by other proceedings by the Watermaster or by any Producer on the
20 Watermaster's behalf. All proceeds of Replenishment Assessments shall be used to procure
21 Non-Native water, including, if appropriate, substitute reclaimed water.

22 iv. Budget Assessments. The Watermaster budget for each
23 Administrative Year, and for the initial funding of the Monitoring and Management Plan, shall be
24 funded by Budget Assessments. The Watermaster budget will be composed of three separate
25 budgets. The first budget is solely for the funding of the Monitoring and Management Plan.
26 The initial, one-time funding for the Monitoring and Management Plan shall not be in excess of
27 \$1,000,000. The annual budget for the Monitoring and Management Plan shall not be in excess
28 of \$200,000 for the first Administrative Year, and thereafter as determined by the Watermaster.

1 The Budget Assessment for the Monitoring and Management budget shall be assessed against
2 each Producer (except those in the Landowner Group) by multiplying the amount of the
3 Monitoring and Management Plan budget for the ensuing Administrative Year by the following
4 percentages:

- 5 (1) California American 91%
- 6 (2) City of Seaside 7%
- 7 (3) Granite Rock Company 1%
- 8 (4) D.B.O. Development No. 27 1%

9 At such times as a Party within the Coastal Subarea chooses to change its Alternative Production
10 to a Standard Production Allocation that Party will be assessed a proportionate share of the
11 Budget Assessment for the Monitoring and Management Plan Budget based upon a modification
12 of the percentages to include any new Standard Production.

13 The administrative budget shall be fixed at \$100,000 annually for the first Administrative
14 Year, and thereafter as determined by the Watermaster. The Budget Assessment for the
15 administrative budget shall be assessed against each Producer (except those inn the Landowner
16 Group) by multiplying the amount of the budget for the ensuing Administrative Year by the
17 following percentages:

- 18 (1) California American 83%
- 19 (2) City of Seaside 14.4%
- 20 (3) City of Sand City 2.6%

21 The Replenishment Budget shall be calculated based upon the anticipated cost of
22 obtaining replenishment water, and shall be assessed as set forth in Section III.A.21, and in
23 Section III.L.3.j.iii.

24 Except for the initial Budget Assessment which shall be due 30 days from the date
25 Judgment is granted, payment of the Budget Assessment, subject to any adjustment by the Court
26 as provided in Section III.N., shall be made by each Producer prior to the beginning of the
27 Administrative Year to which the Budget Assessment relates, or within 40 days after the mailing
28 of the tentative budget, whichever is later. If such payment by any Producer is not made on or

1 before said date, the Watermaster shall add a penalty of 5 percent thereof to such Producer's
2 statement. Payment required of any Producer hereunder may be enforced by execution issued
3 outside of this Court, by order of this Court, or by other proceedings by the Watermaster or by
4 any Producer on the Watermaster's behalf.

5 v. Reports, Information, and Records. The Watermaster will require
6 Parties to furnish such reports, information, and records as may be reasonably necessary to
7 determine compliance or lack of compliance by any Party with the provisions of this Decision.

8 vi. Requirement of Measuring Devices. The Watermaster will
9 require all Parties owning or operating any Groundwater Extraction and/or Storage facilities to
10 install appropriate Water measuring devices, and to maintain said Water measuring devices at all
11 times in good working order at such Party's own expense. Such devices shall not interfere with
12 any measuring gauges required by MPWMD.

13 vii. Inspections by the Watermaster. The Watermaster will make
14 inspections of Water Production facilities and measuring devices at such times and as often as
15 may be reasonable under the circumstances, and to calibrate or test such devices.

16 viii. Collection of Arrears. The Watermaster will undertake any and all
17 actions necessary to collect the arrears of any Party with regard to any and all components of the
18 Budget Assessment and/or the Replenishment Assessment.

19 ix. Hearing Objections; Review and Approvals. The Watermaster
20 will hear all objections and/or review and determine approval or denial of the action(s) of any
21 Party as provided for by any other provision of this Decision.

22 x. Annual Report. The Watermaster will prepare, file with the Court
23 and mail to each of the Parties on or before the 15th day of February, an annual report for the
24 preceding Administrative Year, the scope of which shall include but not be limited to the
25 following:

- 26 • Groundwater Extractions;
- 27 • Groundwater Storage;
- 28 • Amount of Artificial Replenishment, if any, performed by Watermaster;

- Leases or sales of Production Allocation;
- Use of imported, reclaimed, or desalinated Water as a source of Water for Storage or as a Water supply for lands overlying the Seaside Basin;
- Violations of the Decision and any corrective actions taken;
- Watermaster administration costs;
- Replenishment Assessments;
- All components of the Watermaster budget; and
- Recommendations.

xi. Annual Budget and Appeal Procedure in Relation Thereto. The

Watermaster will annually adopt a tentative budget for each Administrative Year stating the anticipated expense for administering the provisions of this Decision, including reasonable reserve funds. The adoption of each Administrative Year's tentative budget shall require the affirmative vote of seven (7) voting positions. The Watermaster shall mail a copy of said tentative budget to each of the Producers hereto at least 60 days before the beginning of each Administrative Year. The Landowner Group representative shall not participate in any vote concerning the approval of the Watermaster budget. If any Producer hereto has any objection to said tentative budget, it shall present the same in writing to the Watermaster within 15 days after the date of mailing of said tentative budget by the Watermaster. If no objections are received within said period, the tentative budget shall become the Final budget. If objections are received, the Watermaster shall, within 10 days thereafter, consider such objections, prepare a Final budget, and mail a copy thereof to each Producer, together with a statement of the amount assessed to each Producer (Administrative Assessment). Any Producer may apply to the Court within 15 days after the mailing of such Final budget for a revision thereof based on specific objections thereto in the manner provided in Section III.N. The Producer challenging the budget shall make the payments otherwise required of them to the Watermaster, despite the filing of the request for revision with the Court. Upon any revision by the Court, the Watermaster shall either remit to the Producers their pro rata portions of any reduction in the budget, or credit their accounts with respect to their Administrative Assessment for the next ensuing Administrative Year, as the Court

1 shall direct. The amount of each Producer's Budget Assessment shall be determined as provided
2 in Section III.L.3.j.iv.

3 Any money in Watermaster's budget not expended at the end of any Administrative Year
4 shall be applied to the budget of the succeeding Administrative Year.

5 xii. Rules and Regulations. The Watermaster will adopt and amend
6 from time to time such Rules and Regulations as may be reasonably necessary to carry out its
7 duties, powers and responsibilities under the provisions of this Decision. The Rules and
8 Regulations and any amendments thereto, shall be effective on such date after the mailing thereof
9 to the Parties as is specified by the Watermaster, but not sooner than thirty (30) days after such
10 mailing. The Watermaster shall adopt initial Watermaster Rules and Regulations within ninety
11 (90) days from the date Judgment is granted.

12 xiii. Acquisition of Facilities. The Watermaster may purchase, lease,
13 acquire and hold all necessary property and equipment as necessary to perform the duties,
14 powers, and responsibilities provided to Watermaster by this Decision; provided, however, that
15 Watermaster shall not acquire any interest in real property in excess of year-to-year tenancy for
16 necessary quarters and facilities.

17 xiv. Employment of Staff and Consultants. The Watermaster may
18 employ such administrative, engineering, geologic, accounting, legal, or other specialized
19 personnel or consultants as may be deemed appropriate to the carrying out of its duties, powers,
20 and responsibilities and to require appropriate bonds from all officers and employees handling
21 the Watermaster funds.

22 xv. Investment of Funds. The Watermaster may hold and invest any
23 and all funds that the Watermaster may possess in investments authorized from time to time for
24 public agencies in the State of California.

25 xvi. Borrowing. The Watermaster may borrow in anticipation of
26 receipt of assessment proceeds an amount not to exceed the annual amount of assessments levied
27 but uncollected.

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1 xvii. Contracts. The Watermaster may enter into contracts for the
2 performance of any administrative power herein granted.

3 xviii. Cooperation with Public and Private Entities. The Watermaster
4 may act jointly or cooperate with any public or private entity to the end that the purposes of the
5 Physical Solution may be fully and economically carried out. Where it is more economical to do
6 so, Watermaster is directed to use such facilities of a public or private entity as are available to it
7 to execute the duties, powers, and responsibilities provided to Watermaster under this Decision.

8 xix. Declaration of Total Usable Storage Space. The Watermaster will
9 declare the Total Useable Storage Space and periodically issue adjustments to the same.

10 xx. Review of Storage Applications; Regulation of Storage; Issuance
11 of Storage and Recovery Agreements. The Watermaster will review applications for Storage in
12 the Seaside Basin, regulate the Storage of Non-Native Water in the Seaside Basin, and issue
13 Storage and Recovery Agreements, all as provided below. All applications for Storage in the
14 Seaside Basin shall be considered and voted on before a noticed meeting of the Watermaster.
15 However, all such applications shall be approved absent the issuance of findings that a Material
16 Injury to the Seaside Basin or Producers will or is likely to occur as a result of the proposed
17 Storage program and no reasonable conditions could be imposed to eliminate such risk. If a
18 Storage application is approved, the Watermaster shall issue a Storage and Recovery Agreement.
19 The Storage and Recovery Agreement may include, among other possible elements and/or
20 provisions, the following conditions to avoid Material Injury: (1) the quantity of Water authorized
21 to be Spread or Directly Injected into the Seaside Basin, (2) the location of the authorized
22 Spreading or Direct Injection, (3) the location(s) where the Water may be recaptured, (4) the
23 particular Water quality characteristics that are required pursuant to the Storage and Recovery
24 Agreement, (5) the amount of Water that may be recaptured pursuant to the Stored Water Credits
25 calculated by Watermaster, (6) any other terms and conditions deemed necessary to protect the
26 Seaside Basin and those areas affected by the Seaside Basin. Such Storage and Recovery
27 Agreements may provide for different locations for introduction and Extraction of Stored Water if
28 deemed appropriate by the Watermaster.

1 xxi. Monitoring and Study of the Seaside Basin and All Seaside Basin
2 Activities. The Watermaster will monitor and perform or obtain engineering, hydrogeologic, and
3 scientific studies concerning all characteristics and workings of the Seaside Basin, and all natural
4 and human-induced influences on the Seaside Basin, as they may affect the quantity and quality
5 of Water available for Extraction, that are reasonably required for the purposes of achieving
6 prudent management of the Seaside Basin in accord with the provisions of this Decision.

7 xxii. Relocation of Authorized Production Locations. The Watermaster
8 will order relocation of the authorized quantity of Production pursuant to any Producer's
9 Production Allocation from a specific location or from a specific aquifer within the same Subarea
10 of the Seaside Basin, provided that it allows equivalent Production from any other location/aquifer
11 in the Seaside Basin within the same Subarea that would not also create a reasonable potential for
12 Material Injury. Watermaster may only order relocation of Production after issuing findings that
13 a Material Injury has occurred or is likely to occur as a result of the then-authorized quantity and
14 geographic distribution of Production. Watermaster may not order the relocation of Production
15 by any Producer that is a member of the Landowner Group.

16 xxiii. Water Quality. The Watermaster will take any action within
17 the Seaside Basin, including, but not limited to, capital expenditures and legal actions, which in
18 the discretion of Watermaster is necessary or desirable to accomplish any of the following:

- 19 • Prevent contaminants from entering the Groundwater supplies
20 of the Seaside Basin, which present a significant threat to the Groundwater quality of the
21 Seaside Basin, whether or not the threat is immediate;
- 22 • Remove contaminants from the Groundwater supplies of the
23 Seaside Basin presenting a significant threat to the Groundwater quality of the Seaside Basin;
- 24 • Determine the existence, extend, and location of contaminants in, or
25 which may enter, the Groundwater supplies of the Seaside Basin;
- 26 • Determine Persons responsible for those contaminants; and
- 27 • Perform or obtain engineering, hydrologic, and scientific studies as
28 may be reasonably required for any of the foregoing purposes.

1 xxiv. Other Specified Powers Pursuant to Decision Terms. The
2 Watermaster will undertake any other powers, duties, or responsibilities provided through any
3 other provision of this Decision.

4 xxv. No Power to Alter Allocation or Rights. Watermaster has no
5 power to adjust any Producer's Base Water Right or the formula for determining Production
6 Allocation, except to accommodate the intervention of a new Party pursuant to Section III.O.1.b.
7 However, should an adjustment of Base Water Right and/or Production Allocation within a
8 Subarea be required to accommodate the intervention of a new Party, no adjustment shall be made
9 to the Base Water Right or Production Allocations possessed by any Party operating under the
10 Alternative Production Allocation within the Landowner Group until the Production Allocations
11 for that Subarea possessed by Parties operating under the Standard Production Allocation have
12 been reduced to zero.

13 xxvi. Effect of Non-Compliance by Watermaster With Time
14 Provisions. Failure of the Watermaster to perform any duty, power or responsibility set forth
15 in this Decision within the time limitation herein set forth shall not deprive the Watermaster
16 of authority to subsequently discharge such duty, power, or responsibility, except to the extent
17 that any such failure by the Watermaster may have rendered some otherwise required act by a
18 Party impossible.

19 xxvii. Public Records. Watermaster shall conform to the procedures
20 established under the California Public Records Act, California Government Code section
21 54950 et seq., as it may be amended from time to time.

22 M. Additional Provisions of Physical Solution.

23 In order to provide flexibility to the injunctive provisions set forth in Section III.D of
24 this Decision, and to assist in a Physical Solution to meet Water requirements in the Basin,
25 the determination of rights and responsibilities, and the injunctive provisions so set forth are
26 subject to the following provisions:

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1 1. California American Obligation to Augment Water Supply

2 a. Long-Term Supplemental Water Supplies. California American shall
3 undertake all reasonable best efforts to promptly and diligently pursue, and if necessary
4 collaborate with other entities, to obtain and develop sufficient long-term supplemental Water
5 supplies to augment the Water supply available for its service territory within Monterey
6 County.

7 b. Interim Supplemental Water Supplies. During the interim period, until
8 long-term supplemental Water supplies are available, California American shall undertake all
9 reasonable best efforts to ensure that it has sufficient Water supplies to meet all present Water
10 supply needs, including the Water credits allocated to the various political subdivisions
11 pursuant to the MPWMD's Water Allocation Program, in such quantities as set forth in
12 Exhibit D, and the Water credits issued to various properties pursuant to the MPWMD's
13 Water Allocation Program.

14 c. Regulatory Authorization. California American's duties under
15 Sections III.M.1.a and III.M.1.b above will be measured and construed in the context that
16 there are various regulatory approvals that must be obtained for California American to
17 successfully implement the measures reasonably contemplated to secure supplemental Water.
18 For example, it is acknowledged and understood that California American's ability to
19 complete a supplemental Water supply project will require approvals and authorizations from
20 the State Water Resources Control Board ("SWRCB") and the California Public Utilities
21 Commission ("CPUC"). Accordingly, California American will not be considered in default
22 under this Section III.M.1 if it uses reasonable best efforts to obtain the required approvals
23 and authorizations.

24 d. Credit Toward Replenishment Assessment. California American's
25 expenditures for water supply augmentation may also provide replenishment water for the
26 Basin. Accordingly, on an annual basis, California American will provide the Watermaster
27 with an accounting of all expenditures it has made for water supply augmentation that it
28 *Completely has*
~~believes have~~ or will also result in replenishment of the Basin. The Watermaster shall review

1 these expenditures and ^{if it concurs} reduce California American's Replenishment Assessment obligation,
2 for that year, by an amount equal to the amount claimed by California American. To the
3 extent that the Watermaster ^{revis} ~~disputes~~ any of the claimed amounts, it shall provide California
4 American with an explanation of ^{for the rejection} ~~its contest~~ and allow California American an opportunity to
5 meet and confer on the disputed amount. In the event that the Watermaster and California
6 American cannot resolve ^{agree} their dispute, the matter will be referred to the Court through a
7 request filed by ^{California American may} ~~the Watermaster~~. _{AW}

8 2. Assignment and Transfer of Production Allocation. Subject to other
9 provisions of this Decision, and any applicable Watermaster Rules and Regulations, the
10 Parties may assign and transfer any portion of their respective Production Allocation either on
11 an annual Administrative Year basis or in perpetuity to any Person for use within the Basin.

12 The Parties may also assign and transfer the right to Extract any quantity of Water
13 associated with an existing Stored Water Credit or Carryover Credit, subject to other
14 provisions of this Decision, and any applicable Watermaster Rules and Regulations.

15 3. Export of Groundwater Outside of Subarea or Seaside Basin.

16 a. Exports Authorized from the Coastal Subarea. Producers may export
17 Water Produced from the Coastal Subarea for reasonable and beneficial uses within another
18 Subarea of the Seaside Basin. Only California American may export water outside the Basin,
19 and then only to provide water to its current customers. This means that, in any
20 Administrative Year, any Producer may export from the Coastal Subarea up to, but not in
21 excess of, a quantity equal to the sum of that Producer's Production Allocation, plus Stored
22 Water Credits, plus Carryover Credits. Export of Groundwater in excess of a Producer's
23 total rights (Production Allocation, plus Stored Water Credits, plus Carryover Credits),
24 however, is prohibited.

25 b. Exports of Natural Replenishment Water Prohibited from the Laguna
26 Seca Subarea. Exports from the Laguna Seca Subarea of Natural Replenishment Water and
27 Carryover Credits not caused by Artificial Replenishment are prohibited.

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1 c. Portability Authorized Within Subareas; Portability Prohibited
2 Between Subareas. Any Producer may change the location of its Production facilities within
3 its respective Subarea or join other Production facilities within its Subarea, so long as such
4 relocation does not cause a Material Injury or threat of Material Injury to the Basin or
5 interfere with the Production by any pre-existing Production facilities operated by another
6 Producer(s). No Party may Produce Groundwater from the Coastal Subareas pursuant to any
7 right recognized by this Decision in the Laguna Seca Subarea, and *vice versa*.

8 N. Watermaster Decision Review Procedures. Any action, decision, rule or procedure of
9 the Watermaster pursuant to this Decision shall be subject to review by the Court on its own
10 motion or on timely motion by any Party, as follows:

11 1. Effective Date of the Watermaster Action. Any order, decision or action of the
12 Watermaster pursuant to this Decision on noticed specific agenda items shall be deemed to
13 have occurred on the date of the order, decision or action.

14 2. Notice of Motion. Any Party may, by a regularly noticed motion, petition the
15 Court for review of the Watermaster's action or decision pursuant to this Decision. The
16 motion shall be deemed to be filed when a copy, conformed as filed with the Court, has been
17 delivered to the Watermaster together with the service fee established by the Watermaster
18 sufficient to cover the cost to photocopy and mail the motion to each Party. The Watermaster
19 shall prepare copies and mail a copy of the motion to each Party or its designee according to
20 the official service list which shall be maintained by the Watermaster according to Section
21 III.P.2. A Party's obligation to serve notice of a motion upon the Parties is deemed to be
22 satisfied by filing the motion as provided herein. Unless ordered by the Court, any such
23 petition shall not operate to stay the effect of any Watermaster action or decision that is
24 challenged.

25 3. Time for Motion. A motion to review any Watermaster action or decision will
26 be filed within thirty (30) days after such Watermaster action or decision, except that motions
27 to review Budget Assessments and Replenishment Assessments hereunder shall be filed
28 within fifteen (15) days of mailing of notice of the Assessment.

1 4. De Novo Nature of Proceedings. Upon filing of a petition to review a
2 Watermaster action, the Watermaster shall notify the Parties of a date when the Court will take
3 evidence and hear argument. The Court's review shall be de novo and the Watermaster
4 decision or action shall have no evidentiary weight in such proceeding.

5 O. Reserved Jurisdiction and Other Remedies.

6 1. Continuing Jurisdiction.

7 a. Jurisdiction Reserved. Full jurisdiction, power and authority are
8 retained by and reserved by the Court upon the application of any Party or by the
9 Watermaster, by a noticed motion to all Parties, to make such further or supplemental orders
10 or directions as may be necessary or appropriate for interpretation, enforcement, or
11 implementation of this Decision. The Court may also modify, amend or amplify any of the
12 provisions of this Decision upon noticed motion to all the Parties. The Court, through its
13 reserved and retained jurisdiction, however, shall not have the authority to adjust any
14 Producer's Base Water Right or Production Allocation, except to accommodate the
15 intervention of a new Party pursuant to Section III.O.1.b. However, should an adjustment of
16 Base Water Right and/or Production Allocation within a Subarea be required to accommodate
17 the intervention of a new Party, no adjustment shall be made to the Base Water Right or
18 Production Allocations possessed by any Party operating under the Alternative Production
19 Allocation within the Landowner Group until the Production Allocations within that Subarea
20 possessed by Parties operating under the Standard Production Allocation have been reduced
21 to zero.

22 b. Intervention After Decision. Any non-party who is Producing or
23 proposes to Produce Groundwater from the Seaside Basin in an amount equal to or greater
24 than five (5) acre feet per year, may seek to become a Party to this Decision through (1) a
25 stipulation for intervention entered into with the Watermaster or (2) any Party or the
26 Watermaster filing a complaint against the non-party requesting that the non-party be joined
27 in and bound by this Decision. The Watermaster may execute said stipulation on behalf of
28 the other Parties herein, but such stipulation shall not preclude a Party from opposing such

1 intervention at the time of the Court hearing thereon. A stipulation for intervention must be
2 filed with the Court, and the Court will then consider an order confirming said intervention
3 following thirty (30) days' notice to the Parties. Thereafter, if approved by the Court, such
4 intervenor shall be a Party bound by this Decision and entitled to the rights and privileges
5 accorded under the Physical Solution herein.

6 2. Reservation of Other Remedies.

7 a. Claims By and Against Non-Parties. Nothing in this Decision shall
8 expand or restrict the rights, remedies or defenses available to any Party in raising or
9 defending against claims made by any non-party. Any Party shall have the right to initiate an
10 action against any non-party to enforce or compel compliance with the provisions of this
11 Decision.

12 b. Claims Between Parties on Matters Unrelated to the Decision.

13 Nothing in this Decision shall either expand or restrict the rights or remedies of the Parties
14 concerning any subject matter that is unrelated to the use of the Seaside Basin for Extraction
15 and/or Storage of Water as allocated and equitably managed pursuant to this Decision.

16 P. General Provisions.

17 1. Decision Constitutes Inter Se Adjudication. This Decision constitutes an
18 inter se adjudication of the respective rights of all Parties.

19 2. Service Upon and Delivery to Parties and Interested Persons of Various
20 Papers. This Decision and all future notices, determinations, requests, demands, objections,
21 reports and other papers and processes Produced from this Court shall be served on all
22 Parties by first class mail, postage prepaid, addressed to the designee and at the address
23 designated for that purpose in the list attached as Exhibit E to this Decision, or in any
24 substitute designation filed with the Court.

25 Each Party who has not heretofore made such a designation, within thirty (30) days
26 from the date Judgment is granted, shall file with the Court, with proof of service of a copy
27 upon the Watermaster, a written designation of the Person to whom, and the address at which,
28 all future notices, determinations, requests, demands, objections, reports and other papers and

1 processes to be served upon that Party or delivered to that Party are to be so served or
2 delivered.

3 A later substitute designation filed and served in the same manner by any Party shall be
4 effective from the date of the filing as to the then future notices, determinations, requests,
5 demands, objections, reports and other papers and processes to be served upon or delivered to
6 that Party.

7 Watermaster shall maintain at all times a current list of Parties to whom notices are to be
8 sent and their address for purposes of service. Copies of such lists shall be available to any
9 Person. If no designation is made, a Party's designee shall be deemed to be, in order of priority:
10 (a) the Party's attorney of record; (b) if the Party does not have an attorney of record, the Party
11 itself at the address on the Watermaster list.

12 Watermaster shall also maintain a list of interested Persons that shall include all Persons
13 whom, by written request to Watermaster, request to be added to Watermaster's list of interested
14 Persons. All notices, determinations, requests, demands, objections, reports and other papers and
15 processes required to be delivered to interested Persons shall be delivered to all Parties and all
16 Persons on Watermaster's list of interested Persons.

17 Delivery to or service upon any Party or interested Person by Watermaster, by any other
18 Party, or by the Court, of any document required to be served upon or delivered to a Party under
19 or pursuant to this Decision shall be deemed made if made by deposit thereof (or by copy
20 thereof) in the mail, first class postage prepaid, addressed to the designee of the Party and at the
21 address shown in the latest designation filed by that Party.

22 Any Party desiring to be relieved of receiving deliveries from Watermaster may file a
23 waiver of notice on a form to be provided by Watermaster.

24 3. Decision Binding on Successors. All provisions contained in this Decision are
25 applicable to and binding upon and inure to the benefit of not only the Parties to this action, but
26 also to their respective heirs, executors, administrators, successors, assigns, lessees, licensees and
27 to the agents, employees and attorneys in fact of any such Persons.

28 //

1 Q. The Complaints in Intervention

2 The Complaint in Intervention of MPWMD seeks declaratory relief regarding its statutory
3 right to manage and control pumping in the Basin, to store water in and Extract water from the
4 Basin, to store and use reclaimed water, to manage all water distribution facilities within the
5 Basin, and “the quantification and prioritization of its water and storage rights”. It also sought a
6 Physical Solution for the management of the Basin’s water resources, with MPWMD being
7 appointed as Watermaster to administer the Court’s judgment. It also sought parallel injunctive
8 relief against the parties to the lawsuit.

9 The Complaint in Intervention of MCWRA sought declaratory and injunctive relief
10 regarding its right to manage and control water resources including, inter alia, those within the
11 boundaries of the Seaside Basin, and a permanent injunction prohibiting any party to the lawsuit
12 from exercising control “in any fashion” of the Basin in contravention of its water management
13 authority.

14 On December 12, 2005, the Court asked the parties to brief the issue of whether
15 MPWMD should be designated as Watermaster. Briefs were submitted by MPWMD ,
16 Plaintiff, Cal Am, and the City of Seaside. The court had previously received an Amicus brief
17 from the Sierra Club which dealt with the issue of the powers of MPWMD land the effect on
18 those powers if the court were to appoint a Watermaster other than MPWMD. The Court has
19 read and considered each submitted brief. It has also read the Act which created MPWMD
20 (Water Code Appendix, Chapter 118), and has had the benefit of the arguments of the parties
21 concerning the subject. Being so informed it has concluded that the appointment of a
22 collaborative Watermaster does not interfere with the powers of the District.

23 The District has argued that appointment of a Watermaster other than itself would violate
24 the Separation of Powers doctrine. It urges that the legislature has vested it with the power to
25 regulate pumping, and therefore only it is qualified to serve as Watermaster. On the other hand,
26 the District has asked the Court to adopt a Physical Solution for the Basin. In so arguing, it
27 necessarily concedes that this Court possesses power to regulate use of the Basin beyond any
28 power the District currently possesses. Furthermore, the undisputed evidence in this case has

1 shown that, although the District is empowered to adopt a Groundwater management plan it has
2 never done so. The language of Water Code Section 10753 is instructive regarding the issue of
3 the Separation of Powers:

4 “(a) Any local agency, whose service area includes a groundwater basin...that is
5 not subject to groundwater management pursuant to...a court order, judgment, or
6 decree, may...adopt and implement a groundwater management plan.”

7 (Emphasis added.)

8 Pursuant to the quoted provisions of the foregoing section, the District will not be able in the
9 future to adopt a Groundwater management plan for the Seaside Basin. Clearly the legislature
10 contemplated that courts had the power to develop management plans for aquifer management
11 even if a water management district already existed in a geographical area.

12 The District further argues that if the Court appoints a Watermaster other than itself, the
13 authority of the Watermaster must not conflict with the MPWMD’s authority. It is certainly
14 true that the District possesses certain authority, which it is free to exercise according to the
15 legislative mandate which created it. However, it is apparent the legislature did not intend that all
16 of the powers it granted to the District be held exclusively by the District, else it would not at a
17 later time have created the Monterey County Water Resources Agency and endowed it with
18 many of the powers granted to the MPWMD. Rather, in creating the MCWRA, the legislature
19 mandated that the two agencies cooperate with one another (Water Code Appendix Section 52-
20 85). Similarly, the judgment contemplated in this Decision requires the Watermaster to “...act
21 jointly or cooperate with any public...entity to the end that the purposes of the Physical Solution
22 may be fully...carried out.” (Section III.L.3.j.xviii)

23 On pages 15-16 of its brief, the District lists 9 powers and asserts those powers would
24 “encompass the duties of any appointed watermaster.” The Court has compared those 9
25 asserted powers and has concluded that those powers, to the extent that they exist or are currently
26 being utilized by the District, do not encompass all the duties of a Watermaster appointed by the
27 judgment. Furthermore, to the extent the Watermaster may be given powers akin to those of the
28 District, this Court retains jurisdiction to determine any conflict which may arise in the future.

1 For example, the Decision directs that any metering of Production wells by the Watermaster
2 shall be done in a way which does not conflict with the MPWMD gauging already in place on all
3 producing wells. The MPWMD is still able to develop water resources within its boundaries
4 and can store water for the benefit of the District in the Basin, although it has not to date done
5 either of those things with regard to the Seaside Basin.

6 One asserted power deserves more precise attention: the asserted "...power and duty to
7 manage and regulate the transferability of the water among users- (Water Code Appendix)
8 Section 328(g)." The plain reading of the referenced section does not encompass the right
9 asserted. Furthermore, to the extent those that section purports to grant the District the power to
10 "...declare rights in the natural flow of any subterranean supply of water..." it is apparent that
11 the legislature did not intent to interfere with the ultimate right of the courts to determine the
12 water rights of parties claiming such rights. To read the section otherwise would be to create a
13 true Separation of Powers issue.

14 In fairness to the District, it had, of necessity, to confine its analysis of the duties of the
15 proposed Watermaster to those set forth in the Proposed Stipulated Judgment. The Decision,
16 while obviously relying on the structure and format of the Stipulated Judgment, does not track all
17 provisions of said Judgment. For example, many of the concerns of the District revolve around
18 its statutory right to store water in subterranean reservoirs. The Decision preserves that right.
19 Similarly, while the Decision allows the assignment of Production rights (which the District is
20 not empowered to affect by its referenced legislation, Water Code Section 328(g)), it does not
21 provide for the transferability of Storage rights, a matter which might be of concern to the
22 District under certain circumstances.

23 The District argues that the proposed powers of the Watermaster regarding maintenance
24 and modification of the Operating Safe Yield would conflict with the District's authority. Much
25 of its argument is addressed to language in the Proposed Stipulated Judgment which does not
26 appear in the Decision. The Decision grants certain rights of control to the Watermaster for the
27 purpose of maintaining the viability of the aquifer. However, it does not purport to forbid any
28 regulation of the Basin which may be required by a public agency possessing the power to

1 impose such regulation. In this regard it should be noted that the complaint in this case first
2 raised the issue of the Overdraft status of the Basin, and the initial pleadings of the District stated
3 that it did not know if that were true or not. The Decision does not conflict with any procedure
4 or plan currently in place by the District to establish an Operating Yield for the Basin.

5 Of concern to the District is the fact that the Watermaster will be empowered to augment
6 the underground water supply. While Water Code Section 118-343 gives the District the power
7 to levy a Groundwater charge for the purpose of augmenting underground water supplies, in fact
8 from the time of its creation in 1977 to the present the District has established no such charge,
9 and has not augmented the underground water supply of the Basin. The fact that the
10 Watermaster is authorized in the contemplated judgment to assess charges for replenishment of
11 the Basin does not prevent the District in the future from undertaking such augmentation, if it
12 determines it is appropriate to do so.

13 Based upon the evidence adduced at trial, which demonstrated that a collaborative
14 Watermaster will likely provide more tangible results than any single individual or entity
15 Watermaster, the Court has decided to appoint a collaborative board as Watermaster.

16 The prayer of MPWMD for injunctive relief is denied, except insofar as the court will
17 issue injunctive relief as set forth in the Decision at the request of all parties. The prayer that
18 the Court adopt a Physical Solution for the Seaside Basin is granted. The request for declaratory
19 relief is granted to the extent that the court finds that the statutory rights of MPWMD are not in
20 conflict with the Physical Solution and the appointment of a Watermaster in this proceeding.

21 The Complaint in Intervention of MCWRA also seeks declaratory and injunctive relief, but
22 does not urge the appointment of itself or any other entity as Watermaster. The request for
23 injunctive relief is denied as moot, since the lawsuit does not challenge the statutory authority of
24 the Agency. The request for declaratory relief is granted to the extent that the Court finds that
25 the statutory rights of MCWRA are not in conflict with the Physical Solution adopted by the
26 Court in this proceeding.

27 A statement of decision, if requested by any party, will be prepared by Plaintiff. If no
28 party within ten days of the filing of this Decision specifies controverted issues or makes

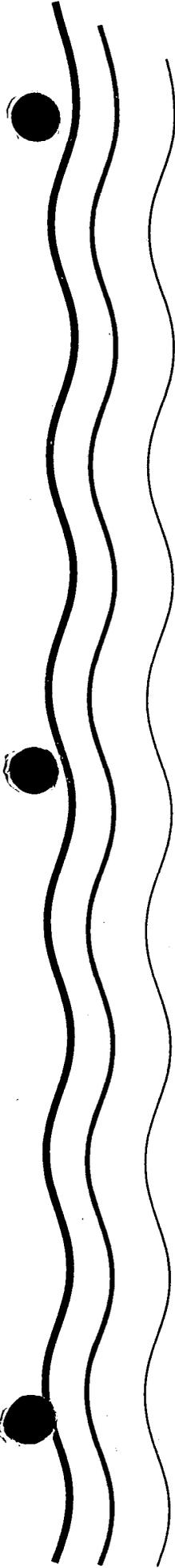
1 proposals not covered in the Decision this Decision shall become the Statement of Decision,
2 and Plaintiff shall prepare a judgment thereon.

3 *March 22*
4 Dated: ~~February~~ _____, 2006

By _____

5
6 Honorable *Roger D. Randall*
7 Roger D. Randall

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**New Los Padres Project
of
Monterey Peninsula
Water Management District**

**Carmel River
Monterey County**

Decision No. 1632

Application 27614 and Permit 7130B

JULY 6, 1995

**STATE WATER RESOURCES CONTROL BOARD
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY**

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CITING THE RECORD

When citing evidence in the hearing record, the following conventions have been adopted:

Information derived from the hearing transcript:

T, II, 12:1-15:17

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 if single line reference is cited)
 beginning page and line number
 hearing transcript volume number
identifying abbreviation of the information source

Information derived from an exhibit:

SWRCB:5,4

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 page number, volume, table, graph, or figure
 number; or application number if a file is cited
 exhibit number
identifying abbreviation of information source

Abbreviations of information sources:

AC	Archeological Consulting
ACHP	Advisory Council on Historic Preservation
ACOE	U.S. Army Corps of Engineers
CAL-AM	California American Water Company
CRSA	Carmel River Steelhead Association
CSPA	California Sportfishing Protection Alliance
DISTRICT or MPWMD	Monterey Peninsula Water Management District
DFG	California Department of Fish and Game
ESSELEN TRIBE	Esselen Tribe of Monterey County
ESSELEN NATION	Esselen Nation of United Families of the Central Coast of California
EVANS	Willis Evans
PARK	Monterey Peninsula Regional Park District
PHBr	Post-Hearing Brief
SWRCB	State Water Resources Control Board
SIERRA CLUB	Ventana Chapter of the Sierra Club
T	Hearing Transcript

Other commonly used abbreviations:

af acre-feet
afa acre-feet annually
cfs cubic feet per second
CEQA California Environmental Quality Act
gpm gallons per minute
RM river miles, measured from the ocean
USGS United States Geologic Survey

DECISION APPROVING AMENDED APPLICATION 27614
AND ORDER REVOKING PERMIT 7130B

SYNOPSIS

This decision approves Application 27614 by the Monterey Peninsula Water Management District for the appropriation of water from the Carmel River by the New Los Padres Project. Application 27614 is approved for up to 42 cubic feet per second of direct diversion and 24,000 acre feet annually (afa) to storage, not to exceed a combined total diversion of 29,000 afa. The authorized season of direct diversion and diversion to storage will extend from November 1 of each year to June 30 of the following year.

The decision includes conditions which provide that any permit issued to the District shall:

- a. Be junior in priority to the rights of persons diverting water for reasonable beneficial use under valid and properly exercised riparian, overlying, pre- and post-1914 appropriative claims of right (which are currently prior to Application 27614) and
- b. Be junior to any approved application for an appropriative right for certain persons identified in the decision who are using established quantities of water within the watershed of origin, irrespective of the priority of such applications *vis a vis* the District's application.

The decision finds that: (a) existing diversions from the Carmel River have adversely affected the public trust resources in the river, (b) the District's proposed method for operating the New Los Padres Project would mitigate the effects of existing diversions from the river, and (c) requires the District to operate the New Los Padres Project to maintain flow in the Carmel River in accordance with a schedule and to implement other measures to preserve steelhead and riparian habitat. The decision also includes conditions to avoid, protect, or minimize the project's effects on historic and traditional cultural properties pursuant to the Programmatic Agreement developed in accordance with Section 106 of the National Historic Preservation Act.

In addition, the decision revokes Permit 7130B for lack of diligence by the District and its predecessors to develop the water authorized by the permit. Finally, the decision finds that no additional water is available for appropriation from the Carmel River between May 1 to December 31 of each year and directs the staff of the State Water Resources Control Board to include the Carmel River among those streams determined to be fully appropriated during all or part of each year in accordance with Water Code Section 1205.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of: (a) Amended)
Application 27614; and (b) Petition for)
Time Extension for Permit 7130B) DECISION 1632
(Application 11674B) by Monterey)
Peninsula Water Management District,)
Applicant and Petitioner,) SOURCE: Carmel River
Asoleado Mutual Water Company, Dale and) tributary to
Marian Blanchard, Cachagua Community) Pacific Ocean
Center, California-American Water) COUNTY: Monterey
Company, California Sportfishing)
Protection Alliance, California Trout,)
Inc., Carmel River Steelhead Association,)
Carmel Valley Ranch, Douglas and Roberta)
Chappell, Chugach and Company, Charity)
Crane, George and Julia Crow, Tom Crow,)
Esselen Tribe of Monterey County,)
Richard Evans, Willis Evans, Jane)
Galante, Hacienda Carmel Community)
Association, Franklin and Catherine)
Johnson, Patricia Johnson, Roy Kaufman,)
James Kirk, Donald Koontz, Dan Lufkin,)
Leo Lutes, A. C. and Linda Markkula,)
Aloyse and Novella Nicholson, Odella)
Brothers, Nancy Porter, Patricia Hoover,)
Pt. Sur Corporation, Quail Lodge, Rancho)
Cañada de la Segunda, Rancho San Carlos,)
Verne Rockhold, William Spear, Bruce and)
Beth Sterten, Syndicate Camp, John and)
Kathryn Tregoe, Craig Vetter, John G.)
Williams, Leonard and Emily Williams)
Trust, Robert and Elizabeth Wilson,)
Roger and Josephine Williams, Wolter)
Properties Ltd., Bill Barker, California)
Department of Fish and Game, California)
Department of Parks and Recreation,)
Green Valley Meadows, Quinn Properties,)
and Sierra Club,)
Protestants & Interested Parties.)

DECISION APPROVING AMENDED APPLICATION 27614
AND ORDER REVOKING PERMIT 7130B

BY THE BOARD:

Monterey Peninsula Water Management District (District) having:

(1) filed Application 27614, and amendments thereto, and

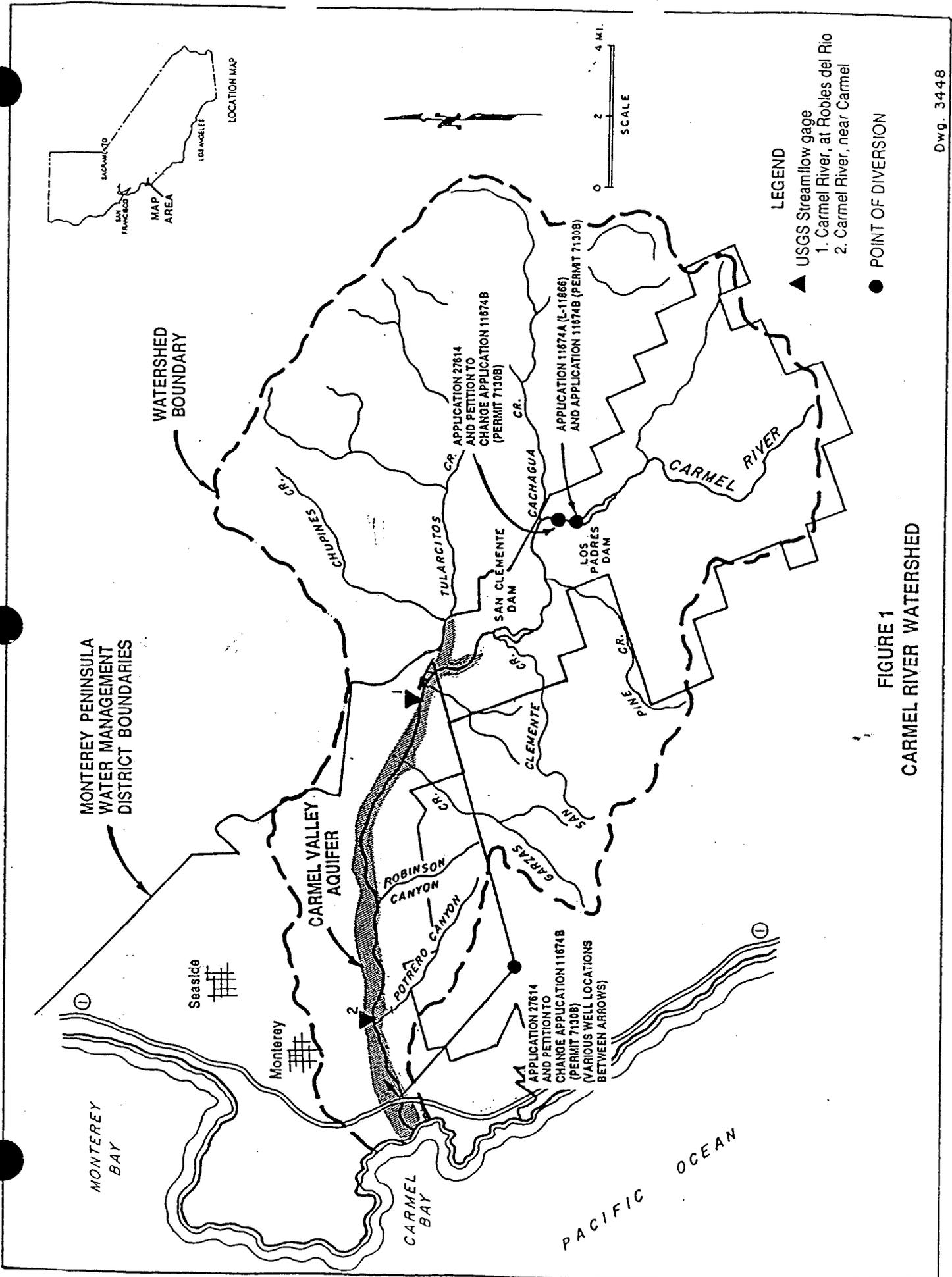
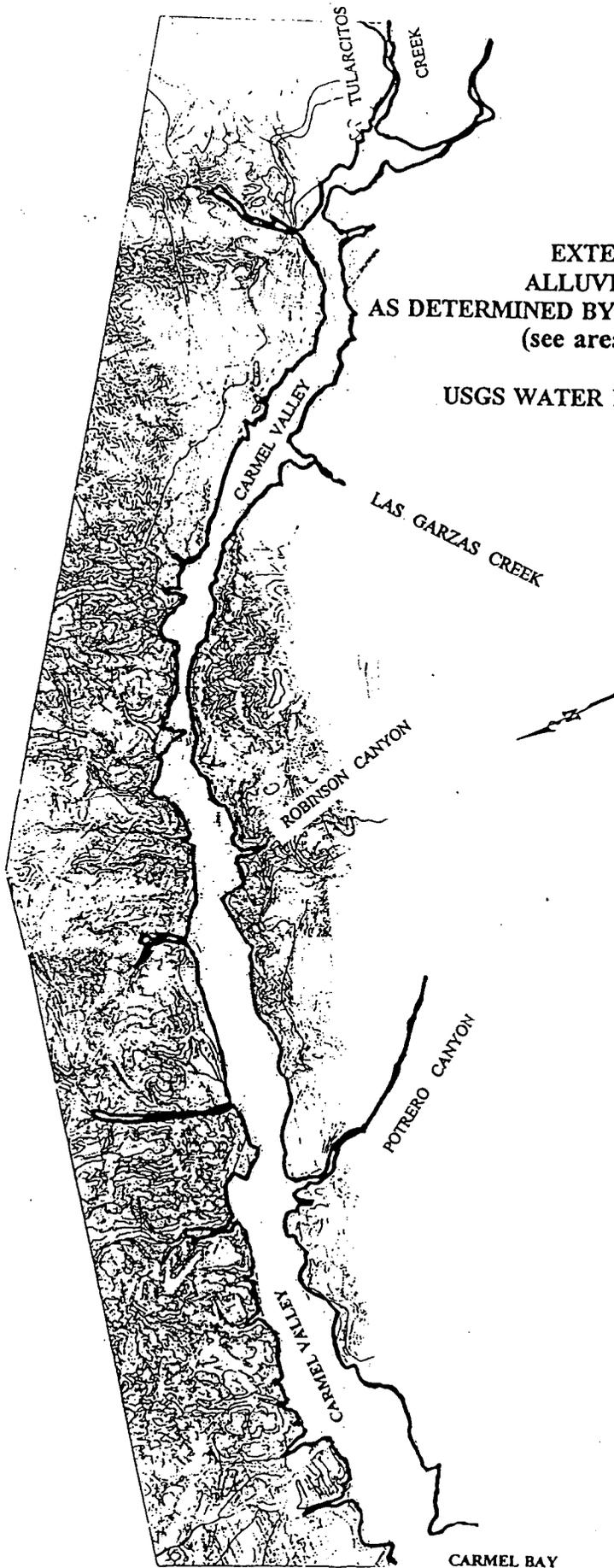


FIGURE 1
CARMEL RIVER WATERSHED

FIGURE 2

EXTENT OF CARMEL VALLEY
ALLUVIAL GROUNDWATER BASIN
AS DETERMINED BY THE U.S. GEOLOGICAL SURVEY (USGS)
(see area defined by the bold lines)

USGS WATER INVESTIGATIONS REPORT 83-4280
JUNE 1984



THE CARMEL RIVER (NOT SHOWN)
FLOWS THROUGH CARMEL VALLEY

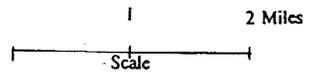
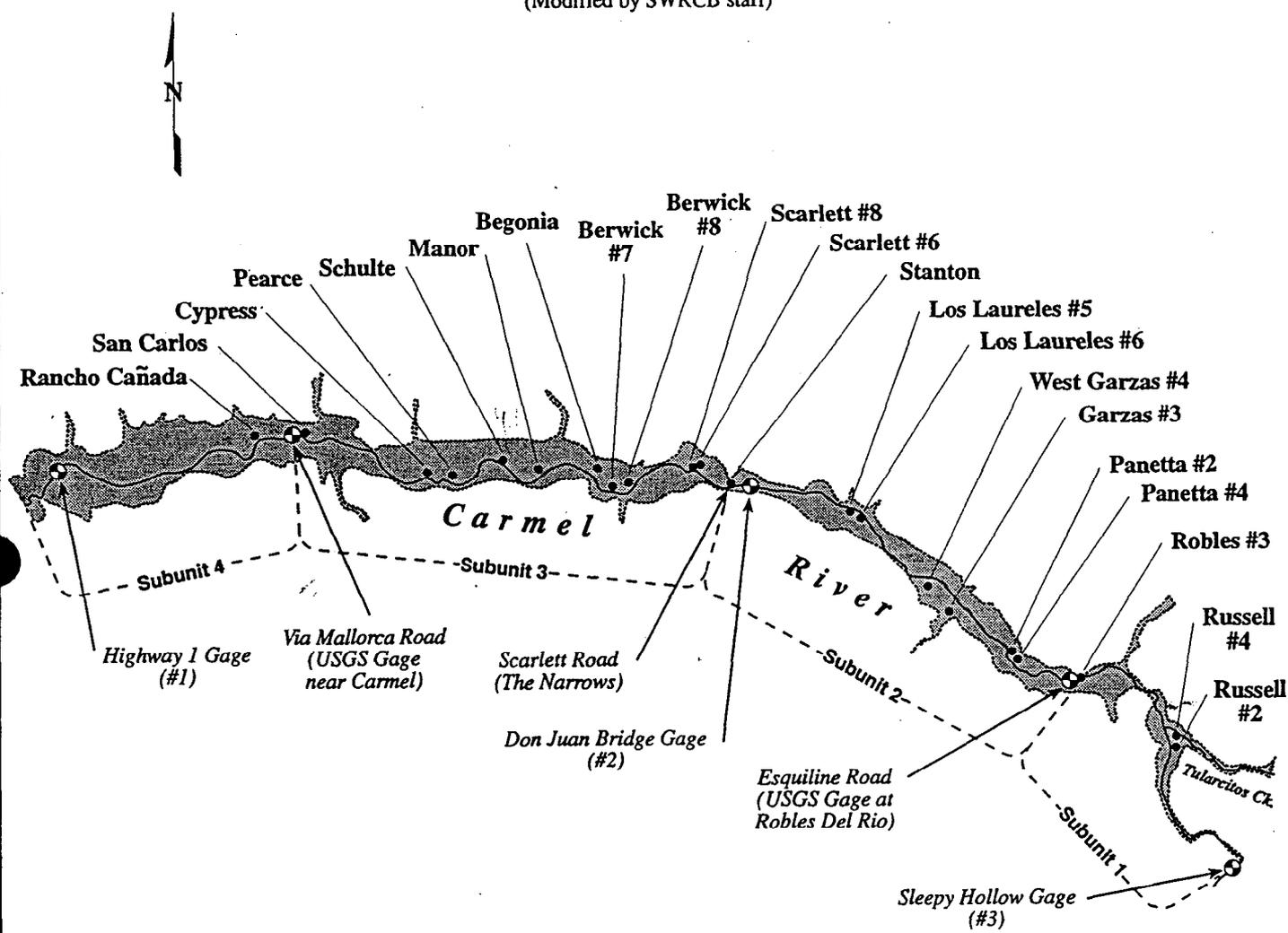


FIGURE 3

ALLUVIAL GROUNDWATER BASIN SHOWING THE LOCATION OF THE CALIFORNIA-AMERICAN WATER COMPANY WELLS

Information obtained from MPWMD Exhibit 287 - Figure 7-2
(Modified by SWRCB staff)



LEGEND

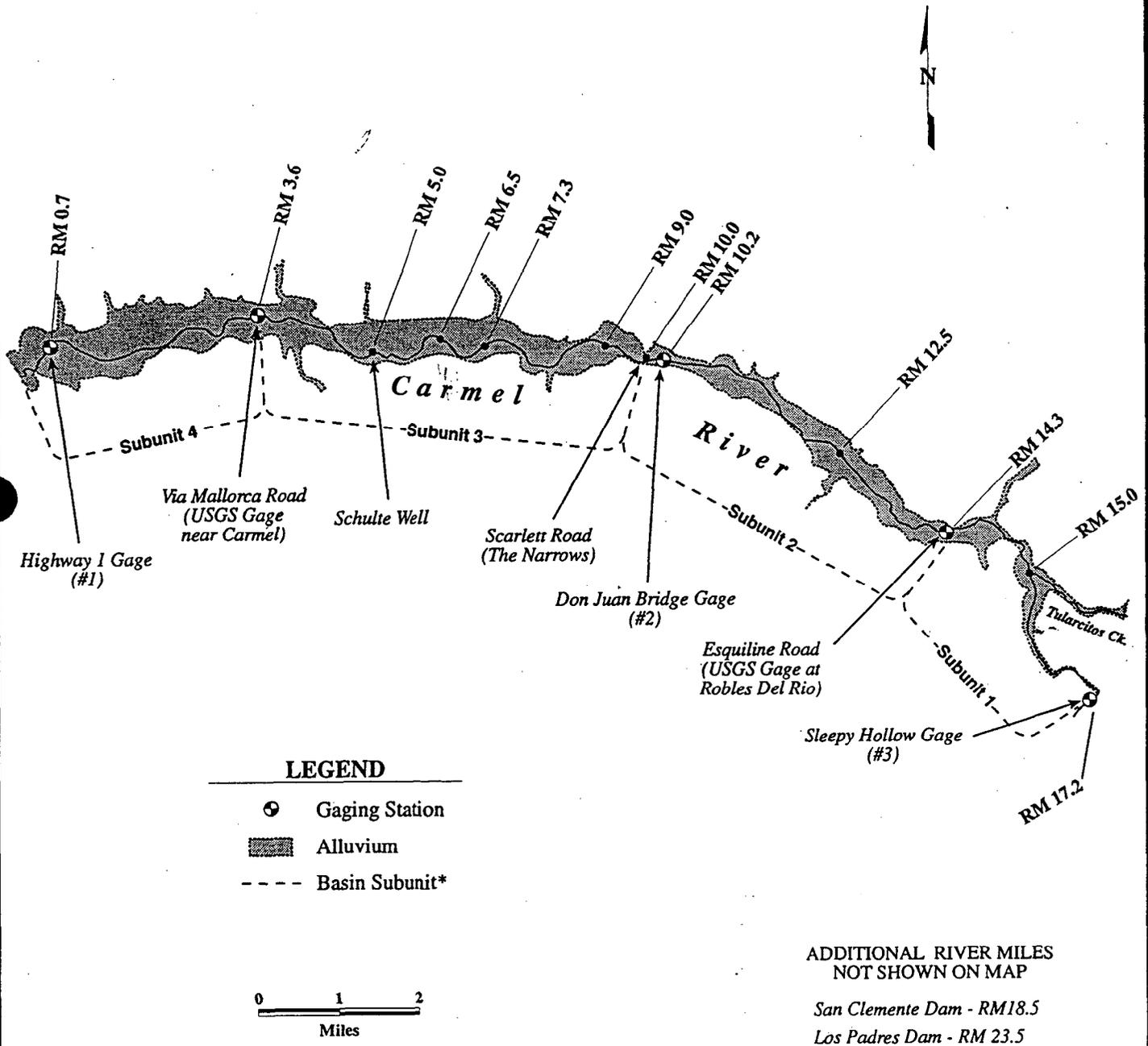
- Water Well
- ⊙ Gaging Station
- ▨ Alluvium
- - - Basin Subunit*



* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage. Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).

FIGURE 4

ALLUVIAL GROUNDWATER BASIN
IDENTIFYING RIVER MILES (RM)



* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage. Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).

(2) petitioned for an extension of time and change in the point of diversion for Permit 7130B; numerous protests having been filed by persons claiming these actions would injure rights to the use of water or the environment, including instream beneficial uses; a hearing having been held on August 24, 25, 26, 31, September 1, 8 and 9, October 19 and 21, and November 7, 8 and 22, 1994; the applicant, protestants and other interested persons having been provided opportunity to present evidence; closing briefs having been filed; the evidence and briefs having been duly considered, the Board finds as follows:

1.0 NEW LOS PADRES DAM AND RESERVOIR, THE DISTRICT'S PROJECT

The District proposes to construct and operate the New Los Padres Reservoir Project (project) under: (1) amended Application 27614 and (2) Permit 7130B (Application 11674B). Petitions have been filed to conform the original application and permit to the proposed project.

The project consists of an onstream storage reservoir on the Carmel River about 23 river miles upstream from the Ocean. Water would be released from the reservoir for: (1) rediversion downstream at San Clemente Dam at RM 18.5, (2) recharge of the Carmel Valley aquifer and subsequent rediversion by 34 wells located approximately from RM 3 to 15, and (3) maintenance of instream flow. In addition, water would be directly diverted from the river at 34 points of diversion located approximately from RM 3 to 15.

Amended Application 27614 requests authorization to store 24,000 acre-feet annually (afa) and to directly divert 47 cubic feet per second (cfs), with a combined limitation of 29,000 afa.

Permit 7130B authorizes storage of 15,970 afa at the existing Los Padres Reservoir located at RM 23.5. The District has petitioned to store this water at the proposed project. Under

Application 27614 and Permit 7130, the District seeks a total of 44,970 afa of water by direct diversion and storage.¹

1.1 Project Purpose

The Monterey Peninsula depends upon local surface and ground water resources to meet regional water supply needs. In normal and wet years, supply exceeds demand, but the area is subject to climatic variability and the impact of multi-year droughts. Since 1976, the Peninsula community has endured two extended periods of mandatory rationing; 18 months in 1976 to 1977 and 28 months in 1989 to 1991.

The New Los Padres Project is proposed to reduce existing drought vulnerability, provide an increment of "new" water to satisfy a modest amount of future growth, and to correct the adverse environmental effects from the present method of diverting and using water from the Carmel River. The stated overall purpose of the project, therefore, is to provide municipal supply and provide adequate instream flow to protect the public trust resources of the Carmel River. (MPWMD:312,15-18.) The dual project purposes are to be achieved by operating the Carmel River system on a conjunctive use basis. In this way, surface water supplies are managed in coordination with ground water supplies. (MPWMD:287, 4-19.)

1.2 Application 27614

Application 27614 was filed on December 16, 1982. The District amended the application on January 14, 1986, and further amended it on March 26, 1992. An amended application supersedes the application on file. Because protests raised the question whether it is appropriate to approve certain elements of the 1992 amendments to the application, both the application and amendments are set forth below:

¹ 44,970 afa is obtained by adding the 15,970 afa for Permit 7130B with the requested 29,000 afa for Application 27614.

TABLE 2

APPLICATION 27614 (AMENDMENT DATED MARCH 26, 1992)

QUANTITY:	47 cfs by direct diversion 24,000 afa by storage in New Los Padres Reservoir combined total annual diversion of 29,000 afa
SEASON:	(1) direct diversion for irrigation purposes--May 1 to October 31 (2) direct diversion for municipal purposes--January 1 to December 31 (3) storage for irrigation, municipal and fish and wildlife purposes--January 1 to December 31
SOURCE:	Carmel River
COUNTY:	Monterey
POINT OF DIVERSION: ²	(1) New Los Padres Dam within the NE¼ of SE¼ of Section 5, T18S, R3E, MDB&M (2) Carmel River (underflow) as follows (the word section is abbreviated as sect. for this table only): <ol style="list-style-type: none"> 1. Reimers Well - NE¼ of SW¼ of Sect. 23, T16S, R1E 2. Pryor Well - NE¼ of SW¼ of Sect. 23, T16S, R1E 3. Scarlett Well - SW¼ of SW¼ of Sect. 09, T16S, R2E 4. DeDampierre Well - NE¼ of SW¼ of Sect. 03, T17S, R2E 5. Cañada Well - NE¼ of SW¼ of Sect. 17, T16S, R1E 6. San Carlos Well - NE¼ of SE¼ of Sect. 17, T16S, R1E 7. Cypress Well - SW¼ of NW¼ of Sect. 22, T16S, R1E 8. Pearce Well - SE¼ of NW¼ of Sect. 22, T16S, R1E 9. Schulte Well - SW¼ of NW¼ of Sect. 23, T16S, R1E 10. Manor Well - NE¼ of SW¼ of Sect. 23, T16S, R1E 11. Manor #2 Well - NE¼ of SW¼ of Sect. 23, T16S, R1E
Continued next page	

² The District submitted an application map depicting only the extreme upstream and downstream points of diversion/rediversion. Title 23, California Code of Regulations (CCR), Section 715 requires all points of diversion/rediversion to be shown on a map, with specific additional information. The District should be required to amend its application map prior to permit issuance.

TABLE 2

APPLICATION 27614 (AMENDMENT DATED MARCH 26, 1992)

Continued from previous page

POINT OF DIVERSION:	12. Begonia Well - NW¼ of SW¼ of Sect. 24, T16S,R1E 13. Begonia #2 Well - NW¼ of SW¼ of Sect. 24, T16S,R1E 14. Berwick #7 Well - SW¼ of SW¼ of Sect. 24, T16S,R1E 15. Berwick #8 Well - SE¼ of SW¼ of Sect. 24, T16S,R1E 16. Scarlett #6 Well - SW¼ of SW¼ of Sect. 19, T16S,R2E 17. Scarlett #8 Well - SW¼ of SW¼ of Sect. 19, T16S,R2E 18. Stanton Well - NW¼ of NE¼ of Sect. 30, T16S,R2E 19. Los Laureles #5 - NW¼ of SE¼ of Sect. 29, T16S,R2E 20. Los Laureles #6 - SE¼ of SE¼ of Sect. 29, T16S,R2E 21. West Garzas #4 - NE¼ of SW¼ of Sect. 33, T16S,R2E 22. Garzas Creek #3 - SW¼ of SE¼ of Sect. 33, T16S,R2E 23. Panetta #2 Well - NW¼ of NW¼ of Sect. 03, T17S,R2E 24. Panetta #1 Well - NW¼ of NW¼ of Sect. 03, T17S,R2E 25. Robles #3 Well - NE¼ of NE¼ of Sect. 10, T17S,R2E 26. Russell #4 Well - SW¼ of SE¼ of Sect. 11, T17S,R2E 27. Russell #2 Well - SE¼ of SE¼ of Sect. 11, T17S,R2E 28. A Well - SW¼ of SE¼ of Sect. 13, T16S,R1W 29. B Well - NE¼ of SW¼ of Sect. 18, T16S,R1E 30. C Well - SW¼ of NW¼ of Sect. 22, T16S,R1E 31. D Well - SW¼ of NW¼ of Sect. 23, T16S,R1E 32. E Well - SW¼ of SE¼ of Sect. 24, T16S,R1E 33. F Well - NW¼ of NW¼ of Sect. 03, T17S,R2E 34. G Well - SW¼ of NW¼ of Sect. 03, T17S,R2E
POINT OF REDIVERSION:	(1) San Clemente Dam within the NW¼ of SW¼ of Section 24, T17S, R2E, MDB&M (2) 34 Carmel River wells as listed above under points of diversion
PLACE OF USE:	110,000 acres as shown on a map on file with the SWRCB
PURPOSE OF USE:	Municipal, irrigation, fish and wildlife

1.3 Permit 7130 (Application 11674)

On July 7, 1948, the State Engineer of the Department of Water Resources adopted Decision 582 approving the issuance of

TABLE 3

PERMIT 7130B OF THE DISTRICT

DATE FILED:	December 30, 1946
QUANTITY:	15,970 afa
SEASON:	October 1 to May 31
SOURCE:	Carmel River tributary to Pacific Ocean
COUNTY:	Monterey
PURPOSE:	Domestic, Industrial and Municipal
POINT OF DIVERSION:	Los Padres Dam within NW¼ of NE¼, Section 8, T18S, R3E, MDB&M
PLACE OF USE:	District service area covering 9,900 acres in the Carmel Valley within Townships 15, 16, 17 and 18 South, Ranges 1 West, 1, 2, 3 and 4 East, MDB&M

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TABLE 4

PETITIONED CHANGES TO PERMIT 7130B

POINT OF DIVERSION:	New Los Padres Dam within NE¼ of SE¼, Section 5, T18S, R3E, MDB&M
POINTS OF REDIVERSION:	<p>(a) San Clemente Dam within NW¼ of SW¼, Section 24, T17S, R2E, MDB&M</p> <p>(b) Carmel River (subterranean stream) as follows (the word section is abbreviated as sect. for this table only):</p> <ol style="list-style-type: none"> 1. Reimers Well - NE¼ of SW¼ of Sect. 23, T16S, R1E 2. Pryor Well - NE¼ of SW¼ of Sect. 23, T16S, R1E 3. Scarlett Well - SW¼ of SW¼ of Sect. 09, T16S, R2E 4. DeDampierre Well - NE¼ of SW¼ of Sect. 03, T17S, R2E 5. Cañada Well - NE¼ of SW¼ of Sect. 17, T16S, R1E 6. San Carlos Well - NE¼ of SE¼ of Sect. 17, T16S, R1E 7. Cypress Well - SW¼ of NW¼ of Sect. 22, T16S, R1E 8. Pearce Well - SE¼ of NW¼ of Sect. 22, T16S, R1E 9. Schulte Well - SW¼ of NW¼ of Sect. 23, T16S, R1E 10. Manor Well - NE¼ of SW¼ of Sect. 23, T16S, R1E 11. Manor #2 Well - NE¼ of SW¼ of Sect. 23, T16S, R1E 12. Begonia Well - NW¼ of SW¼ of Sect. 24, T16S, R1E 13. Begonia #2 Well - NW¼ of SW¼ of Sect. 24, T16S, R1E 14. Berwick #7 Well - SW¼ of SW¼ of Sect. 24, T16S, R1E 15. Berwick #8 Well - SE¼ of SW¼ of Sect. 24, T16S, R1E 16. Scarlett #6 Well - SW¼ of SW¼ of Sect. 19, T16S, R2E 17. Scarlett #8 Well - SW¼ of SW¼ of Sect. 19, T16S, R2E 18. Stanton Well - NW¼ of NE¼ of Sect. 30, T16S, R2E 19. Los Laureles #5 - NW¼ of SE¼ of Sect. 29, T16S, R2E 20. Los Laureles #6 - SE¼ of SE¼ of Sect. 29, T16S, R2E 21. West Garzas #4 - NE¼ of SW¼ of Sect. 33, T16S, R2E 22. Garzas Creek #3 - SW¼ of SE¼ of Sect. 33, T16S, R2E 23. Panetta #2 Well - NW¼ of NW¼ of Sect. 03, T17S, R2E 24. Panetta #1 Well - NW¼ of NW¼ of Sect. 03, T17S, R2E 25. Robles #3 Well - NE¼ of NE¼ of Sect. 10, T17S, R2E 26. Russell #4 Well - SW¼ of SE¼ of Sect. 11, T17S, R2E 27. Russell #2 Well - SE¼ of SE¼ of Sect. 11, T17S, R2E
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TABLE 4	
PETITIONED CHANGES TO PERMIT 7130B	
<i>Continued from previous page</i>	
POINTS OF REDIVERSION:	28. A Well - SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sect. 13, T16S,R1W 29. B Well - NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sect. 18, T16S,R1E 30. C Well - SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sect. 22, T16S,R1E 31. D Well - SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sect. 23, T16S,R1E 32. E Well - SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sect. 24, T16S,R1E 33. F Well - NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sect. 03, T17S,R2E 34. G Well - SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sect. 03, T17S,R2E * By letter dated July 8, 1992, the District indicated that the Manor and Begonia Wells (see nos. 10 and 12 above) will be used only for monitoring purposes.
PLACE OF USE:	110,000 acres within Townships 14, 15, 16, 17, 18 and 19 South, and Ranges 1 West, 1, 2, 3 and 4 East, MDB&M
TIME EXTENSION:	To construct project and put the water to maximum use. SWRCB staff notes that the petition lacks information on the extent of the time extension sought by the permittee.

2.0 PROTESTS TO THE PROPOSED PROJECT

Fifty-three protests were filed against the proposed project. Protests were filed in response to: (1) the 1986 notice of Application 27614, (2) the 1992 rennotice of Application 27614, and (3) notice of Petitions for Change of Permit 7130B. Many protests raise multiple issues. In general, protestants allege that the proposed project will injure: (1) prior rights to the use of water and (2) the environment. Table 5 summarizes protestants claiming prior rights to the use of water and the basis of the right being claimed. Table 6 summarizes the other issues being raised and the protestants raising the issues.

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TABLE 5

PRIOR RIGHT PROTESTS

Protestant	Riparian	Pre-1914 Appropriative	Overlying Ground Water Right	Post-1914 Appropriative
Asoleado Water Company	X			
Blanchard	X	X	X	
Cal-Am		X		A30215
Carmel Valley Ranch	X	X	X	
Chappell	Basis of Right Not Listed			
Chugach	X		X	A30034
Crow, G.	X		X	A30065
Crow, T.	X		X	A30066
Evans, R.	X		X	A29659
Galante	X			A27215
Hacienda Carmel	X	X	X	
Johnson, F. and C.	X	X	X	
Johnson, P.	X	X	X	
Kaufman	X	X	X	
Kirk	X	X	X	
Koontz	X		X	A30057
Lufkin	X	X	X	
Lutes	X	X	X	
Markkula	X	X		
Nicholson	X		X	A30046
Odello Brothers	X	X	X	
Porter	X		X	A30075
Pt. Sur Corporation	X	X	X	

Continued next page

TABLE 6

OTHER PROTEST ISSUES

<i>Issue</i>	<i>Protestant</i>
Export from Cachagua Area	Crane, Charity
Ground Water Depletion	Rancho San Carlos
Construction Related Impacts	Cachagua Community Center
Priority Date of 1992 Application Modifications	Chappell, Douglas and Roberta Chugach and Company Crow, George and Julia Crow, Tom Evans, Richard Koontz, Donald Nicholson, Aloyse and Novella Porter, Nancy Spear, William Sterten, Bruce and Beth
Appropriateness of 1992 Application Modifications	Evans, Willis
Water Management Authority of the District Regarding Pumpage	Pt. Sur Corporation Asoleado Water Company
Reservation of Water for Junior Applicants	Blanchard, Dale and Marian Carmel Valley Ranch Hacienda Carmel Hoss, Peter Johnson, Franklin and Catherine Johnson, Patricia Kaufman, Roy Kirk, James Lufkin, Dan Quail Lodge Rancho Cañada Rancho San Carlos Tregae Trust Williams Trust Wilson, W. Robert and Elizabeth

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TABLE 6

OTHER PROTEST ISSUES

<i>Issue</i>	<i>Protestant</i>
<i>Continued from previous page</i>	
Public Trust Resources	California Trout Ca. Sportfishing Protection Alliance Carmel River Steelhead Association Department of Fish and Game Department of Parks and Recreation Evans, Willis Lutes, Leo Odello Brothers Sierra Club Williams, John Wolter Properties
Final EIR/EIS Prior to Project Approval	Asoleado Water Company Evans, Willis Markkula, A.C. and Linda Pt. Sur Corporation Williams, Roger and Josephine
Cultural Resource Issues (as related to Native American Issues)	Esselen Tribe

3.0 DESCRIPTION OF WATERSHED

The Carmel River drains a 255 square mile watershed tributary to the Pacific Ocean. Its headwaters originate in the Santa Lucia Mountains at 4,500 to 5,000 foot elevations, descend and merge with seven major stream tributaries along a 36-mile river course, and discharge into Carmel Bay about 5 miles south of the City of Monterey. About 65 percent of the watershed is found above the confluence of Tularcitos Creek at RM 15. Downstream from RM 15, the river has a 40 feet per mile gradient where river flow is over and within an alluvium-filled Carmel Valley floor.

Carmel River flow is in a well-defined channel that ranges from 20 to 150 feet wide. (SWRCB:19.) The channel changes progressively from cobble to gravel between RM 15 and RM 7, from gravel to sand

between RM 7 and RM 2.5 and consists entirely of sand from RM 2.5 to Carmel Bay. (DFG:4,2.)

The alluvial deposits downstream from RM 15 comprise a ground water basin which underlies the river in the Carmel Valley portion of the watershed. Local ground water levels within the aquifer are influenced by pumping or production at supply wells, evapotranspiration by riparian vegetation, seasonal river flow infiltration, and subsurface inflow and outflow.

During the dry season, pumping of wells has caused significant declines in the ground water levels. Carmel River surface flow has been found to decrease due to pump-induced infiltration which recharges the seasonally-depleted ground water basin. During normal and dry years, surface flow in the lower Carmel Valley becomes discontinuous or non-existent. Downstream from RM 3.2, there was no river runoff between April 1987 and March 1991. (MPWMD:287,2-8.)⁹

4.0 AVAILABILITY OF UNAPPROPRIATED WATER

Water Code Section 1201 defines the water available for appropriation as all water flowing in any natural channel, excepting the quantity which is reasonably needed for useful, beneficial purposes on riparian lands, or otherwise appropriated. Prior to the issuance of a permit, the SWRCB must find that unappropriated water is available for an application to appropriate water. (Water Code Section 1375(d).)

Under Application 27614, as amended, the District is requesting an appropriative right to: (1) divert 24,000 afa to storage for municipal, irrigation, and other purposes of use at New Los Padres Reservoir from January 1 through December 31 of each year;

⁹ Under predevelopment conditions, the river flowed year round except in the driest of years. (Sierra Club:1,20.)

4.1 Unimpaired Carmel River Streamflow¹⁰

Flow above Los Padres Dam accounts for almost 70 percent of the total runoff which is expected to occur in the watershed under normal conditions. (MPWMD:101,8,22-26.)¹¹ Precipitation occurs almost entirely as rain, with over 90 percent falling between November and April. (MPWMD:103,3,6-7.) Approximately 39,000 af of runoff is generated above the Los Padres site under normal (i.e., median) conditions. (MPWMD:101,8,22-26.) These data indicate that during most years adequate streamflow is available to supply the full 29,000 afa requested by Application 27614. The water described above, however, may be: (1) needed to first satisfy prior rights to the use of water and (2) available only on a seasonal basis.

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¹⁰ During the hearing, the District provided evidence regarding the quantity of water which is available for Application 27614. This evidence is based, in part, on a model which the District developed. The model uses streamflow data developed by the ACOE and includes some synthetic streamflow data. Synthetic flow data is actual data obtained from a nearby watershed which is modified and substituted for missing data in a stream under investigation. John Williams, testifying for the Sierra Club, questioned the accuracy of the streamflow values reported by the District. (Sierra Club:51.)

Selected data from Sierra Club Exhibit 51 were compared with the equivalent data in District's Exhibit 211. For various exceedence values, the flows in Exhibit 51 are inconsistent with the flows in Exhibit 211. The Sierra Club's values are sometimes greater and sometimes less than the District's. Mr. Williams attributes these differences to errors he believes exist in the synthesized streamflow values. (Sierra Club:50.) The historic streamflow record is incomplete. Mr. Williams testified that he could not duplicate the ACOE synthesized flows. (Sierra Club:50,1.) Mr. Williams provided only limited flow data during the hearing. (T:249,5-19.) Further, Mr. Williams indicated that the streamflow values developed by the ACOE may contain some errors for specific reported values. (Sierra Club:50.) The witness did not identify the total number of errors which he believes the ACOE model contains, nor the statistical significance of the errors as it affects the overall accuracy of the ACOE model. Finally, the witness did not provide information to document the statistical validity of the data which he developed. Although Mr. Williams raises questions regarding the reliability of the District's model, we find that insufficient data was provided to support the conclusion that the District's model and its results cannot be relied upon.

¹¹ Flow in the lower Carmel River is approximately 30 percent greater than the streamflow at Los Padres Dam.

TABLE 7						
Reconstructed Inflow To Los Padres Reservoir MPWMD Exhibit 202--Average Monthly Flows Converted To CFS ¹²						
NOV	DEC	JAN	FEB	MAR	APR	
22.3	67.5	153.0	228.9	208.2	119.2	mean
1.0	1.4	1.3	2.4	10.4	6.9	minimum
241.2	368.5	884.3	932.0	1446.5	831.2	maximum

TABLE 8 (Continuation of Table 7)						
Reconstructed Inflow To Los Padres Reservoir MPWMD Exhibit 202--Average Monthly Flows Converted To CFS						
MAY	JUN	JUL	AUG	SEP	OCT	
44.7	19.9	8.2	3.6	3.0	5.8	mean
3.6	1.4	1.0	1.0	1.0	1.0	minimum
311.5	98.5	45.3	29.4	17.8	41.1	maximum

TABLE 9						
Unimpaired Inflow To Los Padres Dam: 1902-1991 District Exhibit 202--Flow Exceedence Frequency Values Average Monthly Flows in AF						
MAY	JUN	JUL	AUG	SEP	OCT	Percent of Time Flow Is Exceeded
7,458	2,940	1,673	821	662	1,042	5.0%
5,427	2,406	1,152	445	377	662	12.5%
3,112	1,861	786	246	194	390	25.0%
2,121	917	319	122	74	218	50.0%
1,097	580	93	63	64	88	75.0%
612	276	70	61	59	71	87.5%
411	93	62	61	59	61	95.0%

¹² Tables 7, 8 and 9 are based on District Exhibit No. 202. Exhibit No. 202 includes flow data for 1902 through 1991. Thus, the statistical characterizations of the flow data are based upon 90 years of flow data.

4.3 Water Diverted Under Riparian, Pre-1914 Appropriative, and Overlying Claims of Right

The combined total of water being claimed and/or used by protestants under riparian, pre-1914 appropriations and overlying claims of right is approximately 3,230 afa,¹³ most of which is directly diverted during the summer months for irrigation purposes. (Sections 5.0 to 5.5, *infra*.)

4.4 Water Diverted Under License 11866 (Application 11674A)

Cal-Am Water Company (Cal-Am) holds the right to divert and use water at the existing Los Padres Dam under License 11866. The dam is just upstream of the location for the proposed project.¹⁴ During 1948, the SWRCB's predecessor adopted Decision 582 authorizing the appropriation of water for the application which became License 11866. The application sought to appropriate water by direct diversion and diversion to storage on a year-round basis. Decision 582 found that only 2.4 percent of the average annual flow occurred during the four-month period beginning June 1 and ending September 30 of each year. In addition, the decision authorized the diversion of water only between October 1 and May 31.¹⁵

The mean inflow to Los Padres Reservoir during the month of October for the period of record is only 218 afa. (MPWMD:202.) As previously noted, Cal-Am is authorized to divert and use water at Los Padres Dam under License 11866 during the month of October. License 11866 authorizes Cal-Am to divert up to 3030 af and the license does not impose a restriction on the rate of

¹³ Cal-Am's pre-1914 appropriative rights are not included in this total.

¹⁴ No significant tributaries join the river between the site of the existing Los Padres Dam and the proposed project.

¹⁵ Table 9 lists the median flow at Los Padres Dam (the 50 percent exceedence flows) for summer months. These flows range from a high of 15.4 cfs (917 af) in June to a low of 1.25 cfs (74.4 af) during September. (MPWMD:202.) The updated hydrology data provided by the District for the pending application confirms the findings made in Decision 582.

collection. This right has a higher priority than the right which could be authorized for Application 27614. Such water as is ordinarily available in October would be diverted under License 11866. This demonstrates the lack of unappropriated water during the month of October for Application 27614. Accordingly, the storage season and direct diversion seasons for Application 27614 should begin on November 1 of each year.

4.5 Cal-Am Diversions at San Clemente Dam and From Wells Between River Miles 3 to 14

In addition to License 11866, Cal-Am claims pre-1914 appropriative rights to divert and use water at San Clemente Dam and from its wells along the Carmel River between RM 3 to 15. In Order WR 95-10, the SWRCB found that Cal-Am did not demonstrate a right to divert water at San Clemente Dam under a pre-1914 appropriative right. Order WR 95-10 also found that, excepting License 11866, Cal-Am has a year-round pre-1914 appropriative right to divert water from the Carmel River of only 1,137 afa or about 95 af monthly. Finally, the order concludes that Cal-Am is diverting as much as 10,730 afa from the river without a valid basis of right.

4.6 Additional Findings On Availability of Water

The Decision 582 diversion season extends from October 1 to May 31. As noted in Section 4.4, the diversion season for Application 27614 should not include October. Accordingly, the water availability analysis will first consider the period from November 1 to May 31. The percentage of mean annual unimpaired streamflow at Los Padres Reservoir between November 1 and May 31 was compared with the percentage generated throughout the remainder of the year. Mean annual unimpaired streamflow is: (a) 50,158 afa for November 1 to May 31 and (b) 2,424 afa for June 1 to October 31. Thus, only 4.6 percent of the mean annual flow at Los Padres Reservoir is produced from June 1 to October 31. Runoff upstream of Los Padres Reservoir accounts for approximately 70 percent of the basin runoff. The average annual

flow in the Carmel River watershed is estimated to be 71,654 afa for the period November 1 to May 31 and 3,462 afa for the period June 1 to October 31.

From June 1 to October 31, a significant amount of available water is required to satisfy claimants of paramount rights. The quantity of water required to serve the claimed rights is approximately 3,705 afa.¹⁶ (Sections 4.3 and 4.6, *infra*.) As previously noted, water is primarily used for irrigation purposes during the summer months. Water applied for irrigation either transpires, evaporates, or percolates to the aquifer. The fraction of the water applied for irrigation which percolates to the aquifer has not been quantified. The 3,705 afa¹⁷ figure exceeds the average surface flow in the river during the summer months.¹⁸ Surface flow is also significantly impacted by diversions of up to 10,730 afa from the aquifer by Cal-Am for which it has no basis of right. (Order WR 95-10.)

Under License 11866, Cal-Am is authorized to collect water to storage in Los Padres Dam from October 1 through May 31. The maximum amount authorized for collection to storage under License 11866 is 3,030 af; however, the present capacity of the reservoir is approximately 2,179 af. (MPWMD:88,11.) Water stored in this facility is delivered to Cal-Am's customers. The license does not restrict the maximum rate of collection to storage and the reservoir can be refilled as soon as runoff becomes available. The Los Padres Reservoir generally fills by

¹⁶ This figure is obtained by adding Cal-Am's pre-1914 appropriative right for the months of June through October (95 af x 5 months = 475 af) to 3,230 afa for riparian, overlying and all other pre-1914 claimants.

¹⁷ This analysis relies upon the prior right claims submitted as part of the hearing record, in order to have adequate information to identify point of diversion, purpose of use and season of diversion of the protestants for purposes of evaluating seasonal water availability.

¹⁸ Diversion from the alluvial ground water basin of the Carmel River is the common practice and explains this apparent discrepancy. In essence, diverters are pumping water during the summer months at a rate which exceeds the seasonal rate of resupply from the surface water course.

mid-December at which time water starts to overflow the reservoir. (MPWMD:106,12,14-15.) Available October runoff is required, therefore, to serve License 11866. Flows in excess of the quantity required to serve License 11866 are generated, occasionally, during October. (MPWMD:202.)

Another factor which affects water availability is the determination that it is appropriate to reserve water for junior applicants to obtain an appropriative right with a priority superior to the District's permit (see Section 5.7).

The Carmel River hearing record has been utilized to determine the general season of water availability for the persons listed in Table 13, in order to determine the quantities of water available to serve District Application 27614. The availability of water for persons on Table 13 varies due to their specific location on various tributaries or the mainstem of the Carmel River.

Water availability within the Carmel Valley is composed of two elements: (1) surface water flow and (2) water flowing through the alluvial aquifer below RM 15. The usable storage capacity of the aquifer is approximately 28,400 af, with 21,900 af of usable storage located in the lower Carmel Valley (below the Narrows) and 6,500 af of usable storage located in the upper Carmel Valley (above the Narrows). (MPWMD:101,6.) In this context, usable storage refers to ground water¹⁹ which can be extracted by Cal-Am production wells. (MPWMD:101,6.) The alluvial aquifer is extensively used as a water supply; Cal-Am generally produces 75 percent of its water supply by pumping from the alluvial aquifer. (MPWMD:101,6.)

¹⁹ Throughout Section 4.6, the word "ground water" actually refers to the Carmel River subterranean stream flowing through the alluvial aquifer. As noted previously, alluvial fill material is generally present downstream of RM 15.

Because Cal-Am will have a priority for the largest quantity of water listed in Table 13, 2,964 af, this assignment of water has the single largest impact upon water availability for District Application 27614. The remaining Table 13 parties will be separately evaluated as a group, to assess how those applicants affect water availability for the District's project.

Under any application filed or to be filed pursuant to Table 13, Cal-Am may be authorized to continue utilizing 2,964²⁰ af for in-basin uses, which have historically been diverted from surface flows at the San Clemente Filter Plant and/or San Clemente Dam. The filter plant is located within one-half mile downstream of San Clemente Dam. Only a small amount of alluvial fill is present in this area. Consequently, water availability is contingent upon the presence of surface flows.

Water is available for Cal-Am whenever there is surface flow present in excess of the quantity needed to satisfy prior rights. Water is available for the other persons in Table 13 whenever there is surface and/or subsurface flow present (for parties below RM 15 on the mainstem Carmel River) or surface flow present (for all others in Table 13), after deducting the quantities needed to satisfy prior rights.

During the months of May through September, significant quantities of water are required to serve the Table 12 claimants. The actual quantities of water diverted by Table 12 claimants is set forth in Column 1 in Table 13.

Table 9 lists the unimpaired streamflow at Los Padres Dam. As noted previously, this accounts for approximately 70 percent of the runoff generated in the Carmel Valley. Water use by the persons in Table 13 has been limited, primarily, to direct

²⁰ Table 13 indicates that Column 3 amounts, which includes 2,964 af for Cal-Am, may be reduced.

diversion. For those direct diverters who do not have an alternative water source which can be utilized during a drought, it is appropriate to review water availability based upon the 50-percent exceedence (median flow) value shown in Table 9.

The recorded flow at Los Padres Dam does not include all of the water physically available to Cal-Am, pursuant to Table 13. Pine Creek and San Clemente Creek add to the Carmel River flow between Los Padres Dam and the location where Cal-Am takes its water. Taking this additional flow into account, water may be available to Cal-Am from November 1 of each year through May 31 of the following year.²¹ A final determination regarding the season of water availability for any Cal-Am application for priority based on Table 13 will be made at the time that the application is processed. For purposes of the District's application, however, the Cal-Am Table 13 diversion will be reviewed based upon a diversion season of November 1 through May 31.

The diversion practices of the remaining Table 13 persons can be subdivided into two groups: the irrigators who generally use water during the summer months and persons who divert water throughout the year. Information regarding existing diversion practices is contained in Table 12.²² To avoid double-counting of water under claimed rights (Table 12) and water actually pumped by the claimants (Table 13), only values from Table 13 will be utilized in this part of the analysis.

²¹ Water may be available to Cal-Am during November. Based upon the Carmel River hearing record, it appears that such flow is available less than 50 percent of the time. Only a minimal amount of flow occurs at San Clemente Dam in June. (MPWMD:289, Appendix 5, 23.)

²² Information regarding Cal-Am's existing diversions from the alluvial basin is not contained in the following analysis because, pursuant to Order WR 95-10, the SWRCB is requiring Cal-Am to implement measures to restrict unlawful diversion of water and to obtain legal rights to its use of water. Any new appropriative rights obtained by Cal-Am at this time, excluding the Table 13 water, will be junior to the appropriative rights obtained by persons listed in Table 13.

TABLE 10

WATER AVAILABILITY AND PRODUCTION LIMITS CARMEL VALLEY SUBBASINS (IN AF)				
	AQ 1	AQ 2	AQ 3	AQ 4
Usable Storage Capacity of Subbasin (SWRCB:42,IV-45)	4,502	2,029	16,927	5,000
Production Limit Based Upon MPWMD Allocation ²⁸	139	610	8,345	1,584
Cal-Am 1994 Pumping	23	205	8,154	1,657
Non-Cal-Am 1994 Pumping ²⁹	110	158	983	847
1994 Pumping Total	133	363	9,137	2,504
Pumping Within Usable Storage Capacity of Subbasin	Yes	Yes	Yes	Yes
Pumping Within MPWMD Allocation	Yes	Yes	No	No
Quantity Remaining From MPWMD Allocation	+6	+247	-792	-920

Based upon the usable storage capacity of the four subbasins, water is available for appropriation from the alluvial aquifer for the persons listed in Table 13,³⁰ even if there is no surface

²⁸ The estimated allocation in this table is based upon the revised water production summary for 1987 for both non-Cal-Am and Cal-Am diversions. (SWRCB:1,A-27614,10-27-94 letter.)

²⁹ The Table 13 amounts are generally included in the non-Cal-Am pumping records for AQ 1 through AQ4, except for the quantities assigned to the following persons: Asoleado, Beckerman, Blanchard, Evans, P. Johnson, F. Johnson, Kirk, Lufkin, Markkula-Holt, Porter-Hoover, Samson, Scardina, Spear, Syndicate Camp, Tregaea Trust, Wilson-Rancho Chupinos, and Wolfe. These quantities are not included in the records for AQ 1 through AQ4, because these persons pump water from elsewhere in the Carmel River watershed.

³⁰ Cal-Am water availability under Table 13 was analyzed separately above. Consequently, the finding of year-round water availability for Table 13 diverters does not pertain to Cal-Am.

flow present. Pumping in subbasins AQ3 and AQ4 has increased from 1987 to 1994. The quantity of water which can be diverted, however, is limited. The District has developed a methodology to identify the practical limit for diversion and has further determined that it will allow the quantity of pumping identified in the table to continue. The hearing record contains evidence which indicates that the District has determined that the existing production limits shall not be increased until the New Los Padres Reservoir Project is operable. Thus, we find that appropriation from the alluvial aquifer should be limited to the quantities identified in Table 13.³¹ The public trust impacts of such diversions should be evaluated at the time the Table 13 applications are processed.

Unappropriated water is available for District Application 27614 whenever the flow requirements listed above are present. The District's project is composed of two elements: (1) surface water storage in the New Los Padres Reservoir and related project elements and (2) direct diversion at downstream wells located throughout the Carmel River Valley. Water availability for the New Los Padres Reservoir is based upon the surface flow record. The wells the District proposes to use would divert water from the alluvial ground water basin. The District proposes, however, to mitigate project impacts by implementing a bypass flow regime and releases to maintain, as much as possible, surface flows in the Carmel River. Therefore, it is not appropriate to authorize diversion for Application 27614 based upon water contained in the

³¹ The data in Table 10 above indicates that the District's water allocation methodology, which utilized 1987 as the base year for purposes of establishing production limits, may further restrict water availability for Table 13 parties. The water allocation methodology is described in the District's Water Allocation EIR (SWRCB:42). The Water Allocation EIR did not establish pumping limits for the respective subbasins or particular individuals. The analysis in Table 10 was performed to illustrate which portions of the aquifer are currently subject to the greatest pumping impacts and related environmental impacts. The pumping in subbasins AQ3 and AQ4 by Cal-Am may have increased over the 1987 level due to reoperation (reduced diversion) at San Clemente Dam to maintain instream flows as far downstream as possible. Therefore, this evaluation does not purport to find that such pumping exceeds reasonable production limits for Cal-Am.

alluvial aquifer. Consequently, our evaluation will be limited to the surface flow records.

The flow records at Los Padres indicate the following water availability. (MPWMD:202.)

TABLE 11					
ANALYSIS OF WATER AVAILABILITY FOR APPLICATION 27614 AND JUNIOR APPLICATIONS					
Month	Median Flow	Prior Water Rights (af/month)	Percent of Time Prior Rights Met	Water Available For Application 27614	Water Available For Junior Applicants ³²
October	218	983	< 10	No	No
November	596	1,230	< 25	Yes ³³	No
December	1,940	794	> 75	Yes	No ³⁴
January	4,626	358	100	Yes	Yes
February	6,934	358	100	Yes	Yes
March	8,550	358	100	Yes	Yes
April	4,302	358	100	Yes	Yes
May	2,121	358	100	Yes	No ³⁵
June	917	523	< 75	Yes	No
July	318	523	< 25	No	No
August	122	523	< 12	No	No
September	74	523	< 10	No	No

³² If the District were to divert the 29,000 afa under Application 27614 uniformly throughout the eight-month diversion season, 3,625 af would be diverted each month. Water availability for junior applicants is determined by adding this quantity to the prior rights column.

³³ Even though water is rarely available for Application 27614 in November, it is appropriate to permit storage of peak flows when they do occur.

³⁴ Water is available less than 25 percent of the time.

³⁵ Water is available less than 25 percent of the time.

In conclusion, the District could have an authorized diversion season which extends from November 1 of each year to June 30 of the following year. A limited quantity of water is available for junior applicants, however, from only January 1 through April 30 of each year.

4.7 Conclusions Regarding the Availability of Unappropriated Water

Based upon the need to refill Los Padres Reservoir, the water required to satisfy persons claiming paramount rights to the use of water during summer months, and the need to maintain water in the surface channel for instream uses, we find that the diversion season for Application 27614 should be limited to November 1 of each year to June 30 of the following year.³⁶ We also find that unappropriated water is available and that Application 27614 should be approved for 42 cfs of direct diversion and storage of 24,000 afa, not to exceed a combined total of 29,000 afa.³⁷ Finally, we find that any permit issued for Application 27614 should limit the diversion season to November 1 of each year through June 30 of the following year. The period of available water for applicants with priorities of right which are junior to Application 27614 extends from January 1 through April 30 of each year.

5.0 VESTED RIGHT PROTESTS

Numerous protests are based upon potential injury to prior rights of protestants. Water needed to serve prior rights is water which is not available for appropriation by the District. Accordingly, the quantity of water needed to satisfy prior rights is considered in this section.

³⁶ Because water is only available from January 1 to April 30 of each year, the Carmel River should be considered at a future hearing for inclusion in the Declaration of Fully Appropriated Streams pursuant to Water Code Section 1206, et seq.

³⁷ The District's request to directly divert 5 cfs during summer months should be denied, due to the absence of available supply.

5.1 Protests Based Upon Overlying Ground Water Rights

In Order WR 95-10, the SWRCB found that the water flowing through the Carmel River alluvium constitutes a subterranean stream and not percolating ground water. Consequently, the protests based upon claims of overlying ground water rights are dismissed. However, these protestants also claimed riparian and/or appropriative rights which are considered in the following sections.

5.2 Protests Based Upon Riparian Rights³⁸

A riparian is entitled to pump and use water on a parcel which overlies a subterranean stream. The following protestants claim a riparian right to divert water: Asoleado Water Company, Carmel Valley Ranch, Chugach, George and Julia Crow, Tom Crow, Evans, Galante, Hacienda Carmel, Kaufman, Kirk, Koontz, Lufkin, Lutes, Markkula, Nicholson, Odello Brothers, Porter, Pt. Sur Corporation, Quail Lodge, Rancho Cañada, Rancho San Carlos, Spear, Sterten, Syndicate Camp, Tregua Trust, Quinn Properties, Williams Trust, Wilson and Wolter Properties. In addition, protestants Blanchard, Frank and Catherine Johnson and Patricia Johnson claim an overlying right to divert water and may, consequently, be overlying riparian users.³⁹

Protestants Blanchard, Chugach and Company, Evans, Franklin Johnson, Patricia Johnson, Kirk, Lufkin, Markkula, Porter, Spear, Tregua Trust and Wilson divert water from Tularcitos Creek, Chupines Creek, Robertson Creek, and Big Creek and do not divert water from the Carmel River. These protestants are able to divert and use water from these streams prior to the water reaching the Carmel River. The proposed project will divert

³⁸ The District has stipulated to recognize the riparian rights of many of the protestants. The information contained in the stipulations is insufficient to utilize for purposes of determining availability of unappropriated water. Consequently, the protest materials are analyzed in this Decision.

³⁹ Those parties claiming both a riparian and an overlying right are only listed once in this portion of the decision.

water to storage and directly divert water only from the Carmel River. Thus, we find that the proposed project will not interfere with the prior rights of these persons and that their protests should be dismissed.⁴⁰

Most of the riparian protestants did not submit parcel maps to identify the parcels which are contiguous to the Carmel River. Further, most of the protestants did not submit deeds identifying: (1) any riparian rights preserved by deeds of conveyance and (2) any riparian rights which have been affected by waiver of riparian rights (see Cal-Am 13-17, for example). Consequently, the hearing record is not adequate to make determinations regarding the validity of claimed riparian rights.⁴¹

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⁴⁰ Even though these protests should be dismissed, any water used under these claims must be deducted from the unimpaired Carmel River flows to estimate availability of unappropriated water.

⁴¹ Prior to the hearing, riparian claimants had not complied with Water Code Section 5100, et seq. requiring the filing of Statements of Water Diversion and Use with the SWRCB, with the exception of Chugach and Company; Crow, G. and J.; Evans; Koontz; Nicholson; Porter; and Sterten. Such statements might have documented the extent and location of the claimed rights.

The protestants claim the right to divert and use the following quantities of water from the Carmel River:

TABLE 12			
PROTESTS BASED UPON RIPARIAN CLAIMS			
PROTESTANT	QUANTITY		SEASON
	afa	Source	
Asoleado Water Company	11.3	ASO:B ⁴²	01-01 to 12-31
Carmel Valley Ranch	525.0	protest	04-01 to 11-15* ⁴³
Crow, George and Julia	3.5	protest	05-01 to 10-01*
Crow, Tom	7.0	protest	05-01 to 10-01*
Galante	40.0	protest	11-01 to 04-15
Hacienda Carmel	50.0	protest	04-15 to 11-15*
Kaufman	150.0	protest	04-15 to 11-15*
Koontz	2.0	protest	05-01 to 10-31*
Lutes	70.0	protest	04-01 to 11-15*
Nicholson	2.0	protest	05-01 to 10-31*
Odello Brothers	540.0	protest	04-01 to 11-01*
Pt. Sur Corporation	4.9	protest	01-01 to 12-31
Quail Lodge	254.0	protest	04-01 to 11-15*
Quinn Properties	40.0	protest	03-01 to 10-15
Rancho Cañada	700.0	protest	04-15 to 11-15*
Rancho San Carlos	240.0	RSC:3;3	04-01 to 11-01*
Sterten	6.0	protest	05-01 to 09-30*
Syndicate Camp	0.8	protest	04-01 to 11-01*
Continued to next page			

⁴² The combined available well output of 20,000 gpd was converted to cfs using the formula $(20,000 \text{ gpd} \times (1 \text{ cfs}/646,317 \text{ gpd})) = 0.03 \text{ cfs}$.

⁴³ The "*" denotes the primary diversion season.

TABLE 12

PROTESTS BASED UPON RIPARIAN CLAIMS

PROTESTANT	QUANTITY		SEASON
	afa	Source	
<i>Continued from previous page</i>			
Williams Trust	38.0	protest	04-01 to 11-01*
Wolter Properties	60.0	protest	04-01 to 11-15*
TOTAL	2752.1		
Protestants diverting water from tributaries to the Carmel River:			
Blanchard	0.1	protest	01-01 to 12-31
Chugach and Company	2.1	protest	05-01 to 12-31*
Evans	15.0	protest	05-01 to 12-31*
Johnson, Franklin	0.1	protest	01-01 to 12-31
Johnson, Patricia	0.1	protest	01-01 to 12-31
Kirk	9.5	protest	01-01 to 12-31
Lufkin	28.0	protest	01-01 to 12-31
Markkula	quantity not listed		
Porter	30.0	protest	05-01 to 10-31*
Spear	17.4	protest	05-01 to 10-31*
Tregea Trust	6.0	protest	01-01 to 12-31
Wilson	377.0	protest	01-01 to 12-31
TOTAL	477.9		

The combined total of water being claimed by riparian protestants is approximately 3,230 afa, most of which is directly diverted during the summer months for irrigation purposes. No evidence was submitted to demonstrate that the District's proposed project would interfere with prior riparian rights during a diversion season between November 1 of each year through June 30 of the following year. Further, the District has stipulated to recognize valid riparian rights of protestants, and any permit which is issued by the SWRCB will include a condition to implement the stipulation. Accordingly, we find that protests based upon riparian right claims should be dismissed.

5.3 Protests Based Upon Pre-1914 Appropriative Rights

The following persons filed protests based upon claims of pre-1914 appropriative rights: Blanchard, Cal-Am, Carmel Valley Ranch, Hacienda Carmel, Hoss, F. and C. Johnson, P. Johnson, Kaufman, Kirk, Lufkin, Lutes, Markkula, Odello Brothers, Pt. Sur Corporation, Quail Lodge, Rancho Cañada, Rancho San Carlos, Syndicate Camp, Tregua Trust, Williams Trust, Wilson and Wolter Properties.

Title 23, CCR, Section 745 states that if a protest is based upon interference with a prior right, the protest shall state the basis of the claim of right to use water, when the use began, the use which has been made in recent years, and present use.

Section 746 states that a protest based upon a claim of interference with an alleged appropriative right which is based solely upon use of water commenced since December 19, 1914, without compliance with statutory procedure, will not be accepted. Protestants either: (1) failed to offer evidence which satisfies all of the requirements of Section 745⁴⁴ or (2) claimed a pre-1914 appropriative right for a use which commenced after 1914. Accordingly, we find that these protests should be dismissed.

Except for protestant Cal-Am, protestants claiming a pre-1914 appropriative right also claim a riparian right for the same properties. The quantities of water which the protestants use are listed in Section 5.2. Accordingly, the quantities of water which the protestants divert under pre-1914 appropriative claim are included in the quantities listed in Section 5.2. No evidence was submitted to demonstrate that the District's proposed project would interfere with these claimed rights during a diversion season between November 1 of each year through May 31 of the following year. Further, the District has stipulated to

⁴⁴ Several persons introduced evidence of some of the elements required by Section 745.

recognize valid pre-1914 appropriative rights of protestants and any permit which is issued by the SWRCB will include a condition to implement the stipulation. Thus, we find that protests based upon pre-1914 appropriative rights should be dismissed.⁴⁵

5.4 Protest Based Upon Unidentified Prior Right

The protest filed by Douglas and Roberta Chappell is based upon potential injury to an unspecified type of water right. The protest indicates that use of 3.5 afa began in 1972 for stock watering purposes. The water is stored in a stockpond. Storage of water initiated after December 19, 1914, can only be accomplished under a valid appropriative water right. The SWRCB has no record of an appropriative water right for the Chappell stockpond. The protestant is seeking an appropriative right for the stockpond pursuant to pending Application 30145; however, the protest should be dismissed, per Title 23, CCR, Section 746.

5.5 Protest Based Upon Permit 18976 of Galante

Galante Vineyards protested Application 27614 on the basis of need to continue service to Permit 18976 (Application 27215) of Galante, which authorizes storage of 40 afa. On behalf of Galante Vineyards, Donald Kienlen testified that the District's proposed project will not have an adverse effect on the water use of Galante Vineyards. (GALANTE:1,2.) Thus, the standard permit condition according protection to senior water rights is adequate to protect the permit and, on this basis, the protest is dismissed.

5.6 Protests Regarding the Priority Date of Application 27614

Application 27614 was filed on December 16, 1982. The application originally requested authorization both to directly divert and store water throughout the year. In 1986, the

⁴⁵ Our conclusion is based, in part, on the protestants duplicative riparian claim and that riparian claims are, generally, permanent to appropriative claims of right.

application was amended to request storage only. In 1992, a second amendment was filed and the application now requests authorization to both directly divert and store water throughout the year.

Protestants Chappell, Chugach and Company, G. Crow, T. Crow, Evans, Koontz, Nicholson, Porter, Spear, and Sterten filed protests which request that the priority date of the 1992 Application 27614 modifications be set to the date of the 1992 amendments and not the date of the application in 1982. Protestant Evans filed a protest regarding the appropriateness of allowing the District to add direct diversion to Application 27614 via the 1992 amendment to the application.

Title 23, CCR, Section 699 provides that:

"Neither the amount of water applied for, nor the season of diversion, as stated in the application as first filed, can subsequently be increased in the application or in a permit or license issued on the application."

In both the initial application and the first and second amendments thereto, the District requested the right to divert water on a year-round basis. In addition, neither amendment sought to increase the amount to be diverted. Water Code Section 1450 states that any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Accordingly, the protests listed in this section should be dismissed because the District's amended applications did not: (1) increase the amount of water requested under the application and (2) did not increase the requested diversion season.

5.7 Reversal of Priority For Some Junior Applicants

Protestants Blanchard, Carmel Valley Ranch, Hacienda Carmel, F. Johnson, P. Johnson, Kaufman, Kirk, Lufkin, Quail Lodge, Rancho Cañada, Rancho San Carlos, Syndicate Camp, Tregrea Trust, Williams Trust, and Wilson request that a condition be included

in any permit issued on Application 27614 to reserve a specific quantity of water for appropriation by junior applicants.⁴⁶ These protestants request, in essence, that their junior applications be given a higher priority than the application for the District's proposed project.

All of the listed protestants claim a riparian right as well as other rights to divert and use water. To the extent that the claimed rights are valid, these protestants have water rights which are senior to any right which the District may establish under any permit issued for Application 27614.⁴⁷

The junior applicants and others contend that it is in the public interest to reserve water for appropriation by junior applicants. Clearly, such a condition would be in their individual interests. It can be argued that it is in the public interest that long-standing claims and/or uses of water should be respected irrespective of the validity of the legal basis for such claims and/or uses. The District has entered into settlement agreements with some protestants. These agreements provide, in part:

"2. Pumper and the Water Management District agree that a determination of the existence and extent of the pre-1914, riparian or overlying water rights which may be held by Pumper is not necessary in these proceedings. To the extent Pumper may later establish that they hold perfected and enforceable pre-1914, riparian or overlying water rights the Water Management District agrees not to exercise any water right presently held by District or granted in these proceedings in a manner to impair Pumper's pre-1914, riparian or overlying water rights.

"3. The Water Management District does not and shall not contest Pumper's right to divert or extract water

⁴⁶ Bruce and Beth Sterten, Aloys and Novella Nicholson, Donald R. Koontz, Nancy Porter and Patricia Hoover, Chugach & Company, Richard B. Evans, Thomas Crow, George and Julia Crow, Douglas and Roberta Chappell and William Spear made the same request when closing briefs were filed with the SWRCB. (Supplemental Closing Brief of Carmel Valley Water Users.)

⁴⁷ The amounts claimed under riparian rights are addressed in Section 5.2, *supra*.

from existing wells, existing surface diversions, or other facilities (or replacement wells, diversions, or other facilities of similar capacities) for reasonable and beneficial overlying or riparian uses on Pumper's lands, [which are] described in Exhibit 1 [to each agreement].... To the extent Pumper may have, hold, or obtain a water right or rights to divert or extract water for use on the lands described in Exhibit 1 as an appropriator, a riparian property owner or an overlying owner, the ... District agrees not to exercise any water right presently held by the District or granted to the District in these proceedings in any manner that would impair such water rights pertaining to Pumper's existing wells, diversion or other facilities (or replacement wells, diversion, or other facilities of similar capacities)." (Emphasis added.)

Water Code Section 1450 states that any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. The SWRCB has the authority, however, to modify the relative priority of applications. (Water Code Section 1257.)

The District filed Application 27614 prior to the subsequent filing of any applications by the protestants. Application 27614 requests water to augment municipal water supply, to reduce drought vulnerability for existing customers served by Cal-Am, and to mitigate the adverse effects of existing diversions on the public trust uses of the Carmel River. (MPWMD:287,2-2.) Most of the water which would be supplied to Cal-Am customers would be for use outside of the Carmel River watershed. Finally, this project could make a legal water supply available to Cal-Am in lieu of its unauthorized diversion from the Carmel River. (Order WR 95-10.)

When determining the quantity of water available to supply the proposed project, the District made allowance for established levels of diversions from the river. (MPWMD: 247, 5-11.) These amounts are set forth in a limited number of stipulations between the District and water users along the Carmel River, in the District Water allocation EIR and in other places in the hearing

record. (Table 13.) Whether such water is being diverted and used under valid legal rights is not known.⁴⁸

As previously discussed, surface water is not available in the Carmel River for much of the year, particularly during the summer and fall of each year. Further, the opportunity to develop additional water within the Carmel River Valley is limited.⁴⁹ As a matter of public interest, the District should not be allowed to develop and export water from a watershed at the expense of water used within the watershed. Thus, any permit issued to the District should include conditions for protecting users of established quantities of water within the watershed of origin.⁵⁰ This preference can be accomplished by special permit conditions.

The holders of riparian, overlying, and pre-1914 appropriative rights have a paramount right to take and use water over persons holding post-1914 appropriative water right permits or licenses. A condition should be included in any permit issued for Application 27614 which expressly states that the right to take water under the permit is junior to the rights of persons diverting water for reasonable beneficial use under valid riparian, overlying, and pre- and post-1914 appropriative claims of right. Thus, such users will be assured that their water rights are protected. (Condition 9.)

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⁴⁸ The administrative record does not provide sufficient information for the SWRCB to evaluate such claims.

⁴⁹ The only real option for providing water for significant development within the Carmel River watershed includes additional storage projects and desalination of ocean water. Suitable sites for additional storage within the watershed are limited. Further, additional development within the watershed would have significant environmental effects.

⁵⁰ This preference does not apply to Cal-Am to the extent that it is diverting and supplying water for use outside of the Carmel Valley watershed.

TABLE 13

**CARMEL RIVER WATERSHED--SWRCB DETERMINATION OF
PRIORITY AND QUANTITIES OBTAINED FROM
STIPULATIONS, APPLICATIONS, OR PROTESTS (AFA)**

Name	Quantity of Water Diverted (Obtained from Hearing Record) (1)	Source of Information	Application Number	Quantity Applied For (Storage and Direct Diversion Combined) (2)	Quantity Reserved by SWRCB For Future Appropriation (3)*
Asoleado	11.30	Exhibit ASO:B	A30093	914.0	11.3
Beckerman	0.00	Application	A30351	28.9	0.0
Bernardi	2.30	Well Report ⁵¹	A29193	3.7	2.3
Berube	48.40	Application	A30442	41.2	41.2
Blanchard	0.30	Protest	---	--	0.3
Cal-Am	2,964.00	Exhibit ⁵² Cal-Am:88,5	A30215	33,153.0	2,964.0
Carmel Valley Ranch ⁵³	237.47	Well Report	A30106	340.0	340.0
Chappel	9.09	Well Report	A30145	3.5	3.5
Chugach & Company	7.62	Well Report	A30034	25.2	7.6
Crow, G. & J.	1.40	Well Report	A30065	3.5	1.4
Crow, T.	13.95	Well Report	A30066	12.7	12.7
Evans, R.	15.00	Protest	A29659	17.5	15.0

* NOTE: Column (3) is the lesser of columns (1) or (2), unless there is a stipulation specifying an amount of water. For those parties who have stipulated to a specific maximum quantity of water (see footnotes by names), the stipulated quantity is listed in column (3).

Continued to next page

⁵¹ All well reports were obtained from SWRCB:1,A27614, letters dated 10-27-94, 11-30-94 & 5-1-95.

⁵² From July 1991 to June 1992, 2,964 af was diverted at San Clemente Dam, presumably for use in Carmel Valley Village. (CAL-AM:88.) Beginning in 1991, diversions at San Clemente Dam were restricted by agreement with the District.

⁵³ Carmel Valley Ranch and the District stipulated to a maximum of 340.0 afa.

TABLE 13

**CARMEL RIVER WATERSHED--SWRCB DETERMINATION OF
PRIORITY AND QUANTITIES OBTAINED FROM
STIPULATIONS, APPLICATIONS, OR PROTESTS (AFA)**

Name	Quantity of Water Diverted (Obtained from Hearing Record) (1)	Source of Information	Application Number	Quantity Applied For (Storage and Direct Diversion Combined) (2)	Quantity Reserved by SWRCB For Future Appropriation (3)*
<i>Continued from previous page</i>					
Greco	6.10	Estimate	A30045	6.1	6.1
Hacienda Carmel ⁵⁴	51.25	Well Report	A30112	50.0	50.0
Johnson, P.	0.10	Protest	---	--	0.1
Johnson, F.	0.10	Protest	---	--	0.1
Kaufman/Williams Trust ⁵⁵	122.05	Well Report of Shared Facility	A30067 A30068	150.3 37.7	160.0
Kirk	9.50	Protest	---		0.0
Koontz	0.72	Well Report	A30057	14.4	0.7
Lutes	70.00	Protest	---	--	0.0
Lufkin	28.00	Protest	---		0.0
<i>Continued to next page</i>					

⁵⁴ The District and Hacienda Carmel stipulated to a maximum of 50.0 afa.

⁵⁵ 160.0 afa is based upon a stipulation with the District and the files for Applications 30067 and 30068. These files were accepted into evidence during the hearing. (T,VIII,16:22-17:8.) The SWRCB takes administrative notice of Table 14, Final Environmental Assessment of the Cañada Woods Public Water System, filed for the applications. The amount of water which can be diverted pursuant to Table 13 for the Kaufman/Williams' applications shall not exceed 147 afa until such time as the New Los Padres Project becomes operational under any permit issued to the District for Application 27614. The SWRCB takes administrative notice of the District's May 15, 1995, Conditions of Approval of the Application to Create the Cañada Woods Public Water System. In this document the District stipulates that established use is between 110 and 188 af.

TABLE 13

**CARMEL RIVER WATERSHED--SWRCB DETERMINATION OF
PRIORITY AND QUANTITIES OBTAINED FROM
STIPULATIONS, APPLICATIONS, OR PROTESTS (AFA)**

Name	Quantity of Water Diverted (Obtained from Hearing Record) (1)	Source of Information	Application Number	Quantity Applied For (Storage and Direct Diversion Combined) (2)	Quantity Reserved by SWRCB For Future Appropriation (3)*
<i>Continued from previous page</i>					
Markkula/ Holt ⁵⁶	---	Stipulation	---	--	0.0
Moses	2.28	Well Report	A30047	8.2	2.3
Nicholson	2.23	Well Report	A30046	5.1	2.2
Odello	195.84	Exhibit: Odello, 2.1 ⁵⁷	---	--	195.9
Patterson ⁵⁸	---	Application	A30447	2.8	0.0
Porter-Hoover	82.00	Estimate ⁵⁹	A30075	98.6	82.0
Pt. Sur Corp.	4.90	Protest	---	--	0.0
Quail Lodge ⁶⁰	281.76	Well Report	A30117	253.5	254.0
<i>Continued to next page</i>					

⁵⁶ The District and Markkula/Holt stipulated to an unspecified amount of water. There is insufficient information in the hearing record to identify the quantities beneficially used; however, the SWRCB has established a procedure for parties to seek an application with priority over the District's project.

⁵⁷ Meter readings for East #3 well for 1990 water year. West #1 and West #2 wells serve DPR property and are not considered here. (Odello:1,3.)

⁵⁸ Application 30447 filed June 1, 1995. Quantity of water used during 1987 through 1994 not yet confirmed.

⁵⁹ The pump discharge rate of 0.22 cfs restricts diversion from May 1 through October 31 (irrigation season) to 80.2 af (0.22 cfs x 1.98 af per day/cfs x 181 days = 80.2 af). During the balance of the year, 3 residences require 500 gallons per day (gpd) each, which equals 0.8 af (1,500 gpd x 1 af/325,851 gal x 184 days = 0.85 af). An existing 15.7 af stockpond requires an estimated 1.0 afa to replace water lost to evaporation and seepage. Total water use is 82.0 afa (80.2 + 0.8 + 1.0 = 82.0).

⁶⁰ The District and Quail Lodge stipulated to a maximum of 254.0 afa.

TABLE 13

**CARMEL RIVER WATERSHED--SWRCB DETERMINATION OF
PRIORITY AND QUANTITIES OBTAINED FROM
STIPULATIONS, APPLICATIONS, OR PROTESTS (AFA)**

Name	Quantity of Water Diverted (Obtained from Hearing Record) (1)	Source of Information	Application Number	Quantity Applied For (Storage and Direct Diversion Combined) (2)	Quantity Reserved by SWRCB For Future Appropriation (3)*
<i>Continued from previous page</i>					
Rancho Cañada ⁶¹	524.61	Well Report	A30111	700.0	700.0
Rancho San Carlos	268.00	Well Report	A29282 A29283 A30149 A30150 A30154 A30420	3,000.0 3,000.0 150.0 120.0 116.0 13.0	268.0
Randazzo	18.04	Well Report	A30281	36.5	18.0
Samson	79.12	Estimate ⁶²	A30110	109.8	79.1
Scardina	0.36	Estimate ⁶³	A30060	5.6	0.4
Spear	17.40	Protest	A30059	17.4	0.0
Sterten	5.10	Well Report	A30070	11.2	5.1
Syndicate Camp	0.80	Protest	---	---	0.8
Templeman	0.65	---	A29648	5.0	0.7
Tregae Trust	6.00	Protest	---	---	0.0
<i>Continued to next page</i>					

⁶¹ The District and Rancho Cañada stipulated to a maximum of 700.0 afa.

⁶² The pump discharge rate of 0.22 cfs limits water diversion from May 1 through October 31 to 78.84 af. During the balance of the year, 0.28 af is required for one existing residence (see prior calculation method). Total water use equals 79.12 af (78.84 + 0.28 = 79.12).

⁶³ The pump discharge rate of 150 gpd restricts diversion from May 1 through October 31 to 0.08 af. During the remainder of the year, 0.28 af is required for one existing residence (see calculation method above). Total water use is 0.36 afa (0.08 + 0.28 = 0.36).

TABLE 13

**CARMEL RIVER WATERSHED--SWRCB DETERMINATION OF
PRIORITY AND QUANTITIES OBTAINED FROM
STIPULATIONS, APPLICATIONS, OR PROTESTS (AFA)**

Name	Quantity of Water Diverted (Obtained from Hearing Record) (1)	Source of Information	Application Number	Quantity Applied For (Storage and Direct Diversion Combined) (2)	Quantity Reserved by SWRCB For Future Appropriation (3)*
<i>Continued from previous page</i>					
Vetter	---	--- ⁶⁴	A30446	2.6	0.0
Williams Trust, R & J	1.50	Well Report	A30058	7.6	1.5
Wilson-Rancho Chupinos	12.00	Exh.:Wilson: 1,3,25	---		12.0
Wistrich	0.88	Well Report	A27633	1.5	0.9
Wolter	65.00	Protest	---	--	0.0
Wolfe	8.30	Estimate ⁶⁵	A30040	9.0	8.3
Total					5,247.5

Further, a special condition should be included in any permit issued to the District providing that persons using established quantities of water within the Carmel River watershed and identified in Table 13 shall have an opportunity to obtain a water right permit with a priority superior to the District's permit.⁶⁶ This condition is to protect only persons using established quantities of water who may have questionable rights to the use of water or who wish to make a use of water which

⁶⁴ Application A30446 filed June 1, 1995. Quantity of water used during 1987 through 1994 not yet confirmed.

⁶⁵ Stockpond and pool not built, 8.3 af existing use.

⁶⁶ This decision finds that unappropriated water was only available to the District from November 1 of each year to June 30 of the following year. (Section 4.7.) This determination is based, in part, on the assumption that the amount of water claimed by protestants is not available to the District during summer months. Thus, the months when water is not available to the District are not applicable, necessarily, to applications having a higher priority than Application 27614.

cannot be provided under existing water rights.⁶⁷

(Condition 10.)

About 3,900 af of the yield of the proposed project is available for future growth throughout the District's service area (MPWMD:287,5-11), an area which includes most of the Carmel River watershed. Thus, a significant percentage of project yield would be dedicated to providing a legal supply of water for Cal-Am, firming up an undependable supply from the Carmel River and mitigating the effects of existing diversions on the public trust values of the river. (Condition 11.) These conditions should not be extended to persons who wish to obtain water right permits for quantities of water in excess of actual quantities of established use because the District's proposed project dedicates a very significant portion of developed water to mitigate the effects of existing diversions on public trust resources. In addition, extending the benefits of these conditions for quantities of water in excess of actual quantities of established use would reduce the water available to the District for consumptive use purposes throughout the District (including the valley), and could affect the viability of project financing and feasibility.

5.8 Protests Based Upon Pending Applications

The following protests are based upon applications which are junior to Application 27614: Cal-Am, Chugach, G. Crow, T. Crow, Evans, Koontz, Nicholson, Porter, Spear, and Sterten for

⁶⁷ Persons filing applications and seeking the benefit of this condition are not entitled to additional amounts of water over and above the amounts set forth in Table 13. If such persons are also claiming riparian, overlying and/or pre- and post-1914 appropriative water rights which are superior to any permit issued on Application 27614, standard permit term 21 shall be included in the permit. Term 21 provides, in part:

"During the season specified in this permit, the total quantity and rate of water diverted, stored, and used under this permit and under permittee's claimed existing right for the place of use specified in the permit shall not exceed the quantity and rate of diversion, storage, and use, respectively, specified in this permit...."

Applications 29659, 30034, 30046, 30057, 30059, 30065, 30066, 30070, 30075, and 30215. Water Code Section 1450 provides that any application properly made gives an applicant a priority of right as of the date of the application until such application is approved or rejected. Based upon Water Code Section 1450, the District's Application 27614 is senior to the protestant's applications except as set forth in Section 5.7. Therefore, per Table 13 the protests filed by the junior applicants Cal-Am, Chugach, G. Crow, T. Crow, Evans, Koontz, Nicholson, Porter, Spear and Sterten have been resolved.⁶⁸ Section 5.7 resolves the Cal-Am protest as it relates to a senior right for in-basin uses of water. The Cal-Am protest for out-of-basin uses is hereby dismissed based upon Water Code Section 1450.

6.0 EXISTING ENVIRONMENTAL SETTING

The following sections describe existing environmental conditions in the river and its immediate vicinity. Diversion from the river by Cal-Am and others affect conditions in the river. These conditions include the loss of riparian habitat in the lower river and the near extinction of the Carmel River Steelhead run. The diversions by Cal-Am and others are not the sole cause of current conditions in the Carmel River. One significant cause of current conditions is the series of dry and critically dry years during the late 1980s and early 1990s. Nevertheless, Cal-Am's combined diversions from the Carmel River constitute the largest single impact to the instream beneficial uses of the river.

6.1 Vegetative Resources

Three vegetation communities are found within the Carmel River watershed; coastal wetlands within the Carmel River Lagoon, riparian communities along the river itself, and upland vegetation on the upper alluvial terraces and hills surrounding

⁶⁸ Numerous protestants filed applications to appropriate water subsequent to filing protests against the District's application. These applications are not separately identified because protestants did not supplement their protests to reference the applications. The priority dates for the new applications are junior to the District's application.

the valley. Mature multistoried riparian vegetation supports a wide diversity of plant and animal species, including a number of species which are protected pursuant to federal and state endangered species acts.

Historically, riparian vegetation was more extensive than at present, particularly in the lower nine river miles. Prior to 1956, losses were primarily attributable to agricultural development. Since that time, the decline has coincided with the increasing diversion of ground water to meet growing urban demand on the Monterey Peninsula. (SWRCB:17; SWRCB:42,III-28.) Were it not for the extensive riparian corridor irrigation efforts of the District and Cal-Am, it is estimated that current ground water pumping would severely stress approximately 59 percent of the existing riparian vegetation in the upper portion of Aquifer Subunit 3 (see Figure 2) in normal water years, and nearly all vegetation during critically dry years. (MPWMD:289,9G-1.)

The Carmel River Lagoon contains a mixture of freshwater and salt marsh vegetation. Coastal salt marsh is considered one of the most fragile and rapidly disappearing habitats in California. The Carmel River coastal wetland represents some of the last remaining habitat of this type on the Central Coast. (SWRCB:42,III-32.)

Upland vegetation within the watershed is composed of a mixture of coastal scrub, hardwood forest, coastal dune, chaparral, and closed-cone coniferous forest. Diversions from the river have no direct effect on such resources.

6.2 Wildlife Resources

Carmel River riparian and wetland communities support a diverse group of resident and migratory wildlife. A number of amphibian and reptile species occur within the riparian and wetland zones as well, including the red-legged frog and the western pond turtle. These are, respectively, a proposed and candidate

species for listing under the Federal Endangered Species Act. A more detailed description of these resources is found in the District's EIR/EIS. (MPWMD:287-290.)

6.3 Fishery Resources

The Carmel River supports populations of at least ten resident freshwater and anadromous fish species. Of these fishes, the steelhead (*Onchyrhynchus mykiss*) has been considered the most important, and extensive studies have been performed to define its ecology in the river. (SWRCB:42,III-41.)

Adult steelhead live in the ocean and migrate into the upper reaches of the Carmel River to spawn. Migration may begin in the fall after the lagoon sandbar is breached by either artificial means or by a major storm and when sufficient flow is established in the lower river to allow upstream fish passage.

Typically, in early January the adults spawn and migrate back to the ocean. After approximately three to eight weeks of incubation, depending on water temperature, the eggs hatch and fry soon emerge from the gravel. These fry continue development in the river until fall. By fall, the fry have developed into juveniles and begin moving downstream. They remain in the lower reaches of the river and the lagoon adapting to brackish water until late spring. In late spring as high river flows are receding, most juvenile migrate to the Pacific Ocean. Some juveniles and adults remain in the river system for one or two additional years before migrating to the ocean, hence these life stages may be found in the river throughout the entire year. (SWRCB:42,III-42.)

6.4 Extent of the Steelhead Resource

When first seen by Spanish explorers in 1603, the Carmel River supported a spectacular steelhead run, believed to have been well in excess of 12,000 fish annually. (CSRA:5,2.) Heavy fishing in the 1850s through the 1870s diminished the fishery. Fish

planting began in 1910 and continued through the 1940s.

(MPWMD:289,8-8.)

When San Clemente Dam was constructed in 1921 (RM 18.5), a fish ladder was also built. (MPWMD:289,8-8.) Access to a major portion of the steelhead spawning and rearing habitat was effectively eliminated in 1949 with the construction of Los Padres Dam at RM 23.5. (CSRA:5,2.) Although a fish trap was installed downstream of the dam and captured adults transported into the reservoir, the facility proved ineffective at maintaining steelhead populations above the reservoir.

(MPWMD:289,8-8.)

Annual counts of steelhead passing through the San Clemente fishway began in 1961. The critical dry years of 1976-77, the 1987-92 drought and diversion by Cal-Am from its wells have combined to reduce water available to steelhead and have also reduced the steelhead population to remnant levels. Only one fish was recorded in 1991, and 15 fish in 1992. (MPWMD:337,49.)

Past reviews of Carmel River environmental problems have identified flow reduction and habitat alteration as major factors associated with steelhead decline. (SWRCB:42,III-44.)

Paralleling the declining steelhead population during this period was the rising urban demand for water. Originally, the Monterey Peninsula water supply was diverted entirely from the two reservoirs and from surface flow. When demand exceeded the developed surface resources, wells drilled in the Carmel Valley alluvium aquifer were added to supplement supply. In recent times, dry season surface flows below the Narrows at RM 10 have been depleted in most years as a result of heavy ground water pumping. This results in the stranding and death of many juvenile fish as surface flow recedes. (DFG:4,32.)

7.0 EFFECT OF PROPOSED PROJECT ON THE ENVIRONMENT

When approving an application for a project, the SWRCB must adopt conditions to: (1) keep fish in good condition below a proposed dam; (2) avoid or minimize harm to public trust resources, when feasible; (3) assure that the use of water will be in the public interest; and (4) avoid or mitigate adverse environmental project effects. (California Department of Fish and Game Code Section 5937 and Title 23, CCR, Section 782; National Audubon Soc. v. Sup. Ct. (1983) 33 Cal.3d 419, 189 Cal.Rptr. 346, 364; Water Code Sections 1253 and 1257; Public Resources Code Section 21000, et seq.)

7.1 Project Impacts and Conditions

The evidentiary record, including the EIR/EIS, identify a number of significant and potentially significant environmental impacts associated with the proposed project. Those areas requiring water right permit conditions are discussed below.

7.1.1 *Seismic Considerations and Dam Safety*

The New Los Padres Project is located in a seismically active region and the Cachagua fault is located approximately 0.5 mile downstream from the dam site. For the purposes of project design, the fault must be considered potentially active and the dam designed to withstand the maximum credible earthquake. As a jurisdictional structure, final design criteria should be approved by the Department of Water Resources, Division of Safety of Dams (Department). (MPWMD:287,6-9.) Thus, a condition shall be included in any permit issued for Application 27614 requiring that design of the dam be approved by the Department. (Condition 12.)

7.1.2 *Soil Erosion*

Construction activities will disturb soil and rock, resulting in a period of increased erosion with potential impact on downstream water quality and fishery habitat. Prior to construction, the District should prepare an Erosion Control Plan incorporating, as

a minimum, mitigation measure 6.3.1-1 in the EIR/EIS.

(MPWMD:287,6-12.) Further, as construction will take place in the natural channel of the Carmel River, an executed stream alteration agreement with the Department of Fish and Game (DFG) will be required. Accordingly, a condition shall be included in any permit issued for Application 27614 requiring compliance with soil erosion measures and requiring the District to obtain a stream alteration agreement with DFG. (Conditions 14 and 15.)

7.1.3 Hydrology

Operation of the New Los Padres Reservoir would provide year-round flow to the lagoon in 75 percent of years, representing a significant improvement over pre-project conditions. Flow would cease in the lower river only during critically dry periods, estimated to occur 5 to 13 percent of the time. (MPWMD:287,7-34.) Presence of surface flow would in turn have a beneficial impact on ground water storage, allowing the aquifer to remain 99 percent saturated during normal and better water years.

(MPWMD:287,7-39.)

Reservoir construction can significantly affect the hydraulic characteristics of a river, such as channel geometry and sediment transport. By reducing the frequency of high flows, encroachment by vegetation can decrease the downstream channel capacity and, thereby, increase flood elevations. (MPWMD:287,7-42.) Reduced peak flows can alter the ability of the river to move incoming sediment downstream and result in bank erosion and degraded fishery habitat. In this case, the degree of impact is unknown, but potentially significant. The District proposes to develop a program to monitor long-term changes in channel capacity downstream of the project. (MPWMD:287,7-48.) Accordingly, we find that any permit which may be issued for Application 27614 shall require the District to develop and implement a program to monitor long-term changes in channel capacity downstream of the project. (Condition 16.)

7.1.4 Water Quality

Construction can cause temporary adverse impacts to water quality resulting from wastewater discharge and stormwater runoff. Other potential construction pollutants include sewage, petroleum products, and industrial chemicals. (MPWMD:287,7-66.) Water Code Section 13000 et seq. authorizes Regional Water Quality Control Boards to regulate the discharge of waste to the waters of the State to protect water quality and the beneficial uses of water. Construction of the proposed project should be subject to conditions to protect water quality and the beneficial uses of water. Accordingly, we find that any permit issued for Application 27614 shall require the District to file a report with the California Regional Water Quality Control Board, Central Coast Region (Board) pursuant to Water Code Section 13260 and comply with all waste discharge requirements which may be imposed by the Board. (Condition 17.)

The impoundment of water behind dams can cause significant changes in the temperature and dissolved oxygen concentrations of the stored water. Warm water depleted of oxygen can adversely impact downstream fishery resources. To mitigate these effects, the District proposes to construct a multi-level intake structure enabling cool water to be released in a manner to achieve maximum reaeration. (MPWMD:287,7-64.) Accordingly, we find that any permit issued for Application 27614 shall require the District to construct and operate a multi-level intake structure enabling cool water to be released in a manner to achieve maximum reaeration. (Condition 18.)

7.1.5 Vegetation

Operation and construction of the New Los Padres Project is expected to have significant impact on vegetation within the inundation zone, the construction staging area, and the downstream riparian corridor.

7.1.5.1 Construction Impacts

Dam and reservoir construction will permanently eliminate:

127.0 ac. of mixed hardwood forest and coast live oak woodland
6.3 ac. of valley oak woodland
39.0 ac. of riparian habitat
2.6 ac. of wetland
65.0 ac. of non-native grassland (MPWMD:287,9-64.)

In addition, the construction staging area will result in the temporary loss of 16 acres of upland habitat. With the exception of non-native grassland, vegetation losses are considered significant and require mitigation. (MPWMD:287,9-72.)

To compensate for loss of mixed hardwood/coast live oak woodland, the District plans to preserve in perpetuity similar habitat at a 3:1 ratio. (MPWMD:287,9-67.) Valley oak woodland is considered by the DFG to be a particularly sensitive habitat. To mitigate this impact, the District proposes to enhance a 23-acre site of declining valley oak by infilling with seedlings and protection from grazing as outlined in the Valley Oak Woodland Mitigation and Monitoring Plan. (MPWMD:289,9B.) To compensate for riparian and wetland losses, the District proposes to rehabilitate 46.5 acres of degraded habitat within the current inundation zone of San Clemente Reservoir. (MPWMD:323; MPWMD:324,1.) Accordingly, we find that any permit issued for Application 27614 shall require the District to undertake measures to mitigate the loss of mixed hardwood/coast live oak woodland, valley oak woodland, and riparian and wetland habitat impacts. (Conditions 19 through 22.)

7.1.5.2 Sensitive Plant Species

No state or federally listed endangered or threatened plant species are found within the reservoir or construction impact area. Two sensitive species (CNPS List 4) occur in the inundation zone, the Lewis' Clarkia (*Clarkia lewisii*) and the Douglas' Spineflower (*Chorizanthe douglasii*). Both species, though uncommon, are widely distributed in Monterey County. The

District plans to collect seed prior to reservoir clearing for later reintroduction (MPWMD:288,9E,25). We find that any permit issued for Application 27614 shall require the District to collect seeds of Lewis' Clarkia and Douglas' Spineflower prior to reservoir clearing for later reintroduction. (Condition 23.)

7.1.5.3 *Project Operation Impact on Downstream Riparian Vegetation*

A key feature of the New Los Padres Project is maintenance of a prescribed flow from the dam to the lagoon in normal and above normal water years. Reliable summer flow is expected to have a beneficial impact on riparian vegetation and associated wildlife. Critically dry conditions occur in 12.5 percent of years, and in those years ground water drawdown would cause severe water stress to 119 acres of riparian vegetation. Such impact would be similar to the present conditions. Riparian irrigation programs have mitigated the effect of ground water drawdown on riparian vegetation. (MPWMD:287,9-81; SWRCB:45.) Thus, we find that any permit issued for Application 27614 shall require the District to maintain and use the riparian irrigation system during dry and critically dry water years. (Condition 24.)

7.1.6 *Wildlife*

Construction of the New Los Padres Project is expected to have some impacts on wildlife. By providing more reliable instream flow, however, the project is expected to have a beneficial impact on riparian habitat and associated wildlife. The District has initiated the Wildlife Habitat Monitoring Program (Program) to assess pre-project baseline conditions as well as long-term improvements in wildlife values and species diversity after construction and operation of the project. The Program is intended as partial mitigation for habitat losses in the construction and inundation area. (MPWMD:287,9-84; MPWMD:289,9G.) Accordingly, we find that any permit issued for Application 27614 shall require the District to continue with the

Program to assess wildlife values and species diversity.
(Condition 25.)

7.1.7 Fisheries

The following key issues were included in the June 1992 notice for hearing before the SWRCB:

"Does the District's proposed project have adverse effects on the public trust resources of the Carmel River?"

and

"What instream flows are necessary to protect the public trust resources of the Carmel River?"

The impacts of the proposed project on steelhead were analyzed for the following categories of effects. (MPWMD:287,8-34.)

1. The physical impact of project facilities on steelhead rearing and spawning habitat.
2. How operation of the New Los Padres Project would affect streamflow patterns during specific phases of the steelhead lifecycle.
3. The impact of existing and proposed fish passage facilities on upstream and downstream migration of steelhead.
4. The impact of project operation on water temperature downstream of the reservoir.

In 1988 the District convened an Interagency Group (MPWMD:45) to review water supply alternatives and mitigation plans proposed by the District. The Fishery Working Group (FWG) was formed in 1992 as a technical advisory group to the Interagency Group. The FWG was composed of representatives from the District, DFG, National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), U.S. Forest Service (USFS), and Cal-Am. The primary

objective of the FWG was to develop a set of New Los Padres operating rules and associated instream flow requirements for the protection of public trust resources, particularly steelhead; fish passage issues were also addressed. FWG recommendations were released in March 1994 in their Completion Report (MPWMD:289,A4) and incorporated into the Final EIR/EIS (MPWMD:287,4-25).

In developing instream bypass flow requirements, the FWG was guided by several underlying principles. (MPWMD:A4,5.) First, project bypass flows were designed to mimic natural conditions as closely as possible, taking into consideration season and hydrologic year type. Inflow to the New Los Padres Project in excess of releases to maintain instream flows is available for diversion. Instream flows may be provided by natural inflow, tributary inflow, water stored in the reservoir, or a combination of the three; however, tributary inflow is normally insignificant during the summer months. Second, the bypass flows are designed to satisfy the biological requirements of the life stages for steelhead residence below the new dam, and to provide additional downstream habitat to mitigate for project-induced losses of spawning and rearing habitat. Biological requirements of the Carmel River steelhead have been studied extensively by the District (MPWMD:152), their consultants, and DFG. (SWRCB:36; MPWMD:127; MPWMD:128; DFG:4.)

7.1.8 Construction Impacts on Steelhead Trout Habitat

Construction of the New Los Padres Reservoir will either inundate or block 3.4 miles of the Carmel River and Danish Creek. This represents about 12 percent of steelhead spawning habitat (MPWMD:87,8-34) and up to 14 percent of rearing habitat (MPWMD:87,8-38) in the Carmel Basin. Both impacts are considered significant and adverse.

The District proposes that impacts to spawning habitat be mitigated primarily by injection of suitably sized gravel at

specific locations downstream of the dam, periodically monitoring the sites after major storm events, and reinjecting gravel as necessary. Based upon studies, the District maintains that increased project flows below the dam will increase existing downstream spawning habitat. The District's proposed new fish passage facilities will make available additional fish habitat upstream of the dam, which is currently under utilized due to restricted fish passage at Los Padres Dam. These measures are set forth in the Spawning Habitat Mitigation Plan outlined in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume II, Appendix 8-B. Accordingly, we find that any permit issued for Application 27614 shall require the District to finalize and implement the Spawning Habitat Mitigation Plan outlined in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume II, Appendix 8-B. (Condition 26.)

Inundated rearing habitat will be mitigated through enhancement of downstream habitat. The District proposes to institute programs to manage substrate, the occurrence of small woody debris, and overhanging vegetation in an effort to optimize local habitat conditions. These programs are set forth in preliminary form in the Steelhead Fisheries Mitigation Plan. (MPWMD:288, 8-A.)

We find that any permit issued for Application 27614 shall require the District to finalize and implement the Steelhead Fisheries Mitigation Plan found in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume II, Attachment 8-A. (Condition 27.)

7.1.9 Project Operating Rules

Importantly, the District plans to enhance downstream rearing habitat conditions by providing additional flow in accordance with proposed Operating Rules agreed upon by the FWG.

(MPWMD:287,8-38.) It is the desire of the DFG (DFG:94-2,2), the NMFS (MPWMD:289,A-4,17), and the District (MPWMD:291,13) that the

proposed Operating Rules be made a requirement in any permit issued pursuant to Application 27614 by the SWRCB and to remain in force for the lifetime of the project.

Project operation criteria were designed by the FWG around a set of key assumptions which are described in detail in the Completion Report. (MPWMD:289,A4.) As previously mentioned, flows are intended to satisfy, in most years, the biological needs of the phases of the steelhead lifecycle. Large flows are required to rupture the sandbar at the lagoon and attract adults into the lagoon. Substantial flows are required for adults to successfully navigate critical riffles in the lower river and spawn upstream (January-March), and for juveniles to travel downstream (April-May). Finally, lesser flows are needed for rearing (June-December) in the reach upstream of the Narrows. Higher instream flows will also have a beneficial effect on riparian vegetation and associated wildlife resources.

To ensure sufficient flow in all reaches of the Carmel River below the project, three monitoring sites would be established. Except when no flow is required at the lagoon, the Highway 1 stream gage acts as the controlling monitoring site. The District Water Supply Index (MPWMD:289,A-5,23) is the basis for defining hydrologic year type. The index incorporates flexibility to adjust for water year type classifications (these classifications are based upon monthly streamflow), and related streamflow requirements during the month, rather than waiting until the beginning of the next month to make modifications in water year type and streamflow requirements. (MPWMD:289,A-4,7.) The Water Supply Index is based upon cumulative unimpaired inflow at San Clemente Dam. Year classes are based on selected exceedance values calculated from the long-term record (1902-1978) as follows: (MPWMD:289,A-5,22.)

<u>Water Year Class</u>	<u>Non⁶⁹ Exceedance Frequency</u>	<u>Cumulative Annual Flow (AF)</u>
Normal or Better	>50%	>48,100
Below Normal	50 - 25%	48,100-31,750
Dry	25 - 12.5%	31,750-14,925
Critically Dry	<12.5%	<14,925

During extended periods of drought, storage would be depleted and the project would have to revert to pre-project flow conditions. By definition, "critically low storage" would occur whenever usable storage in New Los Padres falls below 2,000 af, and would persist until storage exceeds 7,500 af. (MPWMD:287,4-27.) It is estimated that the project would be operating under "revert" conditions about 10 percent of the time (MPWMD:289,A-4,15), resulting in less than ideal conditions for the fishery.

An instream flow analysis was performed to provide information on the ability of the project to actually comply with the proposed instream flow schedule. (MPWMD:289,A-4,15.) The analysis indicates that when the project is not operating under critically low storage conditions, specified instream flows can be met 100 percent of the time. These flows can be accomplished, in part, by reducing the amount of project yield which would be made available for diversion at Cal-Am wells from 23,890 afa to 21,000 afa. (MPWMD:287,1-6.) Thus, we find that any permit issued for Application 27614 shall require the District to maintain minimum instream flow below New Los Padres Dam, at the Narrows and at the lagoon with appropriate adjustments for year types, seasons of the year, and reservoir storage. (Conditions 28 through 31.)

⁶⁹ Non-exceedence is a reference to streamflows which are always met during a particular time period, i.e., streamflows which are not exceeded. Hence, a critically dry year is defined as a year in which the cumulative annual flow does not exceed 14,925 af. This occurs in less than 12.5 percent of the water years.

An attraction event is defined as the occurrence of a 200 cfs flow at the Carmel River Lagoon. Once an attraction event occurs and the system is in transition to migration flows, the declining phase of the hydrograph should be regulated in a manner which simulates natural conditions. The methodology used in the following permit term is based upon review of District Exhibit 287, pages 4-27 to 4-28. Thus, we find that any permit issued for Application 27614 shall require the District to regulate the rate at which flows to the lagoon are reduced once an attraction event has occurred. (Condition 32.)

7.1.10 *Interim Operating Rules*

The District's schedule for constructing the proposed project anticipates that there will be a five- to six-year period between project approval and full project operation. (MPWMD:288,8-A,12.) Prior to project operation, critically low storage conditions will continue to occur on the river. To alleviate the impact of current water diversion practices, the District has implemented a program of fall/winter and spring fish rescues, as well as other measures specified by the Water Allocation Mitigation Program. (SWRCB:45.) The District proposes to continue these efforts, as needed, under project conditions. The District also negotiates an annual Memorandum of Agreement with Cal-Am and DFG to regulate the rate of diversion to the San Clemente Filter Plant and release from the San Clemente Dam to the river. The District would undertake to operate the proposed project to provide a minimum flow of 5 cfs below San Clemente Dam under conditions of critically low storage, conditions substantially similar to present conditions on the river. We find, accordingly, that any permit issued for Application 27614 shall require the District to maintain a minimum flow of 5 cfs at all times below the San Clemente Dam. (Condition 33.)

7.1.11 *Project Operation Impacts on Steelhead*

In addition to the beneficial effect which the flow schedule is expected to have on spawning and rearing habitat, project

construction will affect steelhead adult upstream and juvenile downstream migration in the following ways:

- Opportunities for adult upstream migration will be similar to or better than existing conditions, and significantly worse than natural conditions. This impact is considered significant and unavoidable, though it would only occur during severe drought (MPWMD:287,8-45).
- Opportunities for juvenile downstream transport would on average be substantially better than existing conditions and similar, or slightly worse, than natural conditions (MPWMD:287,8-61).

During critically dry years, and under conditions of critically low storage, there will be insufficient water to provide optimal flow conditions for steelhead. To mitigate the effects of critically dry years, the District should continue the present program of trapping and holding fall and spring migrants.

(MPWMD:287,8-61; MPWMD:289,2-D.) Thus, any permit issued to the District for Application 27614 shall require the District to continue to implement the fisheries measures outlined in the Water Allocation Mitigation Program as described in the Monterey Peninsula Water Supply Project Final EIR/EIS. (Condition 34.)

7.1.12 Project Impact on Fish Passage

Fifty percent of Carmel River steelhead spawning habitat occurs upstream of Los Padres Dam (MPWMD:287,8-4). An important element of the District's steelhead mitigation program is the construction of new fish trapping facilities upstream and downstream of the new reservoir to facilitate fuller utilization of this habitat. Fish traveling in both directions would be trapped and transported past the reservoir in specially equipped trucks. (MPWMD:287,8-67.) It is anticipated that the new facilities will provide good to excellent upstream conditions for

adults and significantly improved conditions for emigrating smolts (MPWMD:287,8-72), which now suffer 24-percent mortality as they pass over the Los Padres spillway. (MPWMD:287,8-73.)

The trap and truck facilities being considered are experimental because no other similar facilities are currently operating in California. (T,X,103:6.) DFG testified that operation of the facilities should take place in accordance with a Memorandum of Understanding or some other contractual arrangement between the District and DFG. (T,X,93:13.) Such an agreement should establish monitoring and performance standards. (MPWMD:287,8-70.) The District should formulate a Remedial Action Plan to address problems identified by the monitoring measures included in the Steelhead Resource Mitigation Plan. (MPWMD:288, Appendix 8-A.) Such remedies might include additional water below the dam to compensate for unused habitat upstream. (MPWMD:287,8-72.) We find that any permit issued for Application 27614 shall include a condition to require the District to design, construct, and operate the operation of upstream and downstream fish passage facilities for the New Los Padres Project. (Conditions 35 and 36.)

7.1.13 Project Impact on Water Temperature

Implementation of the operation schedule would result in average minimum dry season flow releases of 18 cfs below the dam. Cool water released from the multilevel outlet structure would influence rearing habitat for a longer distance downstream and create conditions superior to the existing situation. The District proposes to conduct operation studies and temperature simulations during the final design phase of the project to aid in formulating a detailed set of operating rules for managing reservoir releases. These rules will become part of the Steelhead Fisheries Mitigation Plan. (MPWMD:287,8-79.) A condition requiring the construction and operation of the multilevel outlet structure is previously addressed in this decision. (Section 7.3.4.)

7.1.14 Potential Listing of Steelhead Under the ESA

CSPA, in collaboration with a number of other organizations, submitted a petition to the NMFS requesting that the steelhead be listed under the Federal Endangered Species Act (ESA). The petition was accepted and a decision was due from NMFS by February 14, 1995. (CSPA, 12b, 3.) As of June 20, 1995, no decision has been rendered regarding the eligibility of the Carmel River steelhead. Should the Carmel River steelhead be listed at some time prior to construction of the proposed project, the District should seek a formal biological opinion to determine whether additional mitigation measures are warranted. Thus, we find that any permit issued for Application 27614 shall include a condition to require the District to seek a formal biological opinion from the trustee agency in the event that the Carmel River steelhead become listed as threatened or endangered under either the state or federal endangered species acts. (Condition 37.)

7.2 Cultural Resources

The proposed project will inundate archeological resources and traditional cultural properties (TCPs). In addition, the project will have an effect on the cultural and religious practices of persons of Esselen descent.

7.2.1 Regulatory Setting

Cultural resource studies for the New Los Padres Project were undertaken by the District in 1992. These studies were undertaken pursuant to: (a) Section 106 of the National Historic Preservation Act (NHPA) of 1966 (amended in 1992) and (b) the National Environmental Policy Act (NEPA)⁷⁰ and CEQA. CEQA Guidelines provide that a public agency following the federal clearance process under the NHPA or NEPA may use the documentation prepared under the federal guidelines in place of

⁷⁰ NHPA is found at 16 USC § 470; NEPA is found at 42 USC § 4321, et seq.

documentation necessary for CEQA. (Title 14, CCR, Appendix K, VI.)

Section 106 process provides for the evaluation and protection of cultural resources via: (1) the identification and evaluation of historic properties; (2) assessment of effects of the undertaking on properties; (3) consultation with the State Historic Preservation Officer (SHPO), and other designated agencies so that an agreement addressing the treatment of historic properties can be developed; (4) comments from the Advisory Council on Historic Preservation (ACHP); and (5) condition imposed upon a project.

For the proposed project, the Army Corp of Engineers (ACOE) is the Federal Lead Agency responsible for compliance with the Section 106 process. MPWMD is the State Lead Agency; the SWRCB, SHPO, and the ACHP are the consulting parties in the process for developing the required agreement necessary for the project to proceed. The Esselen Tribe and Esselen Nation are interested parties in the process.

The National Register of Historic Places (NRHP) was established by statute to list sites deemed to have historical importance (36 CFR 60). If a property is listed or eligible for listing in the NRHP, it is subject to review and comment under Section 106 of the NHPA. Impacts on historic properties must be considered in accordance with the regulations of the ACHP. (36 CFR 800.) If cultural resources are determined not to possess the qualities to be considered "important" under CEQA, or significant in the federal process, they do not have to be given any additional consideration.

7.2.2 Archeological Sites Affected by the Project

During the inventory phase of the Section 106 process, 22 archeological sites were documented as occurring within the project area. (MPWMD:44,33-34.) Sixteen sites were newly

recorded during the field survey in 1992 and 6 sites were previously recorded during other investigations in the project area. Three of the previously recorded resources were relocated during the 1992 field work and 3 were not relocated as they are known or presumed to have been inundated by the existing Los Padres Reservoir. All 22 sites have prehistoric archeological components. (MPWMD:44,iii.)

All but four of these sites have been characterized as small bedrock milling (BRM) stations with shallow mortar cups which appear to have no or sparse associated cultural constituents. The other four prehistoric sites have midden deposits with dark ashy soil, but with few or no cultural constituents (CA-MNT-481, -1594, -1601, -1604/H). These midden sites are relatively large in area (except CA-MNT-481) and also contain BRM features. Sites that were noted but not formally recorded during the 1992 fieldwork include: (1) the existing Los Padres Dam; (2) an undated rock cairn, possibly a burial; and (3) a Native American "ceremonial site". In July of 1992 limited auger and shovel tests were utilized to determine the presence/absence of subsurface archeological deposits at "all" identified sites. (MPWMD:44,11.)

7.2.3 Assessments of Effects

Project components can adversely affect historic properties either directly or indirectly. Direct impacts may occur when impacts on historic properties cannot be avoided through project redesign or other methods. Demolition or inundation of historic properties and/or bulldozing archeological sites are examples of direct effects. Historic properties can also be affected by indirect impacts (e.g., vandalism and pot hunting) resulting from increased access into the project area. (MPWMD:326,146-155,164,241-242.) The physical effects of inundation may be unavoidable and may damage or destroy historic properties within the inundation zone. Some measures may be possible to avoid adverse effects to historic properties above the reservoir

depending on project design needs, and why the historic properties are important. (MPWMD:300,15:24-16:11.)

Assessment of the project's effects also requires determining how the undertaking will affect those attributes of historic properties that make them NRHP eligible. For most properties within the Area of Potential Effect (APE), determination of how the project will affect the scientific data potential is the primary consideration, although other values including effects on TCPs are considered. (MPWMD:329,146.)

Project effects have been preliminarily assessed for the 22 prehistoric/ethnohistoric archeological resources. Twenty of these resources and 7 TCPs were recommended as eligible for the NRHP. The majority of these resources will be subject to "adverse effects" by inundation, erosion caused by wavecut actions, or by borrow area and staging area operations. It is stated that each resource would likely suffer loss of integrity of setting, feeling, and association; and, for archeological resources, loss of the potential to yield information important in history, or prehistory; for TCPs loss of a tangible referent is also expected. The undertaking is expected to have "no effect" on four resources located well above the proposed reservoir and away from work areas, and project effects were undetermined at two resources due to a lack of detailed project information. (MPWMD:326,146-155; supplemental information titled *Additional Archeological Investigations Prepared As A Supplement To Phase II Cultural Resources Investigations for the New Los Padres Dam and Reservoir Project, Carmel Valley, Monterey County, California* dated August 8, 1994 (SWRCB:1).

7.2.4 Native American Consultation

A TCP is defined as a specific location that is significant due to its association with cultural practices or beliefs of a living community that are (a) rooted in that community's history and (b) are important in maintaining the continuing identity of the

community. "Culture" is understood to mean the "traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community, be it an Indian tribe, a local ethnic group, or the people of the nation as a whole."

(Bulletin 38, National Park Service.) Such values are intrinsic to the maintenance of cultural traditions and to a group's identity and self-respect. (T,X,4:8-4:20.)

In the vicinity of the proposed project, the principal persons who speak for Native American Esselen descendants are the Nason Family, the Esselen Tribe and the Esselen Nation. Ethno-historical cultural memories provided a bridge between prehistory and the present day. (MPWMD:326,134-133.)

The Nason family who have been documented as direct Esselen descendants have expressed heritage claims to the project vicinity and concerns for the protection of TCPs. (MPWMD:326, Appendix 1,177-185; MPWMD:44,35-37.) The Nasons' identified three specific ceremonial sites (two at recorded archeological sites), and asserted their family's continuous use of the project area for hunting, fishing, and the gathering of food and medicinal plants. (MPWMD:326,89-99.)

In the Phase II study, an ethnographer stated that the relationship of contemporary Esselen descendants with the study area remains strong. For those who have lived on this land all their lives, the area contains the cultural and physical remains, the ancient trails and shrines, and the other sacred places of their ancestors. The possible destruction and/or desecration of these areas is a serious concern for today's Esselen, whether they still live in the area or only come to it now and then. (MPWMD:326,96.) Tom Little Bear Nason of the Esselen Tribe, confirmed these concerns regarding traditional cultural and ceremonial sites in the project area, during testimony at the hearing. (T,IX,122:13-141:25.)

In 1993, the Esselen Nation asserted that "... the various lineages comprising the Esselen Nation have strong ancestral ties to this region." (SWRCB:MPWMD transmittal of Esselen Package dated 2-18-93, Appendix, 6.) Of concern, is the lack of participation by the Esselen Nation. The Nation has not, to date, participated in any ethnographic studies for the New Los Padres Reservoir project.

Both the Esselen Tribe and Esselen Nation have expressed dissatisfaction with the ethnographic work conducted to identify TCPs within the project area. During the hearing, the Esselen Tribe provided testimony to indicate that historic use of the locality by Native Americans for grazing and commercial pack expeditions may have significant time depth and links to traditional lifeways, so that these activities should also be considered within the context of TCPs. (T,X,44:8-54:19.)

Specific problems encountered during the identification of the TCPs include: (1) lack of documentary evidence for continuity of use by the Esselen between c.a. A.D. 1830 and the early 1900s; and (2) most of the ethnographic and ethnohistoric data for the Esselen are extremely fragmentary. (MPWMD:326,99.) Dr. McCarthy testified, however, that the information supplied by the Nason family fits very well within the range of Central California religious and cultural practices. (T,X,41:21-43:19.) She also stated that based upon her review of the available information, additional investigations need to be completed. (T,X,44:1-45:1;T,X,47:4-47:9.)

Although archeological research at sites identified in the project area appears to be adequate for determination of NRHP eligibility, these Native American resources should be considered in the context of all values, including TCPs. Until the traditional use of the region by the Esselen descendants has defined the role that archeological sites have played in their

cultural traditions, the value of archeological sites cannot be fully determined. (SWRCB:1,PA,Attachment 2,11.)

We find that the documentation which has been completed to date for the Esselen people is insufficient; the original ethnographer spent relatively little time with the Nason family, which subsequently resulted in incomplete documentation.

(MPWMD:326,89-99.) Dr. McCarthy testified that additional information regarding the historic livestock and packing operations and ethnobotanical resources would provide supplemental documentation necessary for traditional cultural properties determinations. (T,X,44:1-45:19; T,X,47:4-47:9.) In addition, ethnographers should continue the consultation process by conducting additional interviews and the necessary research which will identify Native American concerns and traditional properties.

7.2.5 Preliminary Eligibility for the NRHP

All parties have determined that additional information should be developed for the evaluation of the cultural resources' eligibility for the NRHP. Thirty-five potential TCPs have been identified. Within the project area, six "sacred places" and a "resource procurement area" are judged to qualify as TCPs significant to the Esselen under NRHP eligibility criteria.

These seven TCPs include: the entire length of the Carmel River, doubly described as the "spirit trail of the dead" and significant as a traditional plant gathering area; CA-MNT-34, presumed to be the capital village of Xasa'uan and located adjacent to the study; the "birthing rock", CA-MNT-1594; "the stone circle" at CA-MNT-1604/H, described as a "baby ritual burial area" associated with the nearby "birthing rock"; "unnamed ceremonial site 1", a prominent rock outcrop ascribed as an "altar"; and "unnamed ceremonial site 3", an "altar" located in a rock outcrop, associated with CA-MNT-37, which had been dynamited. (MPWMD:326,128-145.)

The Phase II report recommends that 20 of the 22 archeological sites and 7 traditional properties are eligible for listing in the NRHP. (MPWMD:326,143-145.) These findings are currently only the recommendations of the consultants.

Thus, we find that until the traditional use of the region by Esselen descendants has defined the role that archeological sites have played in their cultural traditions, the value of archeological sites under more than one criterion cannot be determined. (SWRCB:1, Programmatic Agreement, Attachment 2, 11.) Once ethnographic studies have been completed and all components of the project have been defined, the ACOE will be able to render opinions regarding the NRHP eligibility of properties within the project area in consultation with SHPO and apply the criteria of effect and adverse effect on historic properties in the project area. (T, IX, 217:20-218:1.)

7.2.6 The Section 106 Process of the National Historic Preservation Act

Among the basic purposes of CEQA is the purpose of "[i]nforming governmental decision makers and the public about the potential, significant environmental effects of proposed projects."

(Title 14, Section 15002(a)(1).) Unless a project is exempt, an initial study and negative declaration or EIR must be prepared and considered at the time a responsible agency considers approval of a proposed project. (Title 14, Section 15096.)

CEQA Guidelines provide that a public agency following the federal clearance process under the NHPA or NEPA may use the archeological documentation prepared under the federal guidelines in place of documentation necessary for CEQA. (Title 14, CCR, Appendix K, VI.) Because elements of the proposed project are subject to federal review and approval, the District opted to comply with federal guidelines for evaluating the project's effects of archeological resources. For shorthand purposes, the federal process is referred to as the Section 106 process, after

Section 106 of NEHA. Although the District adopted its final EIR/EIS for the project on September 19, 1994, the Section 106 process is still under way.

In general, the final EIR/EIS identifies the impacts of the proposed project on archeological resources as potentially significant, depending upon whether certain resources determined as eligible or are listed as "historic properties" pursuant to the Section 106 process.⁷¹ The EIR/EIS proposed mitigation measures are based on the Phase II investigations.

(MPWMD:287,14-19; MPWMD:326,156-166.) The EIR/EIS states that the mitigation measures are considered preliminary and will be developed in further consultation with the appropriate agencies and interested parties pursuant to the Section 106 process. The District, has identified measures which may mitigate the effects on sites determined to be significant; however, it also recognized that such mitigation may not reduce project effects to less than a significant level and adopted a statement of overriding consideration. (MPWMD:312,76-84,115-116.)

Responsible agencies are directed to presume that a final EIR is adequate if litigation is not commenced unless: (a) substantial changes (1) are proposed for the project or (2) occur with respect to the circumstances under which the project is undertaken or (b) new information becomes available which was not known at the time the EIR was certified as complete.⁷² (CEQA Section 21167.2, 21167.) When litigation is commenced, responsible agencies are directed to presume a final EIR is adequate until such time as a court determines otherwise. (CEQA

⁷¹ For example, the EIR states: "Thirteen cultural resource sites have been identified in the 24 NLP Reservoir project area that would be inundated and/or destroyed as a result of the proposed project. This is considered a potentially significant impact as all thirteen may be eligible for listing in the National Register...." (MPWMD:287,14-15.)

⁷² No substantial changes are proposed for the project or have occurred with respect to the circumstances under which the project is undertaken and no new information is available which would warrant preparation of a supplemental EIR.

Section 21167.3.) Thus, when reviewing the District's EIS/EIR, the SWRCB will proceed in accordance with those sections of CEQA and its guidelines which direct responsible agencies to presume that EIRs comply with the requirements of CEQA.

7.2.7 Development of Mitigation Measures Via the Section 106 Process

If it is determined that the project will have adverse effects on historic properties, the ACOE will consult with SHPO, ACHP, SWRCB, District, and interested parties including the Esselen Tribe and the Esselen Nation, to avoid or minimize adverse effects on historic properties. Measures resulting from this consultation are usually documented in a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA). An MOA usually occurs when all of the technical studies have been completed. However, it is not developed until the effects of a project on cultural resources or historic properties are known. Since the effects of the project will not be known for at least several months, a PA can be used to conclude the Section 106 process. (T, IX, 217:22-218:7.)

On May 2, 1995 a PA was executed by ACOE, SHPO, ACHP, SWRCB and the District. The PA specifies the remaining studies that need to be undertaken and the steps to be accomplished in order to ascertain and finalize historic properties mitigation. Once the ethnographic studies have been completed, the determinations of eligibility and effect can be made, and appropriate mitigation measures can be determined. The Native Americans and appropriate agencies will participate in these determinations. The specific participation protocols for all parties are specified in the PA and in the MOUs between the District, the ACOE, the Esselen Tribe and the Esselen Nation. The completion of the NHPA, Section 106 process and implementation of its terms, and compliance with the PA and MOUs satisfy the requirements of CEQA for addressing cultural resources which are considered to be "important" or unique. Accordingly, we find that any permit issued for

Application 27614 shall require the District to protect important cultural resources by compliance with the PA and the MOUs. (Conditions 42 through 47.)

8.0 PROTEST RESOLUTION--ENVIRONMENTAL ISSUES ONLY

The environmental protests are listed in Table 6. In general, the protestants allege that implementation of the project would result in further reductions in streamflow and declining water table elevations, thus causing additional damage to public trust steelhead and riparian vegetation resources. In addition, several protestants allege that the proposed project will reduce channel sediment transport capability and could result in seawater intrusion. The Esselen Tribe's protest alleges that the proposed project would cause impacts to "significant" traditional cultural properties which would be "culturally devastating" to the tribe. The following is a brief review of specific protests.

8.1 DFG Protest

DFG protest states that maintenance of sufficient streamflow and retention of critical steelhead spawning and rearing habitat is necessary to the continuance of various fish and wildlife species. Following the filing of the protest, project modification and proposed mitigation measures resulted in DFG's conditional support of the project. The following are DFG's conditions for support of the project (DFG:94-2,7):

1. SWRCB adopt as permit conditions the proposed Operating Rules and instream flow requirements as defined in Tables 4-5A and 4-5B in the EIR/EIS. (MPWMD:287,4-25.)
2. SWRCB adopt as permit conditions all mitigation measures concerning public trust fish and wildlife resources in the EIR/EIS and Certification Findings. (MPWMD:313.)
3. SWRCB require the District to conduct specific additional investigations to: (1) further define the Operating Rules

and instream flow requirements for the reach immediately downstream from the new dam, and (2) prepare a report acceptable to the DFG on these investigations.

4. SWRCB shall retain jurisdiction to modify the proposed Operating Rules and instream flow requirements immediately below the new dam as justified by results of additional investigations, and as recommended by the DFG and the NMFS.
5. SWRCB dedicate the instream flows required by the Operating Rules as water appropriated and reserved for protection of fish and wildlife resources.
6. SWRCB monitor the instream flow for fish and wildlife use dedication in perpetuity.
7. SWRCB declare the Carmel River as Fully Appropriated at the close of these proceedings.
8. SWRCB hold further hearings once results from the mitigation monitoring program are available to ensure that the public trust is protected.
9. SWRCB require the District to demonstrate that it has the financial and other resources committed to ensure implementation of the mitigation measures in perpetuity, during the final design phase of the project and prior to solicitation of bids for construction.
10. SWRCB require the District to complete the final Steelhead Fisheries Mitigation Plan (MPWMD:288,8-A) to the satisfaction of the DFG, SWRCB, and the NMFS during the final design phase of the project and prior to solicitation of bids for construction.

11. SWRCB reserve jurisdiction over fish passage facilities to modify the reservoir operation schedule to improve steelhead habitat below the dam, in the event fish passage facilities fail and the SWRCB determines that corrective action is required to protect the steelhead resource.
12. SWRCB require the District to evaluate current fish rescue operations as identified in the 1990 Water Allocation Program Mitigation Plan.

These conditions were presented to the District's Board and were approved, with the exception of condition 7. (T:XI,20:6.) Of these conditions, all but conditions 3, 4, 9 and 12 have been previously discussed in this decision. Special permit terms are required to address DFG protest dismissal conditions 3, 4, 9, and 12. Thus, any permit issued for Application 27614 should include conditions to: (1) conduct additional investigations to further define the instream flow requirements in the reach immediately downstream of the New Los Padres Dam and prepare a final report of these investigations, (2) retain jurisdiction to modify the fishery bypass flows based upon the results of said investigations, (3) require the District to document that sufficient long-term financial resources have been committed to fund all mitigation measures, and (4) conduct studies to determine the effectiveness of the fish rescue operations specified in the Water Allocation Mitigation Program and the Steelhead Resource Mitigation Plan. (Conditions 38 through 40.)

8.2 CRSA Protest

CRSA's protest alleges that the project would have serious adverse effect on fish, wildlife, recreation, and vegetation. Dismissal conditions included provision of adequate instream flows for all steelhead life stages, fish passage facilities, temperature control facilities, and a bedload management program. The mitigation measures required by this decision, and the

associated permit terms, address CRSA's concerns and the protest should be dismissed.

8.3 CSPA Protest

CSPA alleges that the project will cause adverse impacts to various steelhead life stages and riparian habitat due to reductions in flow during normal and below normal water years. They request that any decision issued by the SWRCB protect and restore public trust assets of the Carmel River watershed and fully comply with Fish and Game Code Section 5937 and provisions of CEQA, including consideration of cumulative impacts. The mitigation measures required by this decision, and the associated permit terms, address CSPA's concerns and the protest should be dismissed.

8.4 DPR Protest

DPR protests on the basis of potential impacts to the riparian corridor and the Carmel River lagoon. DPR states that their protest may be withdrawn if it can be shown that the District's project will have no significant impact on the lagoon-wetland complex at the mouth of the Carmel River and that information developed in an EIR would be necessary to evaluate such impacts. DPR failed to supply specific dismissal conditions, did not comment on either the draft or final EIR/EIS, and did not participate in the hearing.

The lagoon is presently impacted by water diversion and sediment accumulation. Under project conditions, however, the lagoon would receive year-round flow in 75 percent of the years (MPWMD:287,7-34) and it is assumed that this would generally have a beneficial effect. Increased dry season flows, however, could increase sand transport into the lagoon and potentially reduce habitat values (MPWMD:287,7-56). As mitigation, the District proposes to annually monitor the lagoon volume and sand transport into the lagoon. If a reduction in habitat value is determined, corrective action should be taken. Thus, any permit issued for

Application 27614 should contain a condition requiring the District to: (1) monitor the volume of the lagoon and sand transport into the lagoon, (2) evaluate the significance of the impacts to the lagoon, and (3) if necessary, initiate a program to prevent reduction in habitat value. (Condition 41.)

8.5 Esselen Tribe Protest

The Esselen Tribe protest was filed by Fred Nason, Fred Nason Jr., and Tom Nason. The protest alleges:

1. The original and supplemental EIR/EISs failed to consider several Native American historical, cultural, religious, village, fishing and gathering sites and the adverse impacts which the project would cause.
2. The original and supplemental EIR/EISs failed to document 11 additional cultural resources which will be adversely impacted by the dam in its new location.
3. Approval of Application 27614 would not be in the public interest because of the destruction, by permanent inundation, of significant Native American cultural, religious, and historical resources. These resources include: the birthing rock and associated deposit, sacred altars, various bedrock mortars, a village site, various middens, burial grounds, traditional fishing sites, and hunting and gathering sites. In addition, there are numerous sacred ceremonial sites which have not been shown to non-members of the Tribe for fear that identification would lead to desecration.

Finally, the protest states that members of the Esselen Tribe have made their livelihoods off the lands since the earliest time of recorded history. The concerns of the Esselen Tribe have previously been addressed in this decision. This decision includes measures which may result in the mitigation of some but

not all of the concerns of the Esselen Tribe. (Conditions 42 through 47.)

8.6 Other Protestants and Issues

The protests filed by **Odello Brothers, Leo Lutes, and Wolter Properties** allege that the District's project could induce seawater intrusion, lower water table elevations, and alter streamflow thus damaging steelhead. The protests state that they may be dismissed if the prior rights of the protestants are recognized by the District. An environmental condition will not satisfy the prior right claims of these protests. This decision includes a condition which protects valid and properly exercised riparian, overlying, and pre-1914 appropriative rights.

(Condition 9.) Thus, we find that these protests should be dismissed.

The protest filed by **California Trout, Inc.** (Cal Trout) alleges impacts to the Carmel River flow regime and inundation of steelhead spawning and rearing habitat. The protest states that dismissal conditions can be determined only after review of the environmental document. Cal Trout did not comment on either the draft or final EIR, nor did they submit protest dismissal conditions during the hearing. In the absence of specific dismissal conditions, we find that the mitigation measures included as a feature of the proposed project and required by this decision will reduce the impacts to less than significant levels. Thus, Cal Trout's protest should be dismissed.

Willis Evans protested on environmental and public trust grounds. Protest dismissal conditions called for public hearings, the completion and certification of a final EIR/EIS, and the establishment of agreed-upon instream flows. The hearings and EIR are a matter of record. Instream flows requirements have been agreed upon by the responsible resource agencies and included as a proposed conditions for this permit. Thus, Mr. Evan's protest should be dismissed.

The **Sierra Club** and **John Williams** allege that the proposed project may result in further riverbank erosion, accumulation of sediment in the downstream channel, and loss of steelhead and riparian habitat. Evidence was offered by the District that provision of reliable instream flow during most years would be beneficial to the 116 acres of riparian habitat in the lower river (MPWMD:287,9-80) and result in a substantial increase in steelhead spawning and rearing habitat (MPWMD:287,8-38). Impacts to channel geometry are considered by the District to be potentially significant. As it is unknown at this time whether these impacts will occur or the degree of severity of such impacts. A formal program to monitor changes in channel geometry is proposed by the District. This decision includes conditions which require the District to monitor changes in channel geometry and to initiate such corrective action as may be appropriate. (Condition 16.) Thus, these protests should be dismissed.

The **Asoleado Water Company, Pt. Sur Corporation, Roger and Josephine Williams, and A. C. and Linda Markkula** protests allege that project impacts cannot be evaluated prior to completion of an EIR. The District has completed and certified a Final EIR/EIS (MPWMD:287-290); therefore, these four protests should be dismissed.

Cachagua Community Center listed a variety of construction-related impacts as the basis of their protest. These effects are considered significant and unavoidable and are so addressed in the District's Statement of Overriding Considerations. Water quality concerns have been addressed in this decision by requiring the District to apply for a waste discharge permit. The issues of noise, dust, and traffic are the responsibility of the lead agencies, which in this case are the District and the ACOE. We find, therefore, that this protest should be dismissed.

9.0 REQUEST FOR TIME EXTENSION AND FOR CHANGES TO PERMIT 7130B

Permit 7130B authorizes storage of 15,970 afa at the existing Los Padres Reservoir. The District has petitioned for a time extension to develop water under Permit 7130B and, among other matters, to change the point of diversion to the location of the proposed New Los Padres Reservoir. If such changes were approved, the water which would be used under this permit would be diverted and stored at the same location and used for the same purposes as the water sought under Application 27614 for the New Los Padres Project.

9.1 Applicable Law

Title 23, CCR, Section 840, et seq. applies to extensions of time. Section 844 states:

"An extension of time within which to complete an application, to commence or complete work or apply water to full beneficial use will be granted only upon such conditions as the board determines are in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted"

Water Code Section 1398(b) provides:

"After any hearing on a petition to extend the period or periods, the board may revoke the permit in accordance with Section 1410."

"Period" refers to the time specified in the permit for: beginning construction work, completing construction, or putting water to beneficial use. (Section 1398(a).)

Water Code Section 1410, et seq. applies to the revocation of permits. Section 1410(a) states:

"There shall be cause for revocation of a permit if the work is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as

contemplated in the permit and in accordance with the this division and the rules and regulation of the board."

Title 23, CCR, Section 850 also pertains to the revocation of permits. It provides:

"When it appears to the board that a permittee may have failed to commence or complete construction work or beneficial use of water with due diligence in accordance with the terms of the permit, the regulations of the board and the law, or that a permittee or licensee may have ceased beneficial use of water, or that he may have failed to observe any of the terms and conditions of the permit or license, the board may consider revocation of the permit or license. The board will notify the permittee or licensee of the proposed revocation. The notice will state the reasons for the proposed revocation and provide an opportunity for hearing upon request of the permittee or licensee. In the case of a permit, a request for extension of time may also be considered at such hearing. Nothing in this section shall be construed as limiting the board's authority to take action pursuant to Water Code Section 1831."⁷³

9.2 Notice of Hearing

On June 19 1992, the SWRCB issued a hearing notice which included issues pertaining to Application 27614 and the request for time extension and petition for changes to Permit 7130B. Among other matters the following issues were noticed:

"7. Should the District be given an extension of time to begin and complete construction, and put the water to maximum beneficial use under Permit 7130B? If so, until when?

"8. Should Permit 7130B be revoked for failure to construct the project and put water to maximum beneficial use?"

The Staff Summary for Hearing was attached to the notice of hearing. The summary briefly describes the history of the

⁷³ Section 1831, et seq. sets forth the SWRCB's authority to issue cease and desist orders.

development, or the lack thereof, under Permit 7130. (Pp. 8 and 9.)

9.3 Development of Water Under Permit 7130B

Application 11674 was filed on December 30, 1946. On July 7, 1948, Decision 582 was adopted by the State Engineer approving a permit for the application.⁷⁴ Decision 582 approved issuance of Permit 7130 in the amount of 19,000 afa, with the following condition:

"Of the 19,000 acre-feet per annum hereinabove specified in Paragraph 2(b) of the application, permittee shall develop and store an amount of water not to exceed 6,000 acre-feet per annum until such time as the Department acting through the State Engineer may, after further hearing held either by the Department upon its own initiative or upon the motion of any of the parties participating in the hearing of April 14, 1948, or their successors in interest, after due notice to the interested parties, authorize the storage and use of an additional amount of water."

The time to complete full beneficial use ended on December 1, 1975, almost twenty years ago.

Los Padres Reservoir was constructed in 1949 with a capacity of only 3,000 af, pursuant to Permit 7130. On August 6, 1974, the SWRCB held a hearing to determine whether the 13,000 afa⁷⁵ portion of Permit 7130 should be revoked or whether the permittee, Cal-Am, had the intent and financial resources to proceed within a reasonable time to develop a project to appropriate the 13,000 afa. Order No. WR 75-17 found that Cal-Am did not have adequate financial resources to construct additional reservoir facilities under the permit. The Order noted that others, such as the ACOE or a public agency might be interested

⁷⁴ At one time, the State Engineer within the Department of Water Resources exercised the water right functions of the SWRCB.

⁷⁵ 13,000 afa = 19,000 afa - 6,000 afa

in constructing a multipurpose dam under the permit in the future.

On May 18, 1976, Cal-Am assigned 13,000 af of Permit 7130 to the District's predecessor and retained 6,000 af under Permit 7130. Cal-Am and the District became co-permittees, although each party retained separate assignments of water under the permit. On January 26, 1983, Cal-Am and the District informed the SWRCB that a total of 15,970 af should be assigned to the District. Cal-Am retained 3,030 af for its use under the permit. The SWRCB approved the reassignment of water and, by Order dated May 2, 1984, Permit 7130 was split into Permits 7130A for 3,030 afa and Permit 7130B for 15,970 afa. The original permit was revoked.

The following condition was included in Permit 7130B on May 2, 1984:

"Project plans and proof of the necessary financing along with a time schedule for completing the work shall be submitted for approval on or before December 1, 1984 or this permit will be revoked."
(Condition 7.)

The District filed Petitions for Extension of Time on December 14, 1984 and September 2, 1986. The SWRCB has not acted on the District's requests for an extension of time to complete construction and full beneficial use for Permit 7130B beyond December 1, 1984. By letter dated October 23, 1984, the District requested an extension of time for permit condition 7, to extend the time to provide plans and proof of project financing to December 1, 1986. The District has also petitioned for extensive changes in Permit 7130B. (Hearing issue 7.)

9.4 Lack of Due Diligence by District and Its Predecessors

Application 11674 was filed 49 years ago and permitted shortly thereafter. In 1976 Cal-Am assigned most of its rights under Permit 7130 to the District's predecessor. In 1984 the SWRCB split Permit 7130 and ordered the District to submit project

plans and proof of the necessary financing along with a time schedule for completing the work to the SWRCB by December 1, 1984, or the permit will be revoked. By letter dated October 23, 1984, the District requested an extension of time to December 1, 1986, to meet the requirements of permit condition 7. No action was taken on the time extension request.

During the 1992 hearing, the District did not explain why plans for developing water under Permit 7130B were not prepared at an earlier date. Further, the District did not submit proof of project financing. We find, therefore, that the requirements of permit condition 7 issued in May 2, 1984, have not been met. The District and its predecessors have had about 48 years to develop water under Permits 7130 and 7130B. With the exception of 3,030 af developed by Cal-Am during the early years, no project facilities have been constructed and no water has been used under Permits 7130 and 7130B. Thus, we find that Permit 7130B should be revoked for the lack of due diligence of the District and its predecessors to develop the water authorized under Permits 7130 and 7130B, the failure to comply with condition 7 of the May 2, 1984 Order and failure to show good cause for an extension of time.

9.5 Revocation of Permit 7130B Will Not Adversely Affect the Proposed New Los Padres Project

The District should not be adversely affected by the revocation of Permit 7130B. The projected demand for the planned "buildout" within District boundaries is calculated to be about 22,750 af in a normal water year. (MPWMD:312,17, Finding 173.) The District plans to construct a 24,000 af capacity reservoir for the proposed project and via Application 27614 seeks to appropriate 29,000 afa via storage and direct diversion. Standing alone, Application 27614 can provide the 22,750 afa which the District has indicated is needed at planned buildout and to fill the proposed reservoir. Consequently, revocation of Permit 7130B

will not result in inadequate appropriative rights to construct the proposed 24,000 afa New Los Padres Reservoir.⁷⁶

10.0 MANDATORY CEQA FINDINGS

For the purposes of considering whether to approve Application 27614 by the District, the SWRCB is a responsible agency under CEQA. (Public Resources Code Section 21069.) When approving an application for a project, a responsible agency must adopt conditions to avoid or mitigate adverse environmental project effects within the scope of its jurisdiction. Failing to avoid or mitigate adverse effects, a responsible agency must adopt a statement of overriding consideration. (Public Resources Code Sections 21002.1, 21081; 14 CCR, Sections 15091 and 15093.)

10.1 Parts of the Project Subject to SWRCB Approval

The proposed project involves construction and operation of the 24,000 af New Los Padres Dam, associated fish passage facilities, and necessary access roads. In addition, water right Application 27614 seeks to use existing Cal-Am wells as points of rediversion for stored project water and for water which would be directly diverted. The environmental effects subject to SWRCB jurisdiction include the land within the inundation zone, lands surrounding the proposed reservoir which are subject to either temporary or permanent construction impacts, and the entire Carmel River channel and riparian area downstream of the project which could be affected by altered flow regimes.

10.2 Adoption of EIR/EIS and Lead Agency Findings

The District is the lead agency for purposes of CEQA. Charged with issuing a Clean Water Act Section 404 permit, the ACOE is the lead agency for purpose of the National Environmental Policy Act (NEPA). The District and the ACOE have prepared a joint EIR/EIS for the project.

⁷⁶ In addition, Cal-Am serves water within the District and has some legal rights to deliver water from the Carmel River.

On September 19, 1994, the District adopted the EIR/EIS for the proposed project. On the same date, the District's Directors passed Resolution 94-12 (MPWMD:313). The resolution found that the final EIR complied with CEQA and adopted the Findings for Certification. The resolution states that even with mitigation, the project would have significant or potentially unavoidable impacts on flow in the river, fisheries, vegetation, and cultural resources. (MPWMD:312,112-117.) The resolution also finds, however, that the New Los Padres Project is the superior project alternative because it is the only alternative which would:

- Correct existing environmental damage in the lower Carmel River by providing year-round flow to the lagoon in three out of four years,
- Provide maximum benefit to the steelhead resource, in some cases exceeding "natural" conditions. (MPWMD:312,20.)

10.3 Nonjurisdictional Project Impacts

The proposed project will have other significant or potentially unavoidable impacts in the areas of traffic, air quality, noise, land use, and planning and recreation. (MPWMD: 312.) The District has adopted measures to mitigate impacts to:

- (1) traffic, air quality, and noise (MPWMD:312,89-91); and
- (2) land use, planning and recreation (MPWMD:312,68-73).

10.4 Conditions Adopted to Mitigate Project Effects

Sections 6.0 through 8.5 of this decision discuss the adverse affects of the proposed project on fisheries, vegetation, and cultural resources subject to the SWRCB's jurisdiction and provide that conditions shall be included in any permit issued to the District to mitigate such effects. Conditions 1 through 47 of this decision set forth the conditions which the District must comply with as a condition of any permit issued by the SWRCB.

10.5 Statement of Overriding Consideration

Notwithstanding the fact that this decision requires conditions to mitigate project effects, the issuance of a permit to the District will result in some effects which cannot be fully mitigated if the proposed project is constructed. The following effects would not be mitigated or substantially lessened:

- Under project conditions, no surface flow will be in the lower reaches of the Carmel River during critically dry or severe drought periods.
- Reduced opportunities for upstream steelhead migration compared to natural conditions would occur in dry or critically dry years.
- Impacts to riparian vegetation downstream of the proposed project during critically dry years due to diversion and drawdown of the alluvial aquifer.
- Impacts to traditional cultural properties which are determined to be eligible for listing in the National Historic Register pursuant to the NHPA Section 106 process.

The SWRCB finds that the advantages of the proposed project outweigh the environmental disadvantages because the:

(1) project will divert water to storage during periods of abundance and release the water to the Carmel River during periods when the river has little natural flow, (2) project will be operated in a manner which will significantly mitigate for the effects of existing diversions from the alluvial aquifer on steelhead and riparian vegetation in the lower Carmel during most types of water years, (3) project will make a legal source of supply available to persons receiving water from Cal-Am for which there is not an adequate basis or right, and (4) project will provide a far more dependable supply of water to Cal-Am customers during dry and critically dry water years. Thus, we find that

Application 27614 should be approved notwithstanding environmental effects which are not avoided or fully mitigated.

11.0 CONCLUSIONS

From June 1 to October 31, a significant amount of available water is required to satisfy claimants of paramount rights for the use of water. The quantity of water required to serve such rights is approximately 3,705 afa. Unappropriated water, however, is available for appropriation from November 1 of each year to June 30 of the following year. Application 27614 should be approved for 42 cfs of direct diversion and storage of 24,000 afa, not to exceed a combined total of 29,000 afa.

No evidence was submitted to demonstrate that the District's proposed project would interfere with prior riparian, overlying, and/or pre- or post-1914 appropriative rights. The District has stipulated to recognize valid riparian, overlying, and pre-1914 appropriative claims. Any permit issued for Application 27614 should expressly provide that the permit is junior to the rights of persons diverting water for reasonable beneficial use under valid and properly exercised riparian, overlying, and pre- and post-1914 appropriative claims of right which have a priority which is superior to the priority of Application 27614. In addition, any permit issued to the District should include conditions to protect persons and applicants for unappropriated water who are using established quantities of water within the watershed of origin, as specified in Table 13, irrespective of the priority of such applications *vis a vis* the District's application.

Existing diversions from the Carmel River have adversely affected the public trust resources in the river. Such diversions have resulted in loss of riparian habitat in the lower river and the near extinction of the Carmel River steelhead run. The diversions by Cal-Am and others are not the sole cause of current conditions in the Carmel River. One significant cause of current

conditions, is the series of dry and critically dry years during the late 1980s and early 1990s. Nevertheless, Cal-Am's combined diversions from the Carmel River constitute the largest single impact to the instream beneficial uses of the river.

The District proposes to operate the New Los Padres Project to mitigate the effects of these ongoing diversions from the river. Mitigation would be accomplished, in large part, by diverting water to storage during the months when water is abundant and releasing the water down the Carmel River for rediversion at Cal-Am's existing wells during months when there is little natural flow in the river. In addition, the District has adopted numerous measures necessary to mitigate the effects of existing diversions from the river as well as the effects of its proposed project. Any permit issued for Application 27614 will require the District to implement these measures as a condition of diverting water from the river.

The proposed project will also inundate archeologic resources and have an effect on the cultural and religious practices of persons of Esselen descent. The District treats impacts to archeological resources as potentially significant, depending upon whether certain resources become listed as "historic properties" pursuant to the NHPA Section 106 process. Similarly, mitigation measures are treated as preliminary and will be developed in further consultation with the appropriate agencies and interested parties pursuant to the Section 106 process. Any permit issued for Application 27614 will require the District to avoid, protect, or mitigate important cultural resources by compliance with the Programmatic Agreement prepared in accordance with Section 106.

Permit 7130B should be revoked for the lack of due diligence of the District and its predecessors to develop the water authorized under Permits 7130 and 7130B, the failure to comply with condition 7 of the May 2, 1984 Order and failure to show good cause for an extension of time. The District should not be

adversely affected by the revocation of Permit 7130B. Standing alone, approval of Application 27614 in the amount of 29,000 afa can provide the 22,750 afa which the District has indicated is needed at planned buildout and to fill the proposed reservoir. Consequently, revocation of Permit 7130B will not result in inadequate appropriative rights to construct the proposed 24,000 afa New Los Padres Reservoir.

Thus, in consideration of all of the foregoing, we find that approval of Application 27614 is in furtherance of Article X, Section 2 of California's Constitution requiring "that the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." Finally, in accordance with Water Code Section 1253, the terms and conditions included herein will "best develop, conserve and utilize in the public interest the water sought for appropriation."

No additional water is available for appropriation from the Carmel River between May 1 to December 31 of each year. The staff of the SWRCB is directed to include the Carmel River among those streams determined to be fully appropriated during all or part of each year in accordance with Water Code Section 1205.

ORDER

NOW, THEREFORE, IT IS ORDERED that Application 27614 is approved subject to conditions. Issuance of the permit shall be subject to the District first submitting to the Chief, Division of Water Rights, amended application maps showing all points of diversion/rediversion with the information required by Title 23, California Code of Regulations, Section 715(c). The permit shall contain standard permit terms 10, 11, 12, and 13 and the following additional terms:

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Permit Conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 42 cubic feet per second by direct diversion and 24,000 acre-feet per annum by storage from November 1 of each year through June 30 of the succeeding year.
2. The total amount of water to be taken from the source shall not exceed 29,000 acre-feet from November 1 of each year through June 30 of the succeeding year. (Permit term 5e.)
3. This permit does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose. (Permit term 5i.)
4. The amount authorized for appropriation may be reduced in the license if investigation warrants. (Permit term 6.)
5. Construction work shall begin within four years of the date of this permit and thereafter shall be prosecuted with reasonable diligence. (Permit term 7.)
6. Construction work shall be completed by December 31, 2003. (Permit term 8.)
7. Complete application of the water to the authorized use shall be made by December 31, 2020. (Permit term 9.)
8. This permit shall not be construed as conferring upon the permittee right of access to the points of diversion. (Permit term 22).
9. Permittee's rights under this permit are junior to the rights of persons diverting water for reasonable beneficial use under valid and properly exercised riparian, overlying,

and pre- and post-1914 appropriative claims of right which have a priority which is superior to the priority of Application 27614.

10. The priority of this permit shall be junior to any permit issued on the applications set forth in Table 13 or for the persons named⁷⁷ in Table 13 for an amount of water not to exceed the quantity set forth in the column titled "Quantity Reserved by SWRCB For Future Appropriation".⁷⁸ Applicants can request the State Water Resources Control Board (SWRCB) to modify the amounts in this column in accordance with the procedures in this condition.

Persons identified in Table 13 that have not filed an application to appropriate water must file an application by December 29, 1995 to benefit from this condition. To the extent such applicants and persons claim riparian, overlying, pre-1914 appropriative or other rights to use the water, they shall not be entitled to a post-1914 appropriative right for water in excess of established quantities of use as a result of this permit condition. Any priority obtained for a permit by virtue of this condition shall be void if the permittee and/or others divert more water under the permit and claimed underlying rights than is authorized on the face of the permit; however, the priority shall not be voided for the diversion of de minimis amounts which can reasonably be attributed to operational uncertainties.

⁷⁷ Several persons named in Table 13 do not have an application on file with the SWRCB.

⁷⁸ No quantity of water is set forth in Table 13 for Kirk, Lufkin, Lutes, Markkula, Pt. Sur Corporation, Tregoe Trust, and Woltor because the hearing record does not contain adequate information; nevertheless, these persons may seek an application under the procedures established herein.

Upon request by an applicant, a protestant, or the District, notification to the District and petitioner, and opportunity for comment, the SWRCB will review whether the amount set forth in the column entitled "*Quantity Reserved by SWRCB For Future Appropriations*" should be increased or decreased, at such time as an application is processed; however, no reconsideration will be provided for amounts based upon a stipulation between the District and an applicant, except in those instances where the stipulation is subsequently revised or new stipulation is entered into by the District with respect to Table 13 quantities.

Request for review shall be submitted and accompanied by prima facie evidence of established quantities of use to the Chief, Division of Water Rights, on or before December 29, 1995. Requests for review submitted after this date shall not be considered. The criterion for review shall be whether the applicant had an established reasonable beneficial use of water and the amount of such use⁷⁹ on or before November 22, 1994. Only recorded water use for the period January 1, 1987⁸⁰ through November 22, 1994 shall be considered. The Chief, Division of Water Rights, is delegated authority to modify the quantities identified in Table 13. This condition is not a restriction on exercise of valid riparian, pre-1914 appropriative, or post-1914 appropriative rights which are senior to the permit issued pursuant to Application 27614, or valid rights to diversion of percolating ground water.

11. Permittee shall not divert water under this permit unless and until California American Water Company (Cal-Am) has obtained an alternate supply of water for its illegal

⁷⁹ Recorded water use shall be based either on records of meter readings or well production records.

⁸⁰ Limited meter readings are available for the Carmel River Valley beginning in 1987.

diversions from the Carmel River. A contract with permittee to obtain water made available under this permit is one means by which Cal-Am can obtain a legal supply of water in lieu of its existing diversions.

12. The New Los Padres Dam is of such size as to be within the jurisdiction of the Department of Water Resources as to safety, and construction under this permit shall not be commenced until the Department has approved the plans and specifications for the dam. (Permit term 48.)
13. Permittee shall consult with the Division of Water Rights and develop, in conformance with Water Code Section 10610, et seq., and implement a water conservation plan or actions. The proposed plan or actions shall be presented to the SWRCB for approval within one year from the date of this permit or such further time as, for good cause shown, may be allowed by the State Water Resources Control Board (SWRCB). A progress report on the development of a water conservation program may be required by the SWRCB at any time within this period.

All cost-effective measures identified in the water conservation program shall be implemented in accordance with the schedule for implementation found therein." (Permit term 29B.)

14. The permittee shall prepare an Erosion Control Plan. The plan shall be submitted to the Chief of the Division of Water Rights, State Water Resources Control Board, for approval prior to project construction.
15. In accordance with Sections 1601, 1603, and/or Section 6100 of the California Fish and Game Code, no work shall be started on the diversion and no water shall be diverted under this permit until permittee has entered into a stream

alteration agreement with the California Department of Fish and Game (DFG) and/or the DFG has determined that measures to protect fishlife have been incorporated into plans for the construction of such diversion works. Construction, operation, and maintenance costs of any required facility are the responsibility of the permittee. (Permit term 63.)

16. Prior to construction, permittee shall develop and implement a program in consultation with the California Department of Fish and Game (DFG) to monitor changes in channel capacity and growth of riparian vegetation downstream of the project. The program shall be submitted to the Chief, Division of Water Rights, for approval prior to initiation of construction activities. Changes shall be monitored for a period of 20 years from issuance of Permit after which time the program will be re-evaluated. Permittee shall submit the results of the monitoring program to the State Water Resources Control Board (SWRCB) and DFG annually with the Progress Report by permittee.

If reduction in pre-project main stem channel capacity is confirmed, or changes in channel geometry increase the risk of bank erosion, and if inspection of sediment deposition indicates fishery habitat degradation, permittee in consultation with SWRCB, DFG and other responsible resource agencies, shall devise and implement measures to correct the adverse changes.

17. In order to prevent degradation of the quality of water during and after construction, permittee shall file a report pursuant to Water Code Section 13260 and shall comply with all waste discharge requirements imposed by the California Regional Water Quality Control Board, Central Coast Region, or by the State Water Resources Control Board. (Permit term 100.)

18. For protection of the downstream fishery, permittee shall install and operate a multilevel intake structure on the outlet works of the New Los Padres Dam. The structure shall be designed to provide temperature control and maximum reaeration of released water. The design of the intake structure shall be approved by the Department of Fish and Game prior to project construction.
19. To mitigate for loss of mixed hardwood forest and coast live oak woodland, permittee shall acquire the rights to a minimum of 380 acres of property in the immediate project vicinity to be preserved as open space and wildlife habitat.
20. To mitigate for loss of valley oak woodland, permittee shall implement the Valley Oak Woodland Mitigation Plan as specified in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume II, Attachment 9-B.
21. To mitigate for construction staging area impacts, permittee shall implement the Construction Staging Area Mitigation Plan as specified in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume II, Attachment 9-E. Monitoring shall occur for a period of 20 years to ensure success in meeting pre-established success criteria. The results of the monitoring program shall be submitted to the Chief, Division of Water Rights. Any modification in the mitigation plan is subject to the review and approval of the Chief, Division of Water Rights, subject to appropriate conditions.
22. Prior to construction, permittee shall finalize the Riparian and Wetland Habitat Mitigation and Monitoring Plan for review and approval by resource agencies participating in the Interagency Vegetation Working Group and the Chief, Division of Water Rights. Permittee shall commence

implementation of the final Plan within one year of construction completion.

23. Prior to construction, permittee shall collect, clean, and place in cold storage seeds of the Douglas' Spineflower and the Lewis' Clarkia. Permittee shall apply the seeds to the construction staging area upon project completion along with the revegetation mix.
24. Permittee shall maintain in good working order all riparian irrigation systems owned or operated by permittee under its Water Allocation Program Environmental Impact Report, 5-Year Mitigation Program (November 1990) for use as needed during dry or critically dry water years, as defined in Table C, when no flow is to be maintained at the lagoon, or under conditions of critically low storage in New Los Padres Reservoir when no flow is required at the Narrows.
25. Permittee shall implement the Wildlife Habitat Monitoring Program outlined in the Monterey Peninsula Water Supply Project Final EIR/EIS, Volume III, Appendix 9-G until Application 27614 is licensed. Survey data and analysis of results shall be submitted annually to the Department of Fish and Game (DFG) for review and comment. If, after review, DFG determines need for mitigation, permittee shall within one year of such a finding, submit to the State Water Resources Control Board, Chief, Division of Water Rights, for review and approval a plan detailing specific measures which will be implemented. Upon approval by the Chief, Division of Water Rights, permittee shall implement the approved measures.
26. Prior to construction, permittee shall in consultation with Department of Fish and Game and the National Marine Fisheries Service finalize the Spawning Habitat Mitigation

Plan outlined in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume II, Appendix 8-B. The plan shall be submitted to the State Water Resources Control Board, Chief, Division of Water Rights, for review and approval. Upon approval, the permittee shall implement the plan.

27. During the final project design phase, and prior to solicitation of bids for construction, permittee shall, to the satisfaction of the Department of Fish and Game, the National Marine Fisheries Service and the State Water Resources Control Board, Chief, Division of Water Rights, finalize the Steelhead Fisheries Mitigation Plan found in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume II, Attachment 8-A. Said plan shall establish a numerical goal against which the success of the plan may be measured.
28. Permittee shall at all times maintain minimum instream flow at the lagoon, the Narrows, and below New Los Padres Dam as specified in Table A and Table B of this permit. The flow shall depend on hydrologic year type, season, and reservoir storage conditions. Hydrologic year types shall be based on the Water Supply Index as specified in Table C of this permit. Permittee shall incorporate a daily timestep in its hydrologic forecasting so that the Water Supply Index can be upgraded on a daily basis.
29. Once the project authorized by this permit becomes operational, permittee shall assure that any water delivered to California American Water Company shall not result in surface water diversion to the San Clemente Filter Plant in excess of 16 cfs in Normal or Better years, 5.6 cfs in Below Normal Years, and 3.5 cfs in Dry or Critically Dry years.

PERMIT TABLE A		
MINIMUM INSTREAM FLOW REQUIREMENTS BELOW NEW LOS PADRES DAM		
JANUARY-MARCH	APRIL-MAY	JUNE-DECEMBER
Normal or Better Years	Normal or Better Years	Normal or Better Years
Maintain 20 cfs below New Los Padres Dam for juvenile rearing until an attraction event occurs. Once an attraction event ³ occurs, maintain 50 cfs below New Los Padres Dam for migration, spawning, and incubation purposes.	Maintain 40 cfs below New Los Padres Dam for smolt emigration.	Maintain 20 cfs below New Los Padres Dam for juvenile rearing.
Below Normal Years	Below Normal Years	Below Normal Years
Same flow requirements as Normal or Better Years.	Same flow requirements as Normal or Better Years.	Same flow requirements as Normal or Better Years.
Dry Years	Dry Years	Dry Years
Same flow requirements as Normal or Better Years except that once an attraction event occurs, maintain 20 cfs below New Los Padres Dam for migration, spawning, and incubation purposes.	Maintain 30 cfs below New Los Padres Dam for smolt emigration.	If usable storage in New Los Padres Reservoir is greater than 5000 AF, maintain 20 cfs below New Los Padres Dam for juvenile rearing. If usable storage in New Los Padres Reservoir is less than 5000 AF, maintain 10 cfs below New Los Padres Dam for juvenile rearing.
Critically Dry Years	Critically Dry Years	Critically Dry Years
Same flow requirements as Normal or Better Years except that once an attraction event occurs, maintain 20 cfs below New Los Padres Dam for migration, spawning, and incubation purposes..	Maintain 20 cfs below New Los Padres Dam for smolt emigration.	Maintain 10 cfs below New Los Padres Dam for juvenile rearing.
Critically Low Storage	Critically Low Storage	Critically Low Storage
Maintain 5 cfs below New Los Padres and San Clemente Dams.	Maintain 5 cfs below New Los Padres and San Clemente Dams.	Maintain 5 cfs below New Los Padres and San Clemente Dams.

Notes for Tables A, B and C:

1. Water Year classifications are based on the District Water Supply Index, computed from the reconstructed long-term record of unimpaired flow at the San Clemente Dam.
2. "Critically Low Storage" occurs whenever usable storage in New Los Padres Reservoir falls below 2,000 af and persists until usable storage exceeds 7,500 af.
3. An attraction event is defined as occurrence of 200 cfs at the Carmel River Lagoon.

PERMIT TABLE B

**MINIMUM INSTREAM FLOW REQUIREMENTS
AT CARMEL RIVER NARROWS AND LAGOON**

JANUARY-MARCH	APRIL-MAY	JUNE-DECEMBER
Normal or Better Years	Normal or Better Years	Normal or Better Years
<p>Maintain 5 cfs to the lagoon for juvenile rearing until an attraction event is projected.</p> <p>Whenever an attraction event is projected, maintain 200 cfs to the lagoon for the duration of the attraction event.</p> <p>Following an attraction event, provide migration flows of 200 to 60 cfs to the lagoon, depending on estimated natural recession rates.</p> <p>Following the migration period, maintain 40 cfs to the lagoon and 70 cfs at the Narrows for spawning.</p>	<p>Maintain 40 cfs to the lagoon for smolt emigration.</p>	<p>Maintain 5 cfs to the lagoon for juvenile rearing.</p>
Below Normal Years	Below Normal Years	Below Normal Years
<p>Same flow requirements as Normal or Better Years</p>	<p>Same flow requirements as Normal or Better Years</p>	<p>Same flow requirements as Normal or Better Years</p>
Dry Years	Dry Years	Dry Years
<p>Same flow requirements as Normal or Better Years except that:</p> <p>(1) Whenever an attraction event is projected, maintain either 200 cfs in January, 100 cfs in February, or 75 cfs in March to the lagoon for the duration of the attraction event.</p> <p>(2) Following the migration period, maintain 40 cfs to the lagoon and 50 cfs at the Narrows for spawning.</p>	<p>Maintain 30 cfs to the lagoon for smolt emigration.</p>	<p>Same flow requirements as Normal or Better Years except that:</p> <p>If usable storage in New Los Padres Reservoir is less than 5000 AF, maintain 10 cfs at the Narrows for juvenile rearing. No flow is required at the lagoon.</p>

Continued next page

PERMIT TABLE C				
WATER YEAR SUPPLY INDEX CUMULATIVE UNIMPAIRED INFLOW AT NEW SAN CLEMENTE DAM (AF)				
	WATER YEAR CLASS			
	Normal or Better	Below Normal	Dry	Critically Dry
End of Oct	>200	> 200 - 100	>100 - 1	0
Oct-Nov	> 1,000	1,000 - 500	500 - 200	< 200
Oct-Dec	> 4,100	4,100 - 1,700	1,700 - 1,175	< 1,175
Oct-Jan	> 11,800	11,800 - 5,450	5,450 - 4,100	< 4,100
Oct-Feb	> 26,300	26,300 - 14,400	14,400 - 7,550	< 7,550
Oct-Mar	> 39,100	39,100 - 21,950	21,950 - 10,925	< 10,925
Oct-Apr	> 46,400	46,400 - 28,300	28,300 - 12,975	< 12,975
Oct-May	> 47,400	47,400 - 30,650	30,650 - 14,425	< 14,425
Oct-Jun	> 48,000	48,000 - 31,550	31,550 - 14,900	< 14,900
Oct-Jul	> 48,100	48,100 - 31,700	31,700 - 14,925	< 14,925
Oct-Aug	> 48,100	48,100 - 31,750	31,750 - 14,925	< 14,925

NOTE: Classes derived from monthly unimpaired flows to San Clemente Dam for the period of 1902-1978. (MPWMD:289,A-5,23.)

33. Until the project authorized by this permit becomes fully operational, permittee shall continue to negotiate with California American Water Company and the Department of Fish and Game to maintain, insofar as possible a minimum 5 cfs bypass flow below San Clemente Dam as measured at the Sleepy Hollow weir.

34. To prevent stranding of spring and fall steelhead juveniles and smolts during critically dry conditions, permittee shall continue to implement the fisheries measures outlined in the Water Allocation Mitigation Program as described in the Monterey Peninsula Water Supply Project Final EIR/EIS (March 1994), Volume III, Appendix 2-D.

35. Permittee shall, in consultation with the Department of Fish and Game, design and construct upstream and downstream fish passage facilities for the New Los Padres Project. The design plans shall be submitted to the State Water Resources Control Board, Chief, Division of Water Rights, prior to commencement of construction of fish passage facilities. The permittee shall fully fund the construction and continued operation of the upstream and downstream fish passage facilities. An annual Memorandum of Understanding (MOU) shall be executed between the permittee and the Department of Fish and Game defining operation of the fish passage facilities. Permittee shall record and maintain records of numbers of adult and juvenile steelhead trapped and transported by the facilities. The MOU shall be submitted to the State Water Resources Control Board, Chief, Division of Water Rights, annually.
36. Permittee shall, in consultation with the Department of Fish and Game and the National Marine Fisheries Service, develop a formal Remedial Action Plan to address problems which may occur with the fish passage facilities. Should the facilities prove unsuccessful, the State Water Resources Control Board may, under its continuing jurisdiction, alter the project instream flow schedule (Tables A and B) to increase habitat below the dam.
37. Should the Carmel River steelhead become listed as threatened or endangered under either the State or the Federal Endangered Species Acts prior to construction of the works authorized by this permit, permittee shall seek a formal biological opinion from the trustee agency and implement additional feasible mitigation measures identified in said opinion.

38. Prior to construction, permittee shall, in consultation with the Department of Fish and Game, conduct additional investigations to further define the instream flow requirements in the reach immediately downstream of the New Los Padres Dam. Permittee shall prepare a final report of these investigations and submit the report to the Department of Fish and Game and the State Water Resources Control Board. Under its continuing authority, after notice and opportunity for hearing, the State Water Resources Control Board may modify the fishery bypass flows in this permit, based upon the results of said investigations.
39. During the final project design phase, and prior to solicitation of bids for construction, permittee shall provide documentation to the State Water Resources Control Board that sufficient long-term financial resources have been committed to fund all mitigation measures specified in this permit to assure their continuing, full implementation.
40. Permittee shall, in consultation with the Department of Fish and Game, conduct studies to determine the effectiveness of fish rescue operations specified in the Water Allocation Mitigation Program and the Steelhead Resource Mitigation Plan. The results shall be submitted to the State Water Resources Control Board, Chief, Division of Water Rights, for review and approval.
41. Permittee shall annually monitor the volume of the Carmel River Lagoon and actual sand transport into the lagoon. Annual reports shall be submitted to the California Department of Parks and Recreation, Department of Fish and Game, and the State Water Resources Control Board, Chief, Division of Water Rights for review. Such monitoring shall take place for a period of 20 years, after which the program shall be evaluated. If increased sediment transport is

observed, the permittee shall, in consultation with the Department of Parks and Recreation and the Department of Fish and Game, evaluate the significance of the impacts and initiate a program to prevent reduction in habitat value.

42. For the protection of historic properties, including both prehistoric/ethnohistoric archeological resources and traditional cultural properties, permittee shall adhere to the May 2, 1995 "*Programmatic Agreement Among the U.S. Army Corps of Engineers, San Francisco District, the California State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Issuance of a Permit Under Section 404 of the Clean Water Act for the New Los Padres Dam and Reservoir Project.*" Permittee shall continue to consult with the U.S. Army Corps of Engineers, the State Water Resources Control Board, the State Historic Preservation Officer, the Advisory Council on Historic Preservation, and the Native Americans regarding cultural resources until all stipulations of the Programmatic Agreement and resultant Historic Properties Management Plan and any Historic Properties Treatment Plans have been completed to the satisfaction of all the parties. Any modifications to the Programmatic Agreement are subject to the approval of the Chief of the Division of Water Rights. The permittee shall also comply with the "*Procedure for the Protection of Historic and Cultural Properties*" (36 CFR 60) and the implementing regulations of the Advisory Council on Historic Preservation, 36 CFR 800.
43. Permittee shall implement the mitigation measures regarding the archeological and traditional properties of importance to the Native Americans that result from the National Historic Preservation Act Section 106 process as set forth in the Historic Properties Management Plans and the Historic

Properties Treatment Plans in the special permit term regarding the Programmatic Agreement.

44. Permittee shall submit an annual progress report regarding cultural resources to the State Water Resources Control Board, Chief, Division of Water Rights, until such time that the cultural resource work has been completed or this permit is licensed.
45. The State Water Resources Control Board reserves jurisdiction to require the permittee to implement such additional mitigation measures for protection of traditional cultural properties as may be necessary in the event the results of the National Historic Preservation Act Section 106 process does not meet with the satisfaction of the State Water Resources Control Board.
46. For the protection of historic properties including both prehistoric/ethnohistoric archeological resources and traditional cultural properties of importance to the Native Americans, permittee shall include the Native Americans as participants in the National Historic Preservation Act Section 106 process as specified in the Programmatic Agreement and the Memorandum of Understanding which were executed by the Tribe, the Nation, the District, and the U.S. Army Corps of Engineers.
47. Any mitigation measures that result from the process outlined in the Programmatic Agreement and in the Memorandums of Understanding, with the Esselen Tribe and Nation, are subject to the approval of the State Water Resources Control Board. If these measures are acceptable to the Chief, Division of Water Rights, permittee shall be responsible for full implementation of these measures.

IT IS FURTHER ORDERED that Permit 7130B is herewith revoked for want of due diligence.

CERTIFICATION

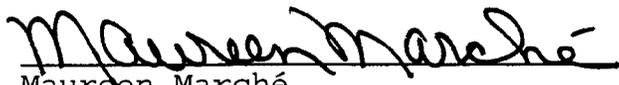
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of a decision duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 6, 1995.

AYE: John Caffrey
 Mary Jane Forster
 Marc Del Piero
 James M. Stubchaer
 John W. Brown

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board



**Order on
Four Complaints Filed Against
The California-American
Water Company**

**Carmel River
Monterey County**

Order No. WR 95-10

JULY 6, 1995

**STATE WATER RESOURCES CONTROL BOARD
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY**

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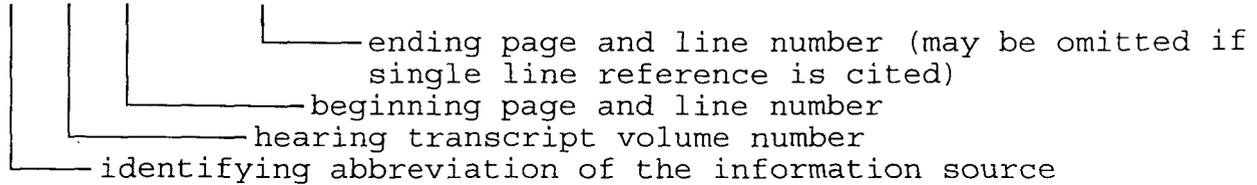
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CITING THE RECORD

When citing evidence in the hearing record, the following conventions have been adopted:

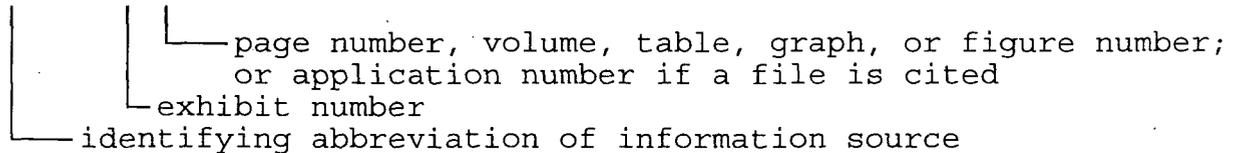
Information derived from the hearing transcript:

T,II,12:1 - 15:17



Information derived from an exhibit:

SWRCB:5,4



Abbreviations of information sources:

AC	Archeological Consulting
ACOE	U.S. Army Corps of Engineers
CAL-AM	California American Water Company
CRSA	Carmel River Steelhead Association
CSPA	California Sportfishing Protection Alliance
DISTRICT or MPWMD	Monterey Peninsula Water Management District
DFG	California Department of Fish and Game
ESSELEN TRIBE	Esselen Tribe of Monterey County
ESSELEN NATION	Esselen Nation of United Families of the Central Coast of CA
EVANS	Willis Evans
PARK	Monterey Peninsula Regional Park District
PHBr	Post-Hearing Brief
SWRCB	State Water Resources Control Board
SIERRA CLUB	Ventana Chapter of the Sierra Club
T	Hearing Transcript

Other commonly used abbreviations:

af	Acre-feet
afa	Acre-feet annually
cfs	Cubic feet per second
CEQA	California Environmental Quality Act
gpm	Gallons per minute
RM	River mile, measured from river mouth
USGS	United States Geologic Survey

**ORDER FINDING AGAINST RESPONDENT, IN PART,
AND DIRECTING CORRECTIVE ACTIONS**

SYNOPSIS

The California-American Water Company (Cal-Am) currently diverts water from the Carmel River and supplies the water, primarily, for use outside of the watershed to users on the Monterey Peninsula. Four complaints were filed with the State Water Resources Control Board (SWRCB) against Cal-Am for its diversion of water from the Carmel River. The complaints generally allege that Cal-Am: (a) does not have the legal right to divert water from the river and (b) diversions are adversely affecting public trust resources within the river. The SWRCB concludes that Cal-Am: (a) does not have legal right for about 10,730 acre-feet annually which is currently diverted from the river (about 69 percent of the water currently supplied to Cal-Am users) and (b) diversions are having an adverse affect on the public trust resources of the river. This order directs Cal-Am to:

- (a) diligently proceed in accord with a time schedule to obtain rights to cover its existing diversion and use of water and
- (b) implement measures to minimize harm to public trust resources. Measures to minimize harm to public trust resources require Cal-Am to reduce the quantity of water which is currently being pumped from the river. Because water is not available for appropriation by direct diversion in the river during summer months, Cal-Am must either obtain the right to additional water supplies from: (a) sources other than the river, (b) a storage project similar to the New Los Padres (NLP) project proposed by the Monterey Peninsula Water Management District (District), or (c) contract with the District for supply from the proposed NLP project.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Complaints Against)	
Diversion and Use of Water by the)	
CALIFORNIA-AMERICAN WATER COMPANY,)	ORDER: WR 95-10
Respondent,)	SOURCE: Carmel River
CARMEL RIVER STEELHEAD)	Tributary
ASSOCIATION, RESIDENTS WATER)	to Pacific Ocean
COMMITTEE, SIERRA CLUB,)	COUNTY: Monterey
CALIFORNIA DEPARTMENT OF PARKS)	
AND RECREATION,)	
Complainants.)	

ORDER FINDING AGAINST RESPONDENT,
IN PART, AND
DIRECTING CORRECTIVE ACTIONS

BY THE BOARD:

Complaints having been filed against Cal-Am for its diversion and use of water from the Carmel River by Carmel River Steelhead Association, Residents Water Committee, Sierra Club, and Department of Parks and Recreation; a hearing having been held on August 24, 25, 26, 31, September 1, 8, and 9, October 19 and 21, and November 7, 8, and 22, 1994; the complainants, Cal-Am, and other interested persons having been provided opportunity to present evidence; closing briefs having been filed; the evidence and briefs having been duly considered; the Board finds as follows:

1.0 CAL-AM, CAL-AM FACILITIES AND CAL-AM OPERATIONS

Cal-Am is an investor-owned public utility subject to the jurisdiction of the California Public Utilities Commission. (T, Sept. 9, 1992, 95:1-95:7; T, I, 49:14-49:22.) Cal-Am currently diverts about 14,106 afa of water from the Carmel River and

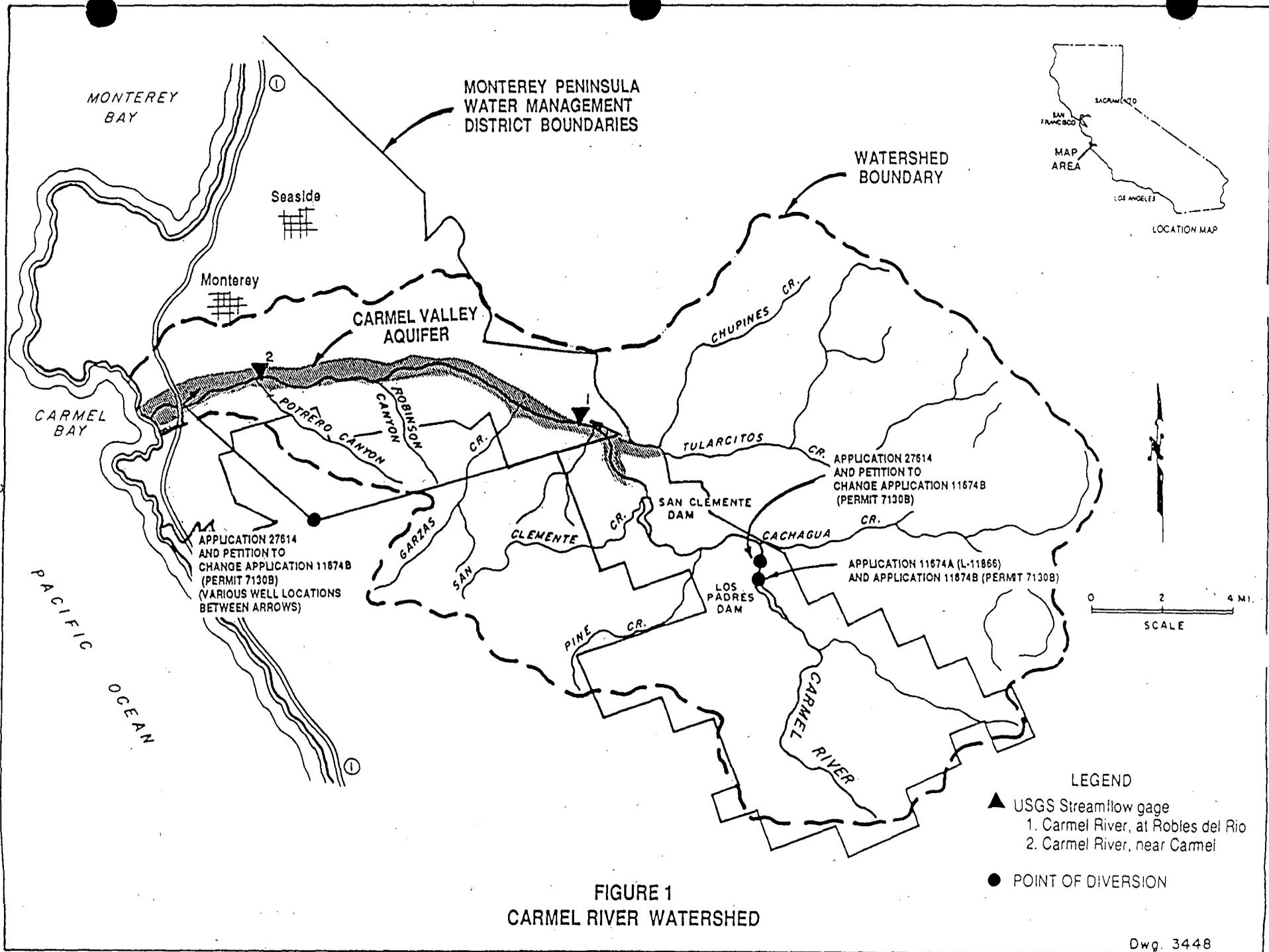


FIGURE 1
CARMEL RIVER WATERSHED

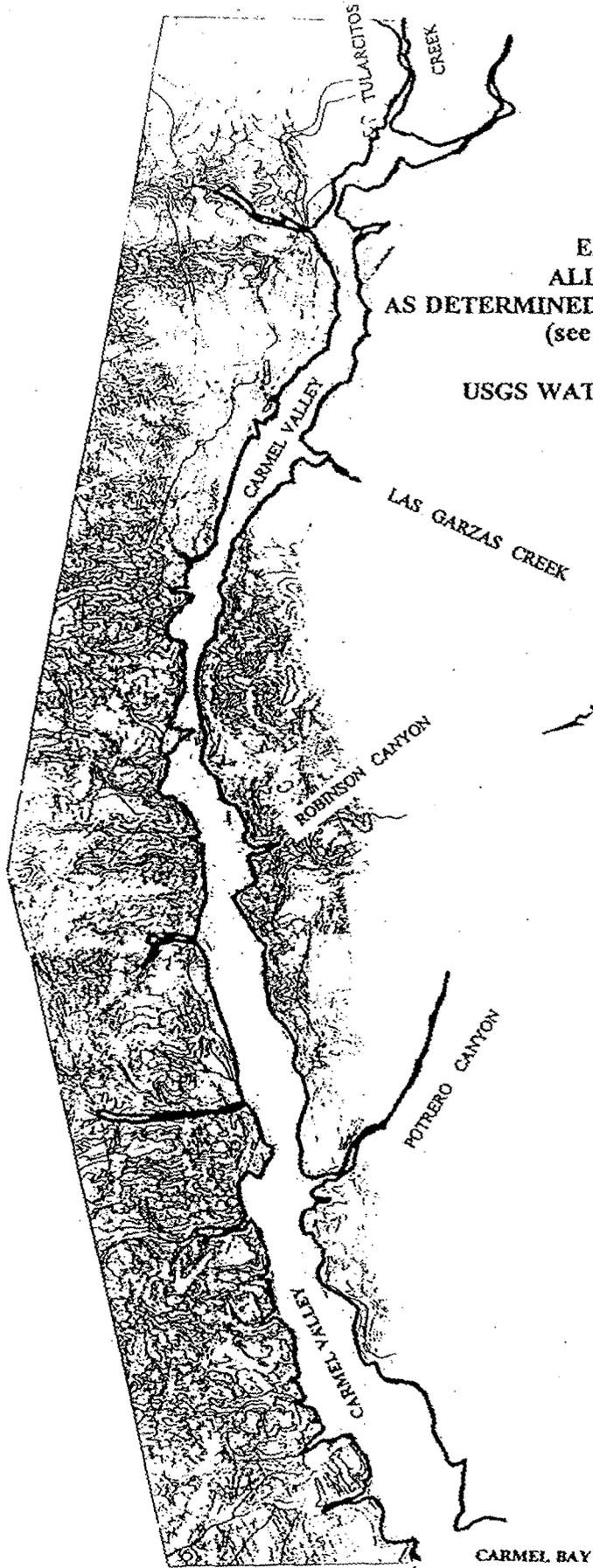


FIGURE 2

EXTENT OF CARMEL VALLEY
 ALLUVIAL GROUNDWATER BASIN
 AS DETERMINED BY THE U.S. GEOLOGICAL SURVEY (USGS)
 (see area defined by the bold lines)

USGS WATER INVESTIGATIONS REPORT 83-4280
 JUNE 1984

THE CARMEL RIVER (NOT SHOWN)
 FLOWS THROUGH CARMEL VALLEY

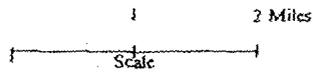
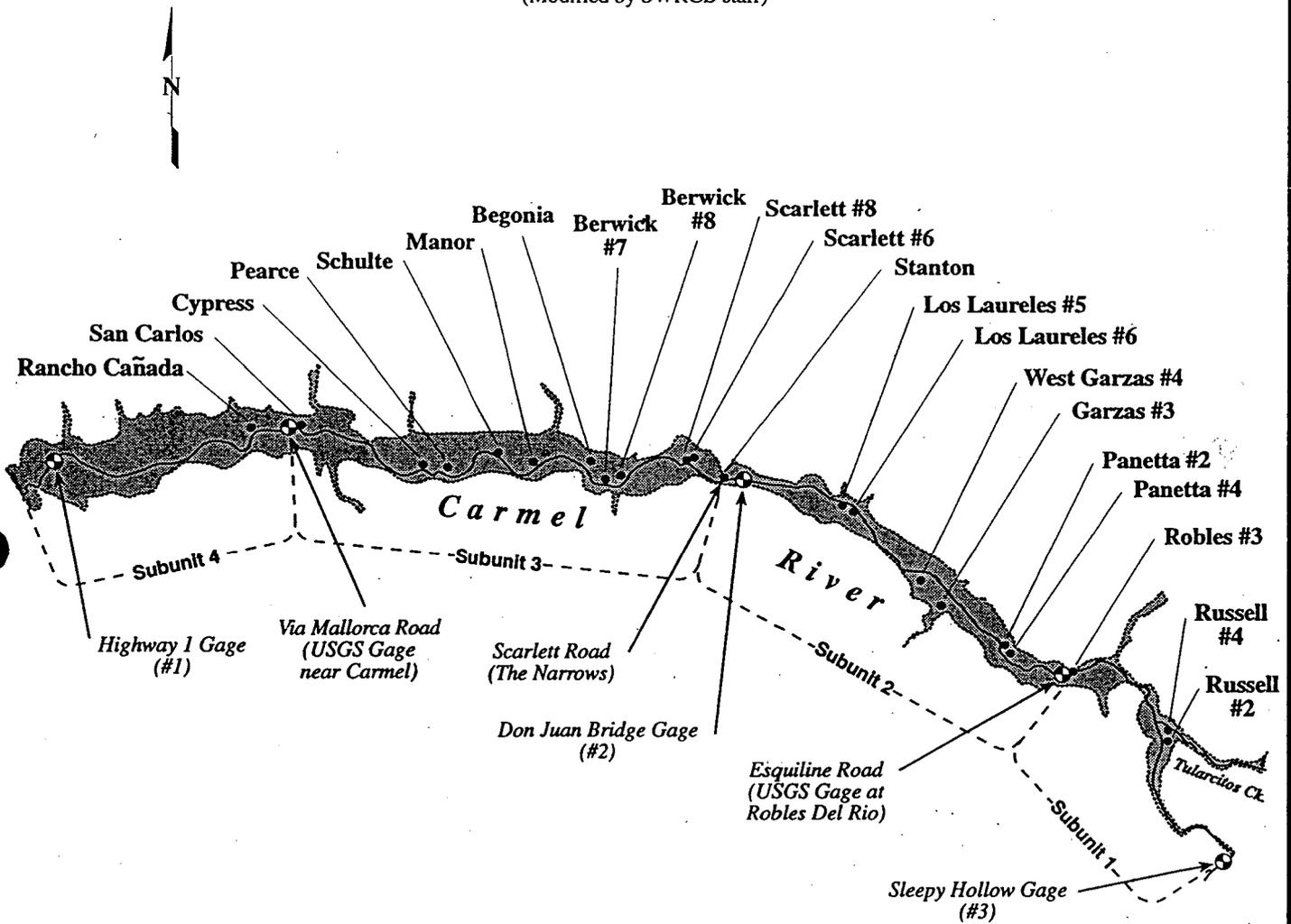


FIGURE 3

ALLUVIAL GROUNDWATER BASIN SHOWING THE LOCATION OF THE CALIFORNIA-AMERICAN WATER COMPANY WELLS

Information obtained from MPWMD Exhibit 287 - Figure 7-2
(Modified by SWRCB staff)



LEGEND

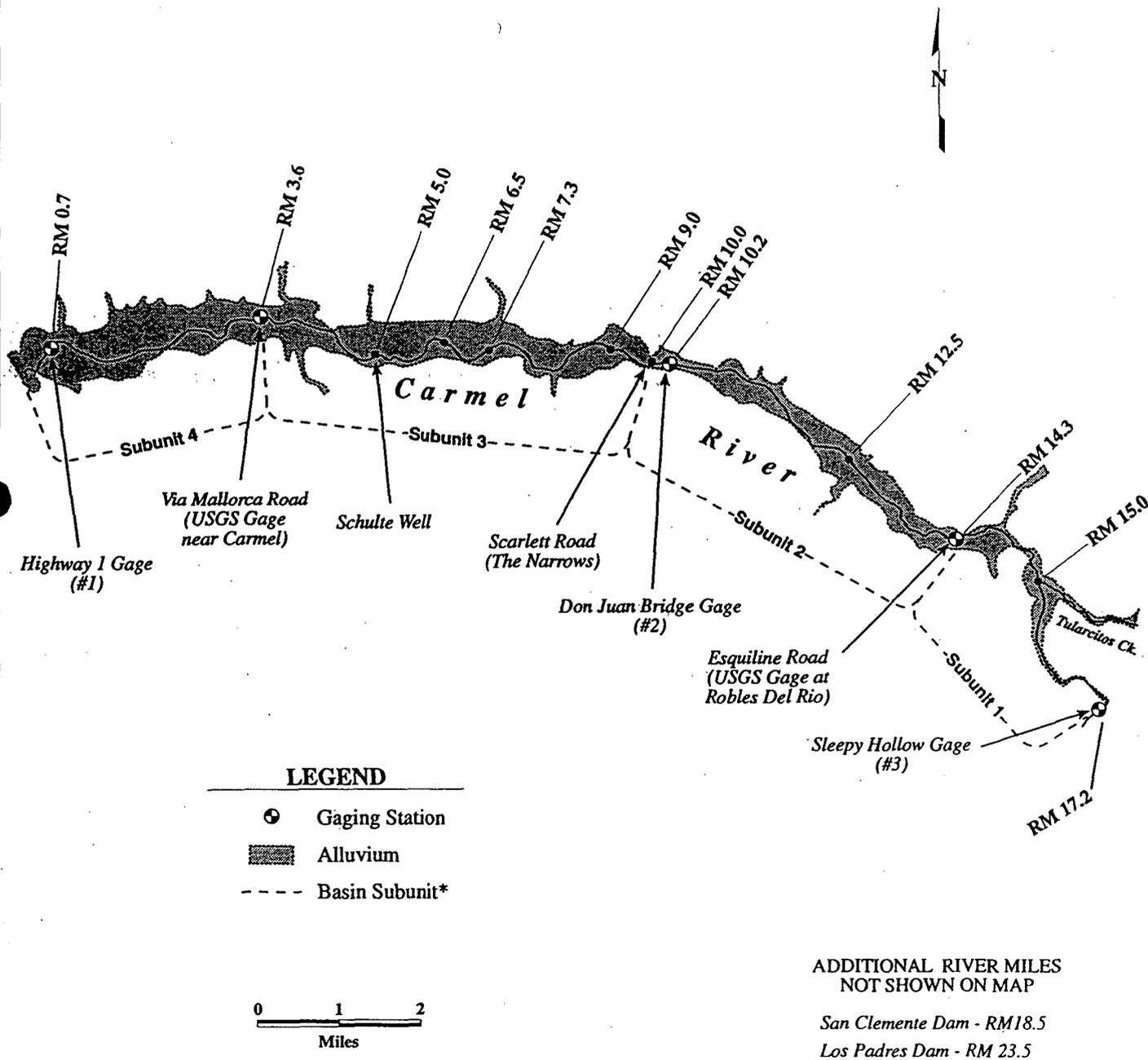
- Water Well
- ⊕ Gaging Station
- ▨ Alluvium
- - - Basin Subunit*

0 1 2
Miles

* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage. Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).

FIGURE 4

ALLUVIAL GROUNDWATER BASIN
IDENTIFYING RIVER MILES (RM)



* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage. Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).

supplies the water, primarily, for use outside of the watershed to users on the Monterey Peninsula.¹ About 105,000 persons are provided service by Cal-Am, most are supplied water from the Carmel River. (T,I,48:1-48:18.)

The primary source of water supply for Cal-Am customers is 21 wells situated on the lower Carmel River. (CAL-AM:91.) These wells supply about 69 percent of the water needs of Cal-Am customers. The balance of the water delivered to Cal-Am customers is supplied from: (1) San Clemente and Los Padres reservoirs in the upper reaches of the Carmel River and (2) pumped ground water in the City of Seaside.² (T,I,131:1-19.)

San Clemente Dam has a storage capacity of approximately 2,140 af. Water is stored in this facility under claim of pre-1914 appropriative right.³ (Statement of Water Diversion and Use No. 8538.) Los Padres Dam is operated pursuant to License 11866 (Application 11674) and authorizes maximum annual withdrawal of 2,950 af. Stored water is released from Los Padres to the river and it is rediverted for use at San Clemente Dam. (T,I,130:16-24.) Sedimentation has reduced the combined usable storage at the

¹ Cal-Am supplies about 17,000 af during a normal year. This estimate is obtained by adding the 2,700 af which is supplied from the wells in Seaside (T,I,131:1-19) to the 14,106 af which is obtained from the Carmel River. (CAL-AM:90.) The 14,106 af represents the recent average, non-drought use (average use from 1979 through 1988, based upon Cal-Am Exhibit 90). (14,106 + 2,700 = 16,806 af, or approximately 17,000 afa.)

² In addition to supplies from the Carmel River and pumped ground water in the area of Seaside, reclaimed wastewater is available to some Cal-Am users from the Carmel Area Wastewater District/Pebble Beach Community Services District Wastewater Reclamation Project. The Project will provide 800 acre-feet of reclaimed water for the irrigation of golf courses and open space in the Del Monte Forest. In return for financial guarantees, the Pebble Beach Company and other sponsors, received a 380 af potable water entitlement from the District, based upon issuance of an appropriative right permit to the District, for development within Del Monte Forest. As of the end of fiscal 1993-1994, the District had not allocated the remaining 420 af of project yield. (MPWMD,337,25.)

³ Diversion at San Clemente Dam was the sole supply for the Monterey Peninsula until the 1940s when wells at the upper end of the Carmel Valley began producing water to meet summer demand (SWRCB:1, A-27614, Folder 6A).

reservoirs to about 2,600 af, about one-half of their combined original capacity. The reservoirs supply about 15 percent of Cal-Am's estimated normal year customer demand. (MPWMD:106,7.) Finally about 2,700 afa is produced from wells in Seaside, California.

2.0 COMPLAINTS

Between 1987 and 1991, the SWRCB received four complaints regarding Cal-Am's operations in the Carmel River watershed. The complaints are summarized below:

2.1 Carmel River Steelhead Association (CRSA)

On July 27, 1987 CRSA filed a complaint alleging that Cal-Am diversions from the underflow of the Carmel River are unauthorized and are destroying the public trust resources of the river, including steelhead. As a possible solution, the CRSA recommended rescue and rearing in ponds of fish stranded by the unauthorized diversions, irrigation of riparian vegetation affected by the unauthorized diversions, and release of more water from San Clemente Dam for redirection through wells downstream. (SWRCB,1,a, Complaint File, Monterey Co., 27-01; CSRA:10,35-28.)

2.2 Resident's Water Committee (RWC)

On August 9, 1989 RWC filed a complaint with the Public Utilities Commission alleging that the supply of water needed to serve Cal-Am's customers exceeded available supply.⁴ RWC also alleges that Cal-Am diversions from the Carmel River will reduce steelhead in the Carmel River to remnant levels. RWC recommends that Cal-Am be prohibited from serving new customers until an additional supply of water is obtained. (SWRCB:1, A-27614, Folder G.)

2.3 Ventana Chapter of the Sierra Club (Sierra Club)

On March 5, 1991, the Sierra Club filed a complaint alleging:

- (1) Cal-Am's pumping from the subsurface flow of the Carmel River

⁴ A copy of the complaint was received by the SWRCB around the same time.

is unauthorized and (2) Cal-Am's diversion from San Clemente Reservoir during low-flow periods is an unreasonable method of diversion. The Sierra Club's proposed solution includes the following: (1) Cal-Am should be enjoined from diverting water during periods of low flow, (2) Cal-Am and Water West should apply for appropriative water rights from the SWRCB, (3) Cal-Am and Water West should be required to pay for development and implementation of a program to restore public trust resources affected by their diversions,⁵ and (4) Cal-Am should be required to release all diversions at San Clemente Reservoir down the Carmel River for collection at downstream wells, instead of diverting water at San Clemente. (SWRCB:1,A-27614, Folder J.)

2.4 California Department of Parks and Recreation (DPR)

On March 8, 1991, DPR filed a complaint alleging that Cal-Am's diversion of water from the underflow of the Carmel River is: (1) unauthorized, (2) results in mortality to mature riparian forests along a 4,000-foot length of river within the Carmel River State Beach, and (3) interferes with DPR's riparian right to divert water from the Carmel River for irrigation purposes. DPR's proposed solution is for Cal-Am to apply for an appropriative water right with the SWRCB and be subject to conditions to protect riparian, wetland, and aquatic resources in the lower Carmel River, and lagoon and riparian rights along the lower Carmel River. (SWRCB:1, A-27614, Folder J.)

2.5 Monterey Peninsula Water Management District

On May 5, 1992, the District petitioned to intervene in the complaints against Cal-Am because of its interest in assuring an appropriate balance between competing demands for the use of the limited water supply. (SWRCB:1, A-27614, Folder K.)

⁵ Water West is a water company owned by Cal-Am. Water West has rights to divert and use water at about one-half mile below San Clemente Dam. The complaint was directed at only Cal-Am's diversions. Although Water West is not a party to this proceeding, its diversions are analyzed as diversions under the control of Cal-Am.

2.6 Interested Persons

In addition to the complainants and the District, other persons participated in the hearing. Participation was directed at the effect Cal-Am diversions were having on the instream resources of the Carmel River and measures which might be taken to mitigate such effects. Such participants included the DFG, Willis Evans, John Williams, Charity Crane and others appearing on their own behalf.

3.0 DESCRIPTION OF THE WATERSHED

The Carmel River drains a 255-square mile watershed tributary to the Pacific Ocean. Its headwaters originate in the Santa Lucia Mountains at 4,500 to 5,000-foot elevations, descend and merge with seven major stream tributaries along a 36-mile river course, and discharge into Carmel Bay about 5 miles south of the City of Monterey. Above the confluence of Tularcitos Creek, the Carmel River constitutes about 65 percent of the watershed. Downstream from RM 15, the river has a 40 feet per mile gradient where the river flows to the bay are over and within an alluvium-filled Carmel Valley floor.

Carmel River flow is in a well-defined channel. The channel in the lower 15 river miles ranges from 20 to 150 feet wide. (SWRCB:19.) The channel changes progressively from cobble to gravel between RM 15 and RM 7, from gravel to sand between RM 7 and RM 2.5 and consists entirely of sand from RM 2.5 to Carmel Bay. (DFG:4,2.)

Downstream from RM 15, alluvial deposits comprise a ground water basin which underlies the river flow in the Carmel Valley portion of the watershed. The legal classification of the ground water basin is discussed in Section 3.2 *infra*. Local ground water levels within the aquifer are influenced by pumping or production at supply wells, evapotranspiration by riparian vegetation, seasonal river flow infiltration and subsurface inflow and outflow.

During the dry season, pumping of wells has caused significant declines in the ground water levels. The Carmel River surface flow

decreases due to pump-induced infiltration which recharges the seasonally-depleted ground water basin. During normal water years, surface flow in the lower Carmel Valley is known to become discontinuous or non-existent. Downstream from RM 3.2, there was no river runoff between April 1987 and March 1991. (MPWMD:287, 2-8.)

3.1 Geologic Setting

The principal hydrogeologic units (from oldest to youngest) along the Carmel River alluvial basin that are significant include:

(1) pre-tertiary metamorphic and igneous rocks, (2) tertiary sedimentary rocks comprised primarily of sandstone beds (Paleocene and Miocene age) and Monterey shale (Miocene age), (3) older alluvium (Pleistocene age), and (4) younger alluvium (Holocene age). (SWRCB:19.)

Metamorphic (mainly schist and gneiss) and igneous (granitic) rocks form the basement complex which is extensively exposed along or near the river upstream from RM 10 at the downstream extremity of the river narrows. Tertiary sandstone units, which overlie the basement rocks, are exposed primarily along the southern flank of the alluvial valley from about RM 1.5 to 3 and 5.5 to 12.5. The Monterey Shale formation overlies the sandstone. It is exposed extensively along the north side of the Carmel Valley alluvium from approximately RM 2 to 12 and surficially borders the southern side of the valley from about RM 3 to 5.5 (in the vicinity of Potrero Canyon) and RM 14.5 to 15.5 (in the community of Carmel Valley). The older alluvium, consisting mainly of gravel and sand, form remnant terraces which directly overlie the Monterey shale and/or basement complex rocks. These terraces are laterally discontinuous patches along the north side of the valley alluvium from RM 1 to 16 and along both sides from about RM 16.5 to 18. The basement complex and the shale formation are considered to be non-water bearing. The sandstone has no subsurface hydrologic significance and the older alluvium is found on terraces above the level of

The younger alluvium, which formed the valley floor, consists principally of boulders, cobbles, gravel, and sand (which contains silt and clay layers of limited horizontal and vertical extent downstream from the river narrows). This alluvium was deposited by river flows (along the lowermost 18 miles of the drainage basin) within a canyon that was incised (by earlier flows) into the shale formation, sandstone units, and basement complex rocks. Its thickness varies from less than a foot at RM 18 to approximately 200 feet in the vicinity of the river mouth. These deposits comprise the most important aquifer in Carmel Valley (MPWMD:105,3) because of their ability to transmit significant amounts of subsurface water to wells.

3.2 Physical (Hydrologic) Characteristics of the Carmel Valley Aquifer

Carmel River surface flow is generally within the well-defined 20- to 150-foot wide channel over the alluvial deposits that form the valley floor. These deposits are the younger alluvium that comprise the Carmel Valley aquifer.

On behalf of the District, Thomas M. Stetson reviewed District Exhibit 108 and SWRCB Exhibits 19, 24, 27, and 29 in connection with his evaluation of the physical aspects of the subsurface water in Carmel Valley. Mr. Stetson also reviewed hydrographs of Carmel Valley aquifer water levels obtained at numerous wells.

(MPWMD:107.) In addition, he reviewed Carmel River streamflow hydrographs for the USGS Robles Del Rio and Carmel gaging stations. By superimposing surface and subsurface water level hydrographs, Mr. Stetson established that there is a direct relationship between recovery of seasonally-lowered subsurface water levels at wells and recurrent river flow increases during ensuing wet periods. On this basis, Mr. Stetson concluded that surface flow recharges river underflow and, consequently, causes a rise in Carmel Valley aquifer water levels. (MPWMD,107,4.)

Mr. Stetson provided written testimony that such underflow is only through the younger alluvium within a known and definite channel

along the entire length of Carmel Valley. (MPWMD:107,4.) Mr. Stetson supported his testimony utilizing the following information: (1) essentially nonwater-bearing rocks (described in Section 3.1) border and underlie the younger alluvium or Carmel Valley aquifer and (2) the average hydraulic conductivity of the younger alluvium is about 60 feet per day (ft/day), as compared to the hydraulic conductivity of the rocks which is in the order of 0.1 to 0.0001 ft/day or less. (MPWMD:107,6.) Mr. Stetson concluded that the hydraulic conductivity difference is substantial and renders the aquifer a "pipeline" for subsurface flow. (MPWMD:107,6.)

Mr. Stetson's testimony is consistent with the findings of SWRCB staff. Ms. Laudon submitted testimony and evidence that the relatively impermeable granitic and sedimentary rocks form the bed and banks of a known and definite channel which restricts the flow of subsurface water to the alluvium. (SWRCB:7&8.) This information is further supported by evidence regarding the subsurface occurrence of granitic or sedimentary rocks beneath the Carmel Valley aquifer at all well installations throughout the valley.

Except where water levels have been influenced by drawdown due to pumping, the general down valley or westerly subsurface flow direction within the aquifer is the same as that of the Carmel River flow. The subsurface flow has a pattern which demonstrates that it is within a known and definite channel rather than that of a diffused body of percolating ground water. (MPWMD:107,6.)

Cal-Am and other parties did not contest the testimony and evidence which describes the subsurface flow of the Carmel River as a subterranean stream flowing through a known and definite channel. Nor did Cal-Am or other parties offer evidence that the ground water in the alluvial basin should be classified as percolating ground water not within the SWRCB's permitting jurisdiction. Accordingly, we find that downstream of RM 15 the aquifer underlying and closely paralleling the surface water course of the

Carmel River is water flowing in a subterranean stream and subject to the jurisdiction of the SWRCB.

3.3 Location of Cal-Am Wells

The locations of Cal-Am's wells are described in the following table:

CAL-AM CARMEL RIVER WELLS (CAL-AM EXHIBIT 91)			
Well Name	Well Location	Depth To Water Static/ Pumping	Date Drilled
Los Laureles #5	NE¼ of SE¼ of Sect.29, T16S, R2E	18 feet/44 feet	1947
Los Laureles #6	SE¼ of SE¼ of Sect.29, T16S, R2E	16 feet/43 feet	1977
Robles #3	NE¼ of NE¼ of Sect.10, T17S, R2E	12 feet/30 feet	1989
Russell #4	SW¼ of SE¼ of Sect.11, T17S, R2E	16 feet/35 feet	1947
Russell #2	SE¼ of SE¼ of Sect.11, T17S, R2E	16 feet/35 feet	1947
Scarlett #6	SW¼ of SW¼ of Sect.19, T16S, R2E	20 feet/26 feet	1963
Scarlett #8	SW¼ of SW¼ of Sect.19, T16S, R2E	20 feet/35 feet	1989
Manor #2	NE¼ of SW¼ of Sect.23, T16S, R1E	30 feet/65 feet	1989
Schulte	SW¼ of NW¼ of Sect.23, T16S, R1E	15 feet/58 feet	1967
Stanton	NW¼ of NE¼ of Sect.30, T16S, R2E	3 feet/35 feet	1977
Begonia #2	NW¼ of SW¼ of Sect.24, T16S, R1E	not listed	1990
Berwick #7	SW¼ of SW¼ of Sect.24, T16S, R1E	23 feet/63 feet	1981
Berwick #8	SE¼ of SW¼ of Sect.24, T16S, R1E	20 feet/50 feet	1986
Rancho Cañada (aka Cañada)	NE¼ of SW¼ of Sect.17, T16S, R1E	15 feet/49 feet	1981
San Carlos	NE¼ of SE¼ of Sect.17, T16S, R1E	16 feet/55 feet	1982
Pearce	SE¼ of NW¼ of Sect.22, T16S, R1E	16 feet/50 feet	1981
Cypress	SW¼ of NW¼ of Sect.22, T16S, R1E	15 feet/48 feet	1981

Continued to next page

CAL-AM CARMEL RIVER WELLS (CAL-AM EXHIBIT 91)

Well Name	Well Location	Depth To Water Static/ Pumping	Date Drilled
<i>Continued from previous page</i>			
Panetta #1	NW¼ of NW¼ of Sect.03,T17S,R2E	13 feet/16 feet	1989
Panetta #2	NW¼ of NW¼ of Sect.03,T17S,R2E	16 feet/22 feet	1989
Garzas #3	SW¼ of SE¼ of Sect.33,T16S,R2E	13 feet/16 feet	1989
Garzas #4	NE¼ of SW¼ of Sect.33,T16S,R2E	12 feet/16 feet	1989

In addition, the location of these wells in relation to the Carmel River and the aquifer associated with the river is shown by Figure 3. The depth to water for each well is identified in the above table. Figure 3 and the table demonstrate that Cal-Am's wells are extracting water from the subterranean stream associated with the Carmel River.

4.0 ANALYSIS OF CAL-AM'S WATER RIGHTS

Among the issues noticed for hearing is the following:

"Does [Cal-Am] have a legal right to divert water from wells located adjacent to the Carmel River?" (SWRCB 1, June 1992 Hearing Notice.)

Cal-Am extracts, on average, 14,106 afa via 21 wells from the alluvial aquifer along the Carmel River. Cal-Am claims the right to divert and use this water under pre-1914 appropriative, riparian, prescriptive, and rights acquired under License 11866. (CAL-AM:92,1,10-27; October 1, 1992 letter to SWRCB from Cal-Am transmitting supplemental exhibits.) During the hearing, Cal-Am's representatives presented testimony and numerous exhibits in support of its claimed rights to divert water from the river. The following sections analyze Cal-Am's rights to divert and use water from the Carmel River.

4.1 Applicable Water Law

The following sections set forth the law applicable to the water rights claimed by Cal-Am.

4.1.1 Pre-1914 Appropriative Rights

Prior to 1914, an appropriative right for the diversion and use of water could be obtained two ways.⁶ First, one could acquire a nonstatutory (common law) appropriative right by simply diverting water and putting it to beneficial use. (Haight v. Costanich (1920) 194 P. 26, 184 Cal. 426.) Second, after 1872, a statutory appropriative right could be acquired by complying with Civil Code Sections 1410 et seq. (*Id.*) Under the Civil Code, a person wishing to appropriate water was required to post a written notice at the point of intended diversion and record a copy of the notice with the County Recorders Office which stated the following: the amount of water appropriated, the purpose for which the appropriated water would be used, the place of use, and the means by which the water would be diverted. (Cal. Civil Code Sections 1410-1422, now partially repealed and partially reenacted in the Water Code; Wells A. Hutchins, The California Law of Water Rights (1956) at 89.)

Generally, the measure of an appropriative right is the amount of water that is put to reasonable beneficial use, plus an allowance for reasonable conveyance loss. (Felsenthal v. Warring (1919) 40 Cal.App. 119, 133, 180 P. 67.) The quantity of water to which an appropriator is entitled, however, is not necessarily limited to the amount actually used at the time of the original diversion. Rather, under the doctrine of "progressive use and development", pre-1914 appropriations may be enlarged beyond the original appropriation. (Haight, 194 P. 26 at 28-29; Hutchins at 118; 62 Cal.Jur. at 370.)

⁶ After 1914, an appropriative right could only be obtained by complying with the provisions of the California Water Code for the appropriation and use of water. (Water Code Section 1225; Stats. 1913, C. 586, p. 1012, Section 1(c).)

Under the progressive use and development doctrine, the quantity of water to which an appropriator is entitled is a fact-specific inquiry. According to Haight, "this right to take an additional amount of water reasonably necessary to meet increasing needs is not unrestricted; the new use must have been within the scope of the original intent, and additional water must be taken and put to a beneficial use in keeping with the original intent, within a reasonable time by the use of reasonable diligence...." (194 P. at 29.) Thus, the progressive use and development doctrine allows an appropriator to increase the amount of water diverted under a pre-1914 right, provided: (a) the increased diversion is in accordance with a plan of development and (b) the plan is carried out within a reasonable time by the use of reasonable diligence. (Senior v. Anderson (1896) 115 Cal. 496, 503-504, 47 P. 454; Trimble v. Heller (1913) 23 Cal.App. 436, 443-444, 138 P. 376.)

4.1.2 Riparian Rights

The riparian doctrine confers on the owner of land abutting a watercourse the right to the reasonable and beneficial use of water on the land. California riparian rights have the following general characteristics. The riparian right is part and parcel of land which abuts a river, stream, lake, or pond. The riparian right may be used only for direct diversion of naturally occurring flow. Unless adjudicated, the riparian right is unquantified and extends to the use of as much water as can reasonably and beneficially be used on riparian lands. A riparian right is a shared right and, therefore, a riparian has a right to the use of the watercourse in common with the equal and correlative rights of other riparians. Finally, the riparian right generally is paramount to all other rights, and must be satisfied before appropriative rights are exercised. (CEB Manual, Water Rights, Water Supply, & Water Related Law (1987) at 7.)

4.1.3 Prescriptive Rights

Generally, "prescription" means the taking of another person's property by adverse use. With regard to water, prescription can only be accomplished by the adverse diversion and use of water that

other private persons are entitled to use under the law. Subsequent to 1914, prescription will not lie against the State for the unappropriated waters of the State. (Water Code Sections 102 and 1225; Stats. 1913, C. 586, p. 1012, Section 1(c); Crane v. Stevinson (1936) 5 Cal.2d 387; People v. Shirokow (1980) 26 Cal.3d 301.)

As to private persons, prescription can be accomplished only by adverse possession that is actual, open and notorious, continuous and uninterrupted, exclusive, hostile and adverse, and under claim of right or color of title for a period of not less than five years. (Locke v. Yorba Irr. Co. (1950) 35 Cal.2d 205; City of Pasadena v. City of Alhambra (1949) 33 Cal.2d 908.) Even though some private rights may be prescribed, the unappropriated waters of the State and post-1914 appropriative water rights cannot be prescribed unless they are supported by a permit. (Shirokow.)

4.1.4 Licenses

Under the California permit system, once a permittee has completed construction of a diversion structure and applied the water to beneficial use, the SWRCB investigates to confirm completion and compliance. The SWRCB will issue a license confirming the amount of water found to have been perfected by reasonable beneficial use subject to the terms and conditions included in the permit and required by statute and California case law. (Water Code Sections 1600, et seq.)

4.2 Analysis of Cal-Am's Water Right Claims

Sections 4.2.1 through 4.2.4, *infra*, analyze the evidence introduced in support of Cal-Am's claimed water rights. For purposes of this order when evaluating Cal-Am's claims, the evidence in the hearing record is considered in the light most favorable to Cal-Am due to the difficulty, at this date, of obtaining evidence that specific pre-1914 appropriative claims of right were actually perfected and have been preserved by continuous use.

4.2.1 Analysis of Pre-1914 Appropriative Rights

The lower Carmel River Valley, Monterey Peninsula, and surrounding areas were settled and developing before 1800. Many of Cal-Am's predecessors in interest developed or acquired appropriative water rights to divert water from the Carmel River and its subsurface waters prior to 1914. (CAL-AM:93, Attachment 1.) Cal-Am's predecessors in interest included: C.P. Huntington, Pacific Improvement Company, Monterey County Water Works, the Monterey County Water Works, Del Monte Properties Co., and California Water and Telephone Company. (*Id.*) Some of these appropriative rights were initiated and probably acquired in accordance with Civil Code Sections 1410, et seq. Other appropriative rights were acquired by the nonstatutory method of simply taking the water and putting it to reasonable beneficial use. (See 4.1.1, *supra.*)

Cal-Am submitted over 100 documents, including deeds and notices of appropriations by Cal-Am's predecessors, "which represent virtually all title documents bearing upon Cal-Am's water rights and chain of title." (CAL-AM, PHBr at 14:15-18.) Cal-Am Exhibit 93 (Attachment 1) summarizes the deeds and notices of appropriation pertaining to Cal-Am's appropriative rights. Nevertheless, Cal-Am did not present nor does the record contain any evidence which would enable the SWRCB to determine for each claimed pre-1914 appropriative right:⁷ (1) whether diversion works were actually constructed, (2) whether water was ever diverted and used under any claimed right prior to 1914 or pursuant to a notice given in accordance with Civil Code Section 1410, or (3) the quantity of water which was put to reasonable beneficial use and maintained by continuous use by Cal-Am's predecessors.

⁷ Despite the fact that Issue #2 was clearly noticed for hearing, Cal-Am asserted throughout the proceedings that the complaint proceedings were not the proper forum to evaluate Cal-Am's appropriative rights. (October 1, 1992 letter to Messrs. Stubchaer and Samaniego from Leonard G. Weiss transmitting supplemental exhibits at 1, n.1; CAL-AM Post-Hearing Brief, 13:14-18.) Nonetheless, Cal-Am submitted extensive evidence of its water rights based on deeds, notices of appropriation, and other documents.

Cal-Am submitted two categories of documents to establish the total quantity of water used under all of its pre-1914 appropriative rights. These are:

"(1) Direct evidence of actual usage in 1913 and earlier; and (2) Material dating back to the 1880s which demonstrate ... the existence of the water company's physical plant, dollar volumes of sales, and the like, prior to 1914." (CAL-AM, PHBr at 15:6-11; October 1, 1992 letter to SWRCB from Cal-Am transmitting supplemental exhibits.)

Several parties objected to the admissibility of the above exhibits on the ground that they are hearsay. (E.g., Carmel Valley Water Users, Closing Brief, 5-8.)

Title 23, California Code of Regulations, Section 761(d) provides, in part, that in a hearing before the SWRCB:

"The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant, non-repetitive evidence shall be admitted *if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.* Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient by itself to support a finding *unless it would be admissible over objection in civil actions*" (Emphasis added.)

Cal-Am exhibits are admissible under Section 761(d) because:

(a) it is the sort of evidence on which responsible persons are accustomed to rely and (b) the exhibits would likely be admissible over objection in a civil action.⁸ Moreover, these exhibits

⁸ The SWRCB is of the opinion that those exhibits pertaining to proceedings of the California Railroad Commission would be admissible over objection in a civil trial. It is difficult to find a clear statement in the California Evidence Code or cases specifically addressing this evidentiary issue. However, there are multiple theories, including: the official notice doctrine, the official records exception to the hearsay rule, and other "residual" exceptions to the hearsay rule that support this conclusion.

Official notice may be taken of the existence of any specific record of the California Railroad Commission. While official notice generally may not be taken of the truth of the Railroad Commission's factual findings (*see Sosinsky v. Grant* (1992) 8 Cal.Rptr.2d 552, 558-59), the factual statements within such exhibits are admissible under the official records exception

(continued)

likely are the best, if not the only, evidence available for events which occurred over eighty years ago. Thus, the SWRCB will allow Cal-Am's exhibits as evidence for the purpose of evaluating its pre-1914 appropriative claims.

These documents, however, do not show the amount of water that was actually used beneficially or maintained by continuous beneficial use by Cal-Am's predecessors under any specific pre-1914 appropriative rights. Thus, Cal-Am has not demonstrated that the

⁸(...continued)
the hearsay rule. Section 1280 of the Evidence Code provides:

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made by and within the scope of duty of the public employee;
- (b) The writing was made at or near the time of the act, condition, or event; and
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

In this case, those exhibits pertaining to proceedings of the California Railroad Commission generally satisfy the requirements of Section 1280. However, some courts have held that the public employee must have had personal knowledge of the act, condition, or event, or received the information recorded from someone in the agency who had personal knowledge in order for the official records exception to apply. (See People v. Parker (1992) 8 Cal.App.4th 114.) Because it is unclear whether any public official had personal knowledge of the quantity of water allegedly being used by Cal-Am's predecessor, it is possible that a court may find such information inadmissible under the official records exception. Nonetheless, the SWRCB concludes that these exhibits should be admitted under the official records exception because "the sources of information and method of time of preparation were such as to indicate [the exhibits'] trustworthiness." (See Cal. Evidence Code Section 1280(c).)

Alternatively, these exhibits would likely be admissible under one of the "residual" exceptions to the hearsay rule that allow California courts to recognize hearsay exceptions "in addition to those exceptions expressed in the statutes." (In re Malinda S, 51 Cal.3d 368, 376 (1990).) For example, evidence of a statement contained in a writing more than 30 years old is admissible if "the statement has been since generally acted upon as true by persons having an interest in the matter." (Cal. Evidence Code Section 1331.)

The deeds are admissible for the purpose of demonstrating chain of title. (Cal. Evidence Code Sections 1330 and 1600.) Finally, Exhibit 93 (Schematic of Chain of Title) is also admissible, but only to the extent the information therein is confirmed by the underlying documents which it purports to summarize.

notices of appropriation were ever perfected into appropriative rights.⁹

The best evidence regarding the amount of water actually put to reasonable beneficial use prior to 1914 by Cal-Am's predecessors is found in Cal-Am Exhibits 126, 131 and 133. The following sections briefly describe these exhibits:

- (a) Exhibit 126 is a copy of a "Petition of the Monterey County Water Works For an Increase of its Water Rates," (MCWW) Application No. 950, filed before the California Railroad Commission on or about January 14, 1914. Exhibit "C" of this petition shows that in 1913 the MCWW sold a total of 314,879,755 gallons (966 afa) of water to its customers.
- (b) Exhibit 131 is an MCWW brief to the Railroad Commission dated June 29, 1914, supporting its position for increased water rates. Page 6 of this brief discusses various estimates of water use and presents a likely total annual water use of 370,515,000 gallons (1,137 afa).
- (c) Exhibit 133 is a January 27, 1915, engineer's report to the MCWW about the impact of the Railroad Commission's Decision regarding the MCWW's petition for a rate increase. Table 1A of this exhibit presents the MCWW's annual use of water in 1913-1914 as 43,444,600 cubic feet (997 afa).¹⁰

⁹ Cal-Am's claimed pre-1914 appropriative rights could not possibly have been perfected and maintained for the face value of the rights being claimed. Assuming that the appropriative rights conveyed to Cal-Am were all perfected and maintained by continuous reasonable beneficial use, the maximum quantity which could be diverted from the Carmel River would be 751,608 afa, an amount which vastly exceeds the amount of water available in the river during even the wettest years of record. (MPWMD:199, Attachment 1 (showing maximum unimpaired Carmel River flow of approximately 325,000 afa).)

¹⁰ The record contains other contradictory evidence as to the amount of water used prior to 1914. For example, less than 507 afa is reported as having been used in 1916. (CAL-AM:90.)

These exhibits shed some light on the amount of water used by Cal-Am's predecessor in interest around 1914. These exhibits are inconclusive as to the actual amount of water used by the MCWW around 1914 due to the different water use figures. For purposes of this analysis and order, the 1,137 afa figure is used because: (1) the range between the high and low values is only fifteen percent and (2) it is reasonable to use the maximum annual water use estimate of 1,137 afa to establish the baseline quantity of water being used under pre-1914 appropriative claims.

In addition to the actual quantity of water used by Cal-Am's predecessors prior to 1914, Cal-Am might have been entitled to an additional quantity of water under the progressive use and development doctrine. However, Cal-Am neither asserted such a claim nor presented evidence which might support findings that it is entitled to additional water under the doctrine.¹¹ In addition, the diversion of a large amount of the water currently taken from the river or its underflow was not initiated until rapid growth occurred on the Monterey Peninsula, which commenced after 1960. (T,I,48:1-9; T,I,38:12-18; CAL-AM,90.) Cal-Am drilled 18 of its 21 wells after 1960. (CAL-AM:91.) Thus, Cal-Am is not entitled to additional water under the progressive use and development doctrine. Cal-Am's pre-1914 rights, therefore, should be limited to the estimated actual use by Cal-Am's predecessors in 1913, an amount which does not exceed 1,137 afa.¹²

¹¹ Indeed, Cal-Am requested that the Board "decline to attempt to quantify Cal-Am's rights until it hears Cal-Am's pending applications for permits." (CAL-AM's Post Hearing Brief at 21:9-11.) This request is rejected because this issue was noticed for this proceeding and Cal-Am had an opportunity to present evidence on the issue.

¹² Pre-1914 appropriative claims for San Clemente Dam. Persons diverting water under pre-1914 claims or right are required to file Statements of Diversion and Use with the SWRCB. (Water Code Sections 5100, et seq.) Cal-Am filed its first statements for San Clemente Dam in 1975. Cal-Am contends that this right was established under four Notices filed under the Civil Code. (CAL-AM, Exhibit A, pp.3 and 4; CAL-AM exhibits 4, 5, 6 and 8.)

The first statements included water diverted for years 1972 through 1975. The statements indicate that Cal-Am was able to divert 1,529 af to storage at San Clemente Reservoir and that Cal-Am was claiming the right to divert up to 20 cfs by direct diversion. Over succeeding years, Cal-Am has
(continued...)

4.2.2 Analysis of Riparian Rights

Cal-Am's riparian claims are limited to the use of water on only those parcels which adjoin the surface water course of the river or which overlie water flowing in the subterranean channel.¹³ Clearly, Cal-Am wells extract water flowing in the subterranean channel. Cal-Am also presented testimony indicating that 60 afa were used to irrigate riparian habitat along the river. (T,I,54:3-10.) Nevertheless, Cal-Am did not identify any specific parcels for which riparian claims were asserted. In summary, although Cal-Am did not submit testimony or exhibits in support of any specific riparian claim, it appears that Cal-Am has riparian rights and it is not unlikely that such rights are being exercised to divert 60 af to irrigate riparian vegetation along the Carmel River.¹⁴

4.2.3 Analysis of Prescriptive Rights

Cal-Am bases its claim to prescriptive water rights on the alleged fact that the claimed combined diversions of two of Cal-Am's predecessors depleted the flow in the Carmel River (CAL-AM: October 1, 1992 letter to SWRCB from Cal-Am transmitting supplemental exhibits, pp. 7 and 8; CAL-AM:136,2) during some years and the fact that the Carmel River often has no surface flow. (CAL-AM:132,14.) Assuming the truth of these facts, Cal-Am's post-1914 claims of prescriptive rights are, nevertheless, not supported

¹²(...continued)

stated that it has approximately diverted between 1,200 to 8,000 af per year under this claim. (SWRCB, Files, Statements of Diversion and Use, Statement 8538.) More recent information indicates the dam can only store between 320 and 800 af. (MPWMD:287,4-49.) Amounts which are currently directly diverted are taken at the Carmel Valley Filter Plant about one-half mile below the San Clemente Dam.

San Clemente Dam was constructed in 1921, seven years after the modern Water Code respecting appropriation became effective. No evidence was presented: (1) as to which, if any, Notice is the basis for the pre-1914 claim of right, (2) that work was commenced on facilities to divert water prior to 1914, or (3) that water was diverted and used prior to 1914 or within a reasonable time thereafter under any Civil Code Notice.

¹³ Cal-Am does not claim that water being diverted from the subterranean channel associated with the Carmel River can be served to persons on the Monterey Peninsula under riparian rights claims. (T,I,91:13-92:8.)

¹⁴ Cal-Am does not claim that water served outside the valley can be diverted from the river under riparian right claims. (T,I,91:13-92:8.)

by the record because Cal-Am failed to introduce other essential evidence necessary to support prescriptive claims. Cal-Am did not: (1) demonstrate that the basic elements of prescription were met and (2) identify any specific persons, lands, or types of water rights that were allegedly prescribed. Thus, there is no basis for finding that Cal-Am is entitled to divert any water from the river under the doctrine of prescription.

4.2.4 Analysis of Rights Under License 11866 (Application 11674A)

On February 14, 1986, Cal-Am was issued License 11866 (Application 11674A) to divert 3,030 afa to storage from October 1 to May 31 from the Carmel River for municipal, domestic, industrial, and recreational uses. (SWRCB:1,b.) The maximum annual withdrawal under this right, however, is 2,950 afa. The above analysis of appropriative, riparian, and prescriptive rights does not affect the rights exercised under License 11866.

4.3 Conclusions Regarding Cal-Am's Claimed Water Rights

In summary, Cal-Am has valid pre-1914 appropriative rights to divert no more than 1,137 afa, based upon the amount of water actually used by Cal-Am's predecessors prior to 1914. Cal-Am is not entitled to additional water under the progressive use and development doctrine because Cal-Am did not present evidence of a plan of development carried out within a reasonable time.

Cal-Am has riparian rights for use within the Carmel River Valley on only those parcels which adjoin the surface watercourse of the river or which overlie water flowing in the subterranean channel. It is not unlikely that such rights are being exercised to irrigate the riparian vegetation along the Carmel River. Such rights do not extend to water that is served outside the valley or water served to non-riparian parcels located within the valley.

Cal-Am is not entitled to any prescriptive water rights because Cal-Am did not identify the persons, lands, or types of water rights that are allegedly prescribed. Cal-Am has an appropriative

right to divert 3,030¹⁵ afa of water to storage in Los Padres Reservoir from October 1 to May 31 pursuant to the conditions imposed by License 11866. Thus the total quantity of water which Cal-Am is presently using under legal rights is 3,376 afa.¹⁶

Because the amount of water to which Cal-Am is legally entitled under the appropriation and riparian doctrines, pre-1914 storage rights, and License 11866 is much less than the amount Cal-Am presently is diverting, Cal-Am is diverting about 10,730¹⁷ afa from the Carmel River or its underflow without a valid basis of right. Accordingly, Cal-Am should be required to diligently develop and implement a plan for obtaining water from the Carmel River or other sources consistent with California water law.

5.0 EFFECT OF CAL-AM DIVERSION ON INSTREAM BENEFICIAL USES

The following sections will discuss the effects of Cal-Am's diversions on the instream beneficial uses of the Carmel River. Such effects include the loss of riparian habitat in the lower river and the near extinction of the Carmel River steelhead run. Cal-Am diversions, standing alone, are not the sole cause of current conditions in the Carmel River. Other causes include the diversion and use of water by other persons and, significantly, a series of dry and critically dry years during the late 1980s and early 1990s. Nevertheless, Cal-Am's combined diversions from the Carmel River constitute the largest single impact to the instream beneficial uses of the river.

5.1 Vegetative Resources

Three vegetation communities are found within the Carmel River watershed: coastal wetlands within the Carmel River Lagoon,

¹⁵ The actual diversion is limited to 2,179 af due to siltation.

¹⁶ 1,137 afa, pre-1914 appropriative + 60 afa, riparian + 2,179 afa, license 11866 = 3,376.

¹⁷ 10,730 afa represents Cal-Am's total diversions from the Carmel River minus that amount which appears to be legally diverted. (14,106 - 3,376 = 10,730.)

riparian communities along the river itself, and upland vegetation on the upper alluvial terraces and hills surrounding the valley. Mature multistoried riparian vegetation supports a wide diversity of plant and animal species, including a number of which are protected pursuant to federal and state endangered species acts.

Historically, riparian vegetation was more extensive than at present, particularly in the lower nine river miles. Prior to 1956, losses were primarily attributable to agricultural development. Since that time, the decline has coincided with the increasing export of ground water to meet growing urban demand on the Monterey Peninsula. (SWRCB:17; SWRCB:42,III-28.) Were it not for the extensive riparian corridor irrigation efforts of the District and Cal-Am, it is estimated that current ground water pumping would severely stress approximately 59 percent of the existing riparian vegetation in the upper portion of Aquifer Subunit 3 (see Figure 2) in normal water years, and nearly all vegetation during critically dry years. (MPWMD:289,9G-1.)

The Carmel River Lagoon contains a mixture of freshwater and salt marsh vegetation. Coastal salt marsh is considered one of the most fragile and rapidly disappearing habitats in California. The Carmel River coastal wetland represents some of the last remaining habitat of this type on the Central Coast. (SWRCB:42,III-32.)

Upland vegetation within the watershed is composed of a mixture of coastal scrub, hardwood forest, coastal dune, chaparral, and closed-cone coniferous forest. Cal-Am's diversions have no direct effect on such resources.

5.2 Wildlife Resources

Carmel River riparian and wetland communities support a diverse group of resident and migratory wildlife. A number of amphibian and reptile species occur within the riparian and wetland zones as well, including the red-legged frog and the western pond turtle. These are, respectively, a proposed and candidate species for listing under the Federal Endangered Species Act. A more detailed

description of these resources is found in the District's EIR/EIS. (MPWMD:287-290.)

5.3 Fishery Resources

The Carmel River supports populations of at least ten resident freshwater and anadromous fish species. Of these fishes, the steelhead (*Onchyrhynchus mykiss*) has been considered the most important, and extensive studies have been performed to define its ecology in the river. (SWRCB:42,III-41.)

Adult steelhead live in the ocean and migrate into the upper reaches of the Carmel River to spawn. Migration may begin in the fall after the Lagoon sandbar is breached by artificial means or by the first major storm and when sufficient flow is established in the lower river to allow upstream passage.

Typically, in early January the adults spawn and migrate back to the ocean. After approximately three to eight weeks of incubation, depending on water temperature, the eggs hatch and fry soon emerge from the gravel. These fry continue development in the river until fall. By fall, fry will have developed into juveniles and begin moving downstream. They remain in the lower reaches of the river and the lagoon adapting to brackish water until late spring. In late spring, as high river flows are receding, they migrate out into the Pacific Ocean. Some juveniles and adults remain in the river for one or two additional years before migrating to the ocean, hence these life stages may be found in the river throughout the entire year. (SWRCB:42,III-42.)

5.4 Extent of the Steelhead Resource

When first seen by Spanish explorers in 1603, the Carmel River supported a spectacular steelhead run, believed to have been well in excess of 12,000 fish annually. (CSRA:5,2.) Heavy fishing in the 1850s through the 1870s diminished the fishery. Fish planting began in 1910 and continued through the 1940s. (MPWMD:289,8-8.)

When San Clemente Dam was constructed in 1921 (RM 18.5), a fish ladder was also built. (MPWMD:289,8-8.) Access to a major portion of the steelhead spawning and rearing habitat was effectively eliminated in 1949 with the construction of Los Padres Dam at RM 23.5. (CSRA:5,2.) Although a fish trap was installed downstream of the dam and captured adults transported into the reservoir, the facility proved ineffective at maintaining steelhead populations. (MPWMD:289,8-8.)

Annual counts of steelhead passing through the San Clemente fishway began in 1961. The critical dry years of 1976-77 and 1987-92, drought, and diversion by Cal-Am from its wells have combined to reduce water available to steelhead and have also reduced the steelhead population to remnant levels. Only one fish was recorded in 1991 and 15 fish in 1992. (MPWMD:337,49.) Past reviews of Carmel River environmental problems have identified flow reduction and habitat alteration as major factors associated with steelhead decline. (SWRCB:42,III-44.)

Paralleling the declining steelhead population during this period was the rising urban demand for water. Originally, the Monterey Peninsula water supply was diverted entirely from the two reservoirs and from surface flow. When demand exceeded the developed surface resources, wells drilled in the Carmel Valley alluvium aquifer were added to supplement supply. In recent times, dry season surface flows below the Narrows at RM 10 have been depleted in most years as a result of heavy ground water pumping. This results in the stranding and death of many juvenile fish as surface flow recedes. (DFG:4,32.)

5.5 The Effect of Cal-Am Diversions Should be Mitigated

To summarize, Cal-Am diversions have historically had an adverse effect on: (1) the riparian corridor along the river below RM 18.5, (2) wildlife which depend on riparian habitat, and (3) steelhead and other fish which inhabit the river. Measures should be adopted requiring Cal-Am to mitigate the effect of its diversions on the environment until such time as it is able to

obtain water from the Carmel River or other sources consistent with California water law.

6.0 MITIGATING EFFECTS OF CAL-AM DIVERSIONS

The following sections identify the measures which are in effect to mitigate the effect of Cal-Am's diversions in the instream beneficial uses of the Carmel River. Many significant measures to protect the instream beneficial uses of the river have been initiated and are being carried out by the Monterey Peninsula Water Management District. In order to avoid confusion, an explanation of the District's role is necessary.

The District was created by special act of the Legislature in 1977. (Water Code Appendix Section 118-2.) The District is responsible for managing available surface and ground water sources to supply water within the District and to protect the environmental quality of the area's water resources, including the protection of fish and wildlife resources. (*Id.*; MPWMD:16,1-2.) Much of the watershed of the Carmel River is within the District's boundaries (Figure 1) and the District has broad powers over the use and distribution of water within its boundaries, including the operations of Cal-Am. (Water Code Appendix Sections 118-2, 118-102.)

6.1 Interim Relief Program

In 1988, as a result of the complaint filed by the CRSA (Section 2.1), the District formed an Environmental Advisory Committee. The committee was composed of citizen groups and public agency representatives, including representatives from Cal-Am and DFG. (MPWMD:53;3&4.) Their efforts resulted in an Emergency Relief Program and an Interim Relief Program, both designed to address chronic environmental degradation in the lower Carmel River. (MPWMD:53.)

The focus of the Interim Relief Program was on rescuing stranded steelhead during critically dry years, preserving the riparian corridor, and enhancing aquatic habitat by increasing streamflow. Specifically, the District undertook to: (1) limit surface

diversion at San Clemente Dam to 29 percent of total Cal-Am production, (2) hire fishery professionals to assess habitat and coordinate steelhead rescue efforts, and (3) monitor the health of riparian vegetation and install, operate, and maintain drip irrigation systems along the lower Carmel River. The provisions of the program expired in November 1993, but are carried forward as elements of the Water Allocation EIR mitigation program of the District. (MPWMD:53; SWRCB:42.)

6.2 Water Allocation Mitigation Program

In 1981, the District established an annual Water Allocation Program to apportion water to each of its member jurisdictions. In 1990, a Water Allocation Program EIR was completed and certified by the District. (SWRCB:42; MPWMD:16.) The EIR analyzed the environmental and socioeconomic impacts of varying levels of water production from the Monterey Peninsula Water Resource System, including the Carmel River. The document found that the amount of water which could be produced without significant environmental impact was less than previous estimates. As a result, the Cal-Am allocation was reduced from 18,600 to 16,744 afa.¹⁸ Even at the reduced level, diversion of water from the Carmel River was found to have significant adverse environmental impacts on fisheries, riparian vegetation and wildlife, and the Lagoon. Therefore, the District also approved the Water Allocation Mitigation Program and committed itself to implement the mitigation program. The Program provides for the following mitigation measures:

Fisheries (MPWMD:16,55)

- Continue Interim Relief Program
- Expand program to capture emigrating smolts in spring
- Prevent stranding of early fall and winter migrants
- Rescue juveniles downstream of Robles Del Rio in summer

¹⁸ The quantity of water which the District allocated to Cal-Am was not based on the amount of water diverted by Cal-Am and not on Cal-Am's legal right to divert water.

- Modify spillway and transport juveniles around Los Padres Dam

Riparian Vegetation and Wildlife (MPWMD:16,64)

- Continue Interim Relief Program
- Conservation and water distribution management to retain water in the Carmel River
- Prepare and oversee a Riparian Corridor Management Plan (MPWMD:69)
- Implement the Riparian Corridor Management Plan
- Expand monitoring programs for soil moisture and vegetative stress

Lagoon Vegetation and Wildlife (MPWMD:16,72)

- Continue Interim Relief Program
- Assist with Lagoon Enhancement Plan investigations
- Expand long-term monitoring program
- Identify feasible alternatives to maintain adequate Lagoon volume

The program was adopted and funded by the District for an initial five-year period, due to expire in late 1995, after which allocations are to be reassessed based on results of monitoring studies. Annual progress reports have been prepared by the District and submitted to the SWRCB. (SWRCB:43; MPWMD:307-308.) Funded primarily by user fees and taxes, the program costs will slightly exceed \$6.5 million over five years. (MPWMD:309.)

The effectiveness of this mitigation program and the degree to which the District has implemented the mitigation program was the subject of considerable testimony during the SWRCB hearing. Both the CSRA and the DFG expressed dissatisfaction with the implementation of the program. (CRSA:94-1,3; T,X,100:2.) Further, DFG stated that it was the Department's position that fish rescue is inappropriate as a long-term mitigation measure and that provision of adequate instream flow is the preferable alternative. (T,IX,8:2.)

6.3 Other District Actions

In addition to the above programs, the District has engaged in a number of other activities to lessen the impact of water extraction on the Carmel River system. These measures include:

- Limitation on total system production
- Mandatory rationing and moratoriums
- Conservation and community education programs
- Development of Seaside aquifer
- Wastewater reclamation

Although these programs have been effective in reducing demand on the Carmel River, their combined effect is inadequate to reverse severe environmental degradation. It is the position of the District and DFG wildlife experts that river flow is the critical element in reversing this degradation. The District has also concluded that a firm municipal supply and water for environmental restoration cannot be provided without additional water storage upstream of Cal-Am's existing well field. (MPWMD:287,2-8.)

6.4 Conditions On the Operation of Los Padres and San Clemente Dams

In 1948 the SWRCB adopted Decision 582 approving an appropriative right for the Los Padres Dam. The Decision and Permit 7130 require, in general, that Cal-Am maintain a flow of not less than 5 cfs in the channel of the Carmel River directly below the outlet structure of the Los Padres Dam at all times during which water is being stored under this permit.

Diverting under a claim of pre-1914 appropriative right, San Clemente Dam has no bypass requirement and, until the early 1980s, the entire summer streamflow was diverted into the filter plant downstream of San Clemente Dam. (DFG:4,8.) During the 1980s, DFG and Cal-Am began negotiating year-to-year agreements for the release of some water at San Clemente Dam to benefit fish in the river. Bypass flows have generally been in the range of 3.5 to 5 cfs. Under more normal hydrologic conditions, the bypass

maintains flow in the stream to the Narrows at RM 10. This habitat below San Clemente Dam is considered significant steelhead habitat.

6.5 Interim Measures to Mitigating Effects of Cal-Am Diversions Should Continue to be Implemented

As previously stated, Cal-Am's diversions have an adverse effect on the instream beneficial use of the river. Although the interim measures discussed herein are beneficial, they are by no means sufficient to offset the total effect of Cal-Am's diversions. Thus, these measures should be continued until such time as Cal-Am is able to obtain water from the Carmel River or other sources consistent with California water law.

That most interim measures have been undertaken by the District and not Cal-Am is a matter of concern. There is no assurance that the District will indefinitely continue to mitigate the effects of Cal-Am's diversions. Furthermore, there is no basis for the SWRCB to order the District to continue implementing the interim measures on behalf of Cal-Am. Thus, a condition should be adopted requiring Cal-Am to implement these interim measures in the event the District fails to continue with its programs.

7.0 OTHER PROPOSALS FOR MITIGATING THE EFFECTS OF CAL-AM DIVERSIONS FROM THE CARMEL RIVER

In addition to the interim mitigation measures being implemented by the District, the Complainants, DFG, and Mr. Evans contend that additional mitigation measures should be implemented by Cal-Am. Some of these measures are discussed in the following sections.

7.1 Maximize Production in Seaside Aquifer, Minimize Production from Carmel River

Several parties advanced the concept that production from the Seaside aquifer should be increased and diversions from the Carmel River should be reduced. Cal-Am produces about 2,700 afa from the Seaside ground water basin from wells in Seaside, California. The Seaside northern and southern coastal ground water subbasins have a usable storage capacity of 4,700 af. (MPWMD:101,6,144.) The long-term yield of the Seaside ground water subbasin, however, is

estimated to be 3,300 afa, using the practical rate of withdrawal method. (SWRCB:1, "Hydrology Update, Seaside Coastal Ground Water Basins, Monterey County, California", Staal, Gardner & Dunne, Inc., 1990, p.22.) A new well became available to Cal-Am and its customers during 1994, the Peralta Well, which is located in the Seaside aquifer. The well is capable of producing approximately 1,000 afa. The District has allocated the potential production from the Peralta Well for purposes which include water for community benefit and among eight jurisdictions for new connections, remodeling, and additions. (MPWMD,291,4:1-17; MPMD,3378,28;Figure 10.) By more fully utilizing water available in the Seaside aquifer, Cal-Am can reduce its diversions from the Carmel River and the effects of such diversions on public trust values. Thus, we find that Cal-Am should be required to maximize production from the Seaside aquifer and reduce diversions from the river to the greatest practicable extent.

7.2 Maximize Production from the Most Downstream Wells

Several parties advanced the proposal that by maximizing production from the most downstream wells that surface water in the Carmel River could be extended farther downstream.¹⁹ The benefit of operating the wells in this manner would be to provide more habitat for fish during some years and seasons. (T,IV,248:24-251:3.) Testifying for DFG, Keith Anderson indicated that Cal-Am was already operating in this manner pursuant to an agreement with DFG. (T,IX,17:2-10.) Testimony did indicate, however, that too much pumping of wells nearer to the Lagoon might result in water quality degradation and adversely affect supply of water to other wells. Thus, we find that Cal-Am should be required to satisfy the water demands of its customers outside of the Carmel River watershed by extracting water from its most downstream wells to the maximum practicable extent.

¹⁹ Some parties advocated drilling more wells farther down the river as near to the Lagoon as possible. The feasibility of this proposal was not demonstrated. Testimony and exhibits indicated that such wells and pumping could result in: (a) poorer water quality for Cal-Am customers, (b) dewatered wells used by other persons in the area, and (c) seawater intrusion into the lower aquifer. (T,IV,251:4-254:4; 258:5-269:4; 272:14-284:2.)

7.3 Supply Water to the Carmel Village Filter Plant from Wells

The Carmel Village is supplied water from a filter plant located downstream of the San Clemente Dam. The filter plant is supplied water from the dam via a pipeline. Several parties advanced the proposal that more surface flow could remain in the river if the filter plant was supplied water from wells instead of the dam. The water diverted to storage at the dam could then be released to the river for fish and to recharge the subterranean stream from which the downstream wells extract water. No evidence was presented to demonstrate the feasibility of the proposal. Indeed the evidence indicates that it is not feasible to supply water to the filter plant from the most downstream wells. No evidence was introduced which would indicate whether the filter plant could be supplied from more nearby wells and thus keep more water at the surface of the stream for some additional distance. We find that Cal-Am should be required to conduct a reconnaissance level study of the feasibility, benefits, and costs of this proposal.²⁰

7.4 Bypass Early Storm Runoff at the Dams

On behalf of DFG, Keith Anderson suggested that runoff from early storms be passed by the Los Padres and San Clemente Dams. (T, IX, 21:4-22:6.) This proposal can result in recharging the subterranean stream and restoring surface water flows in the river at an earlier date. An earlier reestablishment of surface flows would increase the likelihood that steelhead could successfully migrate up and down the stream to complete their life cycle. The record does not include any evidence which demonstrates the feasibility of this suggestion; however, the storage capacity of the dams is so small that it appears likely that this suggestion could be implemented in even the driest water years and the

²⁰ The SWRCB recognizes that the wells nearest the filter plant are not the most downstream wells. The feasibility of supplying the filter plant may depend upon supplying the plant via the nearest wells. Supplying the filter plant from nearby wells would, implicitly, conflict with the principle that water be supplied to Cal-Am customers via the most downstream wells to the maximum practicable extent. Nevertheless, we find that the feasibility, benefits, and costs of this proposal should be evaluated.

reservoirs could still be refilled. We find that Cal-Am should be required to study the feasibility of this proposal.

7.5 Modify Critical Stream Reaches to Facilitate Fish Passage

In the context of this section, a critical stream reach means any portion of the river which, due to low flow, acts as a barrier to migrating steelhead. Such barriers interfere with the ability of steelhead to successfully complete all life stages and to reproduce in the river. Testifying for DFG, Keith Anderson expressed the opinion that modifying critical stream reaches was an action which could be taken to mitigate the effect of Cal-Am's diversions from the river. (T, IX, 20:24-21:3.) Thus, we find that Cal-Am should be required to conduct a study of the feasibility, benefits, and cost of this proposal.

7.6 Remove Boulder Below Los Padres Dam

A large boulder or rock outcrop is situated below the spillway of Los Padres Dam. A significant percentage of steelhead juvenile fail to survive downstream migration during low water conditions over the spillway because they fall upon the rock. Removal of the rock could improve the survival rate of steelhead juvenile moving downstream from Los Padres Dam. Accordingly, Cal-Am should be required to remove the rock or implement some other reliable measure to assure safe passage for fish over or around the rock.

8.0 ENFORCEMENT OPTIONS

Three enforcement options are available to the SWRCB for the unlawful diversion and use of water. First, Water Code Section 1052 declares that the unauthorized diversion of water is a trespass. Such diversions may be referred to the Attorney General for injunctive relief. (Section 1052(c).) Persons committing a trespass may be liable for up to \$500 for each day in which a trespass occurs. (Section 1052(d).)

Second, Water Code Sections 1055 and 1052 authorizes the SWRCB to impose administrative civil liability for the unlawful diversion and use of water. Persons committing a trespass may be liable for

up to \$500 for each day in which a trespass occurs. (Section 1052(b).) Persons committing a trespass may be liable for up to \$500 for each day in which a trespass occurs.

Finally, Sections 1825, et seq. authorizes the SWRCB to adopt cease and desist orders for violation of conditions in permits and licenses. Cease and desist orders may require compliance forthwith or in accordance with a time schedule. (Section 1831.) Diversion of water in excess of the quantity authorized by permit or license can be treated as a violation subject to enforcement under Section 1831. Persons failing to comply with a cease and desist order are liable for \$1,000 for each day in which violation occurs.

This proceeding was not noticed under any of the enforcement provisions and the SWRCB cannot, at this time, proceed directly to an order under Sections 1055 or 1830. The SWRCB, however, can request the Attorney General to take action under Section 1052. Alternatively, the SWRCB can suspend such a referral provided that Cal-Am takes appropriate actions to: (a) mitigate the effect of its diversions on the environment and (b) develop and diligently pursue a plan for obtaining water from the Carmel River or other sources consistent with California water law.²¹

8.1 Considerations Mitigating Against the Use of Punitive Enforcement Options

In the short term, Cal-Am cannot significantly reduce its extraction from the wells along the Carmel River. As previously stated, most of Cal-Am's supply is obtained from the Carmel River and most of that supply is provided by the wells along the river. The people and businesses on the Monterey Peninsula must continue to be served water from the Carmel River in order to protect public health and safety.

²¹ Cal-Am could satisfy this requirement by contracting with MPWMD for the supply from its proposed project or by proposing to develop water under applications to appropriate water from the Carmel River by storage or from other sources.

Cal-Am introduced exhibits during the hearing which show that during 1980 and 1981, on the basis of available information, the SWRCB was not of the opinion that the water pumped by the wells would require a permit from the SWRCB. (CAL-AM, F and G.) Further, Cal-Am does not contend that the wells are not extracting water from a subterranean stream. (CAL-AM, Closing Brief, 20.) Indeed, Cal-Am has filed an application to appropriate water with the SWRCB. (Application 30215.)²²

Cal-Am also supports the New Los Padres Project proposed by the District as one means for providing a reliable and legal water supply for its customers. (CAL-AM, Closing Brief, 2:4-12.) Finally, Cal-Am has cooperated with the District, DFG, and others to develop and implement measures to mitigate the effect of its diversions on the instream resources of the river. (MPWMD:287,2-15.)

Under circumstances such as these, the imposition of monetary penalties make little sense. Rather, the SWRCB's primary concern should be the adoption of an order which, until a legal supply of water can be developed or obtained, will require that Cal-Am:

- (1) minimize its diversions from the Carmel River,
- (2) mitigate the environmental effects of its diversions, and
- (3) prepare a plan setting forth:
 - (a) specific actions to develop or obtain a legal supply of water and
 - (b) the dates specific actions will have occurred so that progress on the plan can be objectively monitored.

9.0 SUMMARY AND CONCLUSIONS

To summarize the foregoing, we find that:

1. Downstream of RM 15 of the Carmel River, the aquifer underlying and closely paralleling the surface water course of the Carmel River is water flowing in a subterranean stream and subject to

²² Administrative notice is taken that on May 29, 1992, Cal-Am submitted Application 30215 to the SWRCB. The application is for the direct diversion of 42 cfs from its wells along the river.

the jurisdiction of the SWRCB. Cal-Am's wells are drawing water from the subterranean stream associated with the Carmel River.

2. Cal-Am is diverting about 10,730 afa from the Carmel River or its underflow without a valid basis of right. In addition, Cal-Am does not have a pre-1914 right to divert and use water at San Clemente Dam. Cal-Am should be required to diligently develop and implement a plan for obtaining water from the Carmel River or other sources consistent with California water law.
3. Cal-Am diversions are having an adverse effect on: the riparian corridor along the river below San Clemente Dam at RM 18.5, wildlife which depend on instream flows and riparian habitat, and steelhead which spawn in the river. Interim measures mitigating the effects of Cal-Am diversions undertaken by the District should continue to be implemented. Cal-Am should be required to implement interim measures in the event the District fails to continue with its program. In addition, Cal-Am should be required to implement other mitigation measures. Cal-Am should be required to mitigate the effect of its diversions until such time as it is able to obtain water from the Carmel River or other sources consistent with California water law.
4. The SWRCB can request the Attorney General to take action under Section 1052. Alternatively, the SWRCB can suspend such a referral provided that Cal-Am takes appropriate actions to: mitigate the effect of its diversions on the environment and develop and diligently pursue a plan for obtaining water from the Carmel River or other source consistent with California water law. The SWRCB's primary concern should be the adoption of an order requiring Cal-Am to: (1) prepare a plan setting forth (a) specific actions which will be taken to develop or obtain a legal supply of water and (b) the dates specific actions will have occurred so that progress on the plan can be

objectively monitored, (2) minimize its diversions for the Carmel River, and (3) mitigate the environmental effects of its diversions.

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED that Cal-Am shall comply with the following conditions:

1. Cal-Am shall forthwith cease and desist from diverting any water in excess of 14,106 afa from the Carmel River, until unlawful diversions from the Carmel River are ended.
2. Cal-Am shall diligently implement one or more of the following actions to terminate its unlawful diversions from the Carmel River: (1) obtain appropriative permits for water being unlawfully diverted from the Carmel River, (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, provided that water pumped from the Seaside aquifer shall be governed by condition 4 of this Order not this condition, and/or (3) contract with another agency having appropriative rights to divert and use water from the Carmel River.
3. (a) Cal-Am shall develop and implement an urban water conservation plan. In addition, Cal-Am shall develop and implement a water conservation plan based upon best irrigation practices for all parcels with turf and crops of more than one-half acre receiving Carmel River water deliveries from Cal-Am. Documentation that best irrigation practices and urban water conservation have already been implemented may be substituted for plans where applicable.

(b) Urban and irrigation conservation measures shall remain in effect until Cal-Am ceases unlawful diversions from the Carmel River. Conservation measures required by this Order in combination with conservation measures required

by the District shall have the goal of achieving 15 percent conservation in the 1996 water year and 20 percent conservation in each subsequent year.²³ To the extent that this requirement conflicts with prior commitments (allocations) by the District, the Chief, Division of Water Rights shall have the authority to modify the conservation requirement. The base for measuring conservation savings shall be 14,106²⁴ afa. Water conservation measures required by this order shall not supersede any more stringent water conservation requirements imposed by other agencies.

4. Cal-Am shall maximize production from the Seaside aquifer for the purpose of serving existing connections, honoring existing commitments (allocations), and to reduce diversions from the Carmel River to the greatest practicable extent. The long-term yield of the basin shall be maintained by using the practical rate of withdrawal method.
5. Cal-Am shall satisfy the water demands of its customers by extracting water from its most downstream wells to the maximum practicable extent, without degrading water quality or significantly affecting the operation of other wells.
6. Cal-Am shall conduct a reconnaissance level study of the feasibility, benefits, and costs of supplying water to the Carmel Valley Village Filter Plant from its more nearby wells downstream of the plant. The objective of supplying water from the wells is to maintain surface flow in the stream as far downstream as possible by releasing water from San Clemente Dam for maintenance of fish habitat. The results

²³ Each water year runs from October 1 to September 30 of the following year.

²⁴ 14,106 afa represents Cal-Am's total diversions from the Carmel River.

of the study and recommendations shall be provided to the District and DFG for comment.

7. Cal-Am shall evaluate the feasibility of bypassing early storm runoff at Los Padres and San Clemente Dams to recharge the subterranean stream below San Clemente Dam in order to restore surface water flows in the river at an earlier date. The results of the study and recommendations shall be provided to the District and DFG for comment.
8. Cal-Am shall conduct a study of the feasibility, benefits, and costs of modifying critical stream reaches to facilitate the passage of fish. The study shall be designed and carried out in consultation with DFG and the District. The results of the study and recommendations shall be provided to the District and DFG for comment.
9. The studies required by conditions 6, 7, and 8 shall be carried out by persons with appropriate professional qualifications. The studies required by condition 7 shall be completed and submitted to the Chief, Division of Water Rights, within 5 months from the date of this order. The Chief, Division of Water Rights may extend the time for performing the study required by condition 8 upon making a finding that adequate flows were not available to perform the study. The studies required by conditions 6 and 8 shall be completed and submitted to the Chief, Division of Water Rights, within 12 months from the date of this order. The Chief, Division of Water Rights may extend the time for performing the study required by condition 8 upon making a finding that adequate flows were not available to perform the study. The report (or reports) transmitting the results of the study (or studies) shall describe the action (or actions) which Cal-Am will undertake to correct the problems addressed by the studies. Cal-Am shall provide a written response to any comments received on the study. If no action (or actions) will be taken to correct the underlying problem (or problems),

Cal-Am's report shall provide written justification why corrective action is not appropriate. Based upon the results of the studies, recommendations, comments by the District and DFG, and Cal-Am responses, the Chief, Division of Water Rights, shall determine what actions shall be taken by Cal-Am consistent with this Order and establish reasonable times for implementation.

10. Cal-Am shall remove the large rock immediately below the spillway of the Los Padres Dam which results in substantial loss of juvenile steelhead or implement some other reliable measure (or measures) to assure safe passage for fish over or around the rock. Prior to removing the rock Cal-Am shall consult with DFG and obtain any streambed alteration permit required by Fish and Game Code Section 1601. If Cal-Am leaves the rock in place, it shall consult with DFG when evaluating what other measures can be used to assure safe fish passage. Cal-Am shall comply with this measure within 4 months.

11. Cal-Am shall be responsible for implementing all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the District after June 30, 1996.²⁵ Not later than August 30, 1996, Cal-Am shall submit a report to the Chief, Division of Water Rights, identifying mitigation measures which the District does not continue to implement after June 30, 1996. At the same time, Cal-Am shall submit a plan for the approval of the Chief, Division of Water Rights, detailing how it will implement mitigation measures not implemented by the District. The Chief, Division of Water Rights, may excuse Cal-Am from implementing specific mitigation measures only upon making a finding that Cal-Am has demonstrated that it does not have

²⁵ On November 5, 1990 the District adopted a mitigation program to be carried out for five years. The plan is summarized in Section 6.2, *infra*. There is no assurance the District will continue with any or all of the elements of its mitigation program after November of 1995. (MPWMD:289, Vol. III, Appendix 2-D.)

14. The Chief, Division of Water Rights, is authorized to refer any violation of these conditions to the Attorney General for action under Section 1052 or to initiate such other enforcement action as may be appropriate under the Water Code.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 6, 1995.

AYE: John P. Caffrey
Mary Jane Forster
Marc Del Piero
James M. Stubchaer
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board

NOTE: This copy of Order WR 2009-0060 is annotated on page 59 to show the amendment to condition 3. a. (6) directed by Order WR 2010-0001.

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0060

In the Matter of the Unauthorized Diversion and Use of Water
by the California American Water Company

Parties

**Water Rights Prosecution Team¹
California American Water Company**

Interested Parties

**Monterey Peninsula Water Management District, City of Carmel by the Sea,
City of Seaside, Seaside Basin Watermaster, Pebble Beach Company,
Monterey County Hospitality Association, City of Monterey, City of Sand City,
Division of Ratepayers Advocates of the California Public Utilities Commission,
Public Trust Alliance, Carmel River Steelhead Association,
Ventana Chapter of the Sierra Club, California Sportfishing Protection Alliance,
Planning and Conservation League, California Salmon and Steelhead Association,
National Marine Fisheries Service**

SOURCE: Carmel River

COUNTY: Monterey

CEASE AND DESIST ORDER

BY THE BOARD:

INTRODUCTION

The California American Water Company (Cal-Am or CAW) diverts water from the Carmel River in Monterey County. The water is used to supply the residential, municipal, and commercial needs of the Monterey Peninsula area (peninsula) communities. In 1995 the State Water

¹ The Water Rights Prosecution Team includes: (1) James Kassel, Assistant Deputy Director for Water Rights, (2) John O'Hagan, Manager, Water Rights Enforcement Section (3) Mark Stretars, Senior Water Resource Control Engineer, (4) John Collins, Environmental Scientist and (5) Staff Counsels Reed Sato, Yvonne West and Mayumi Okamoto. In addition, for purposes of complying with *ex parte* prohibitions, Kathy Mrowka, Senior Water Resource Control Engineer, is also treated as a member of the Prosecution Team.

Resources Control Board (State Water Board) adopted Order WR 95-10 ([WR 95-10](#)). Among other matters, the order found that Cal-Am was diverting about 10,730 acre feet per annum (afa) of water from the Carmel River without a valid basis of right and directed that Cal-Am should diligently implement actions to terminate its unlawful diversion. Alleging that 13 years after the adoption of Order 95-10 Cal-Am continues to divert about 7,150 afa from the river without a valid basis of right, the Prosecution Team (Prosecution Team or PT) seeks issuance of a cease and desist order under Water Code section 1831, subdivision (d). Cal-Am requested a hearing. This order (1) finds that Cal-Am: (a) failed to comply with the requirements of Order 95-10, and (b) is in violation of Water Code section 1052; and (2) issues a cease and desist order (CDO).

The State Water Board finds as follows:

1.0 LEGAL REQUIREMENTS FOR ISSUING A CEASE AND DESIST ORDER

The State Water Board may issue a cease and desist order as provided in Water Code section 1831. Section 1831 provides in part:

- a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.
- b) The cease and desist order shall require that person to comply forthwith or in accordance with a time schedule set by the board.
- c) The board may issue a cease and desist order only after notice and an opportunity for a hearing pursuant to Section 1834.
- d) The board may issue a cease and desist order in response to a violation or threatened violation of any of the following:
 - (1) The prohibition set forth in Section 1052 against the unauthorized diversions and use of water.²
 - (2) Any term or condition of a permit, license, certification, or registration issued under this division.
 - (3) Any decision or order of the board issued under this part.

Section 1832 provides:

Cease and desist orders of the board shall be effective upon issuance thereof. The board may, after notice and opportunity for hearing, upon its own motion or upon receipt of an application from an aggrieved person, modify, revoke, or stay in whole or in part an cease and desist order issued pursuant to this chapter.

² Water Code section 1052, subsection (a) provides “[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass.”

2.0 NOTICE OF PROPOSED CEASE AND DESIST ORDER

On January 15, 2008, the Assistant Deputy Director for Water Rights³ issued a notice of proposed cease and desist order (draft cease and desist order or draft CDO) to Cal-Am. (SWRCB-7.) Among other matters, the draft CDO alleges that:

- 1) In 1995 the Board adopted Order 95-10. The order required Cal-Am to “diligently implement” measures to terminate its illegal diversions from the river (pp. 2 and 3, Facts 5 and 9).
- 2) Cal-Am has failed to comply with Condition 2 of Order 95-10. Condition 2, requires Cal-Am to terminate its unauthorized diversions from the river (p. 5, Finding 3).
- 3) Since 1995 Cal-Am has illegally diverted at least 7,164 afa from the river (p. 5, Finding 1).
- 4) Cal-Am’s diversions continue to have adverse effects on the public trust resources of the river and should be reduced (p. 5, Finding 2).
- 5) The ongoing diversion is a violation of Water Code Section 1052 prohibiting the unauthorized diversion or use of water (p. 5, Finding 1).

The draft CDO seeks to compel Cal-Am to reduce the unauthorized diversions by specified amounts each year, starting in water year 2008-09 and continuing through water year 2014. For example, in 2008-09 Cal-Am would be required to reduce its unauthorized diversions by 15 percent; another 15 percent reduction would be required in water year 2009-2010, etc. (Staff Exhibit 7.)

3.0 REQUEST FOR HEARING

On February 4, 2008, Cal-Am requested a hearing. (CAW-8, p. 2, ¶ 4.) Cal-Am’s request for hearing states, in part, that:

- 1) the terms and conditions of Order 95-10 are being met (id., p.2, ¶ 1);
- 2) the water diverted from the Carmel River is necessary to protect public health and safety (ibid.);
- 3) the schedule of reduction conflicts with the requirements of the California Public Utilities Commission (ibid.); and
- 4) the schedule for reducing diversions is not supported by the recitals in the draft cease and desist order and is unworkable (ibid.).

4.0 NOTICE OF HEARING

On March 5, 2008, the State Water Board issued a notice of hearing for this proceeding. (CAW-10.) The notice stated that the purpose of the hearing is to receive evidence to

³ The Assistant Deputy Director for Water Rights who issued the draft is James W. Kassel.

determine whether to adopt the draft CDO issued to Cal-Am. (*Id.*, p. 5, Purpose of Hearing.)

The key issue noticed for hearing is as follows:

Should the State Water Board adopt the draft CDO? If the draft should be adopted, should any modifications be made to the measures in the draft order? What is the basis for each modification?

(*Id.*, p. 6, Key Issue.)

4.1 Persons Intervening in the Proceeding

The notice also provided that persons wishing to participate in the proceeding must file a Notice of Intent to Appear. In addition to the Prosecution Team and Cal-Am, the following persons filed Notices of Intent to Appear and participated in the hearing:⁴

Planning and Conservation League
Public Trust Alliance
Carmel River Steelhead Association
Sierra Club, Ventana Chapter
California Sportfishing Protection Alliance
National Marine Fisheries Service
California Salmon and Steelhead Association
Monterey Peninsula Water Management District
Seaside Basin Watermaster
Division of Ratepayers Advocates, California Public Utilities Commission
City of Monterey
City of Seaside
City of Sand City
City of Carmel-by-the-Sea
Monterey County Hospitality Association
Pebble Beach Company

5.0 BACKGROUND

5.1 The Carmel River and Cal-Am Facilities on the River

The Carmel River is a central coast stream that flows into Carmel Bay about five miles south of the City of Monterey. The river drains a watershed area of about 255 square miles. Cal-Am owns and operates the San Clemente Dam, the Los Padres Dam and 21 downstream wells that divert water from the underflow of the river. (See Figure 1, Carmel River Watershed and Figures 2 and 3, Alluvial Groundwater Basin Showing The Location of the California American

⁴ Intervention by the Defenders of Wildlife and Mr. George T. Riley was denied. (May 13, 2008, Rulings on Procedural Issues, p. 4-5, Standing of Persons Filing Notices of Intent to Appear.)

Water Company Wells.) During 1994, the wells supplied “. . . about 69 percent of the water needs of Cal-Am’s customers. The balance of the water supplied to Cal-Am customers is supplied from: (1) San Clemente Dam and Los Padres reservoirs in the upper reaches of the Carmel River and (2) pumped ground water in the City of Seaside.”⁵ (Order 95-10, pp. 2-6.)

5.2 Cal-Am’s Rights to Divert and Use Water from the Carmel River

Order 95-10, section 4.3 (pp. 24, 25) found that Cal-Am has the following rights to divert and use water from the river:

- 1) A pre-1914 appropriative right for 1,137 afa.
- 2) Riparian rights for use within the Carmel Valley on parcels which adjoin the surface watercourse or which overlie water flowing in the subterranean channel. These rights cannot be used to serve water outside the valley or non-riparian parcels within the valley. The order recognized 60 afa of use.
- 3) An appropriative right to divert up to 3,030 afa of water to storage in Los Padres Reservoir from October 1 to May 31 pursuant to the conditions in License 11866. The actual diversion is limited to 2,179 afa due to siltation at Los Padres Reservoir.
- 4) Order 95-10 further found that Cal-Am was diverting about 10,730 afa without a valid basis of right (p. 36, ¶2).

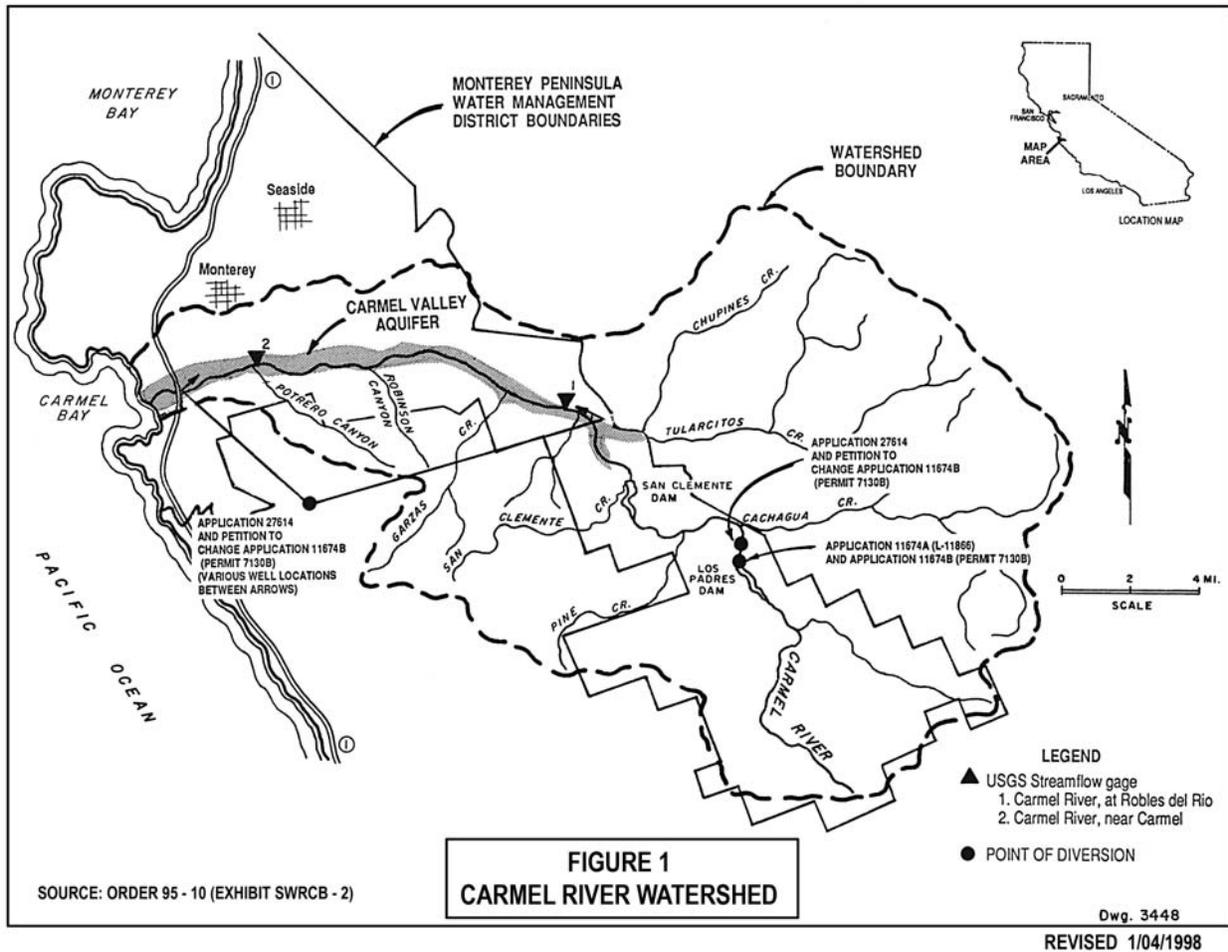
The foregoing findings are binding on Cal-Am.⁶

On November 30, 2007, both the Monterey Peninsula Water Management District (MPWMD) and Cal-Am jointly obtained an additional right to divert water from the river. The State Water Board issued Permit 20808A authorizing the diversion of 2,426 afa water from the river to underground storage in the Seaside Groundwater Basin from December 1 of each year to May 31 of the succeeding year at a maximum instantaneous rate of diversion of 6.7 cubic feet per second (cfs). Thus, Cal-Am’s current legal rights to water in the river that may be used to

⁵ The relative quantity of water delivered from the wells to Cal-Am customers has not materially changed because Cal-Am has failed to develop any meaningful new source of supply. (See 14.0 Cal-Am Has Not Complied with Condition 2 of Order 95-10, *infra*.)

⁶ See Wat. Code, § 1126, subd. (d); see also *People v. Simms* (1982) 32 Cal.3d 468, 477 [principles of *res judicata* and collateral estoppel apply to administrative decision in appropriate circumstances]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944 [discussing the characteristics of administrative proceedings that may be the basis for collateral estoppel]. These findings are also binding on the Monterey Peninsula Water Management District, Pebble Beach Water Company, Carmel River Steelhead Association, Residents Water Committee, Ventana Chapter of the Sierra Club, the California Department of Parks and Recreation, Willis Evans, John Williams, and the California Department of Fish and Game. (Order 95-10, p.7, 2.0 Complaints; p. 9, 2.6 Interested Persons.)

supply peninsula cities is the 3,316 afa recognized in Order 95-10⁷ plus 2,426 afa under Permit 20808A⁸ for a total of 5,742 afa.



⁷ 851 afa is subtracted from this number to adjust for storage loss due to siltation at Los Padres Reservoir.

⁸ As will be discussed, *infra*, the actual amount of additional water supply that may be generated by this project is uncertain, but certainly much less than the face value of the permit.

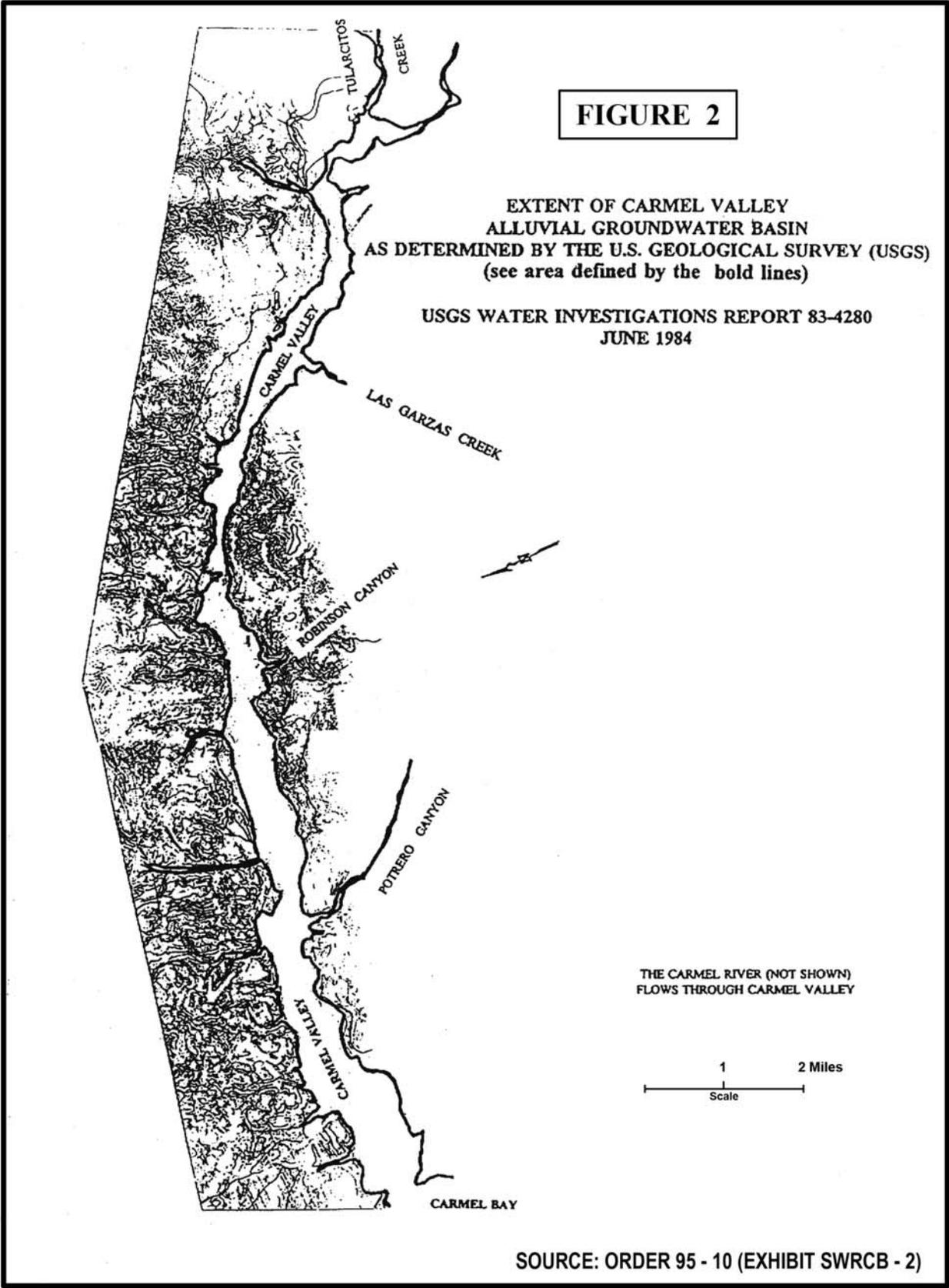
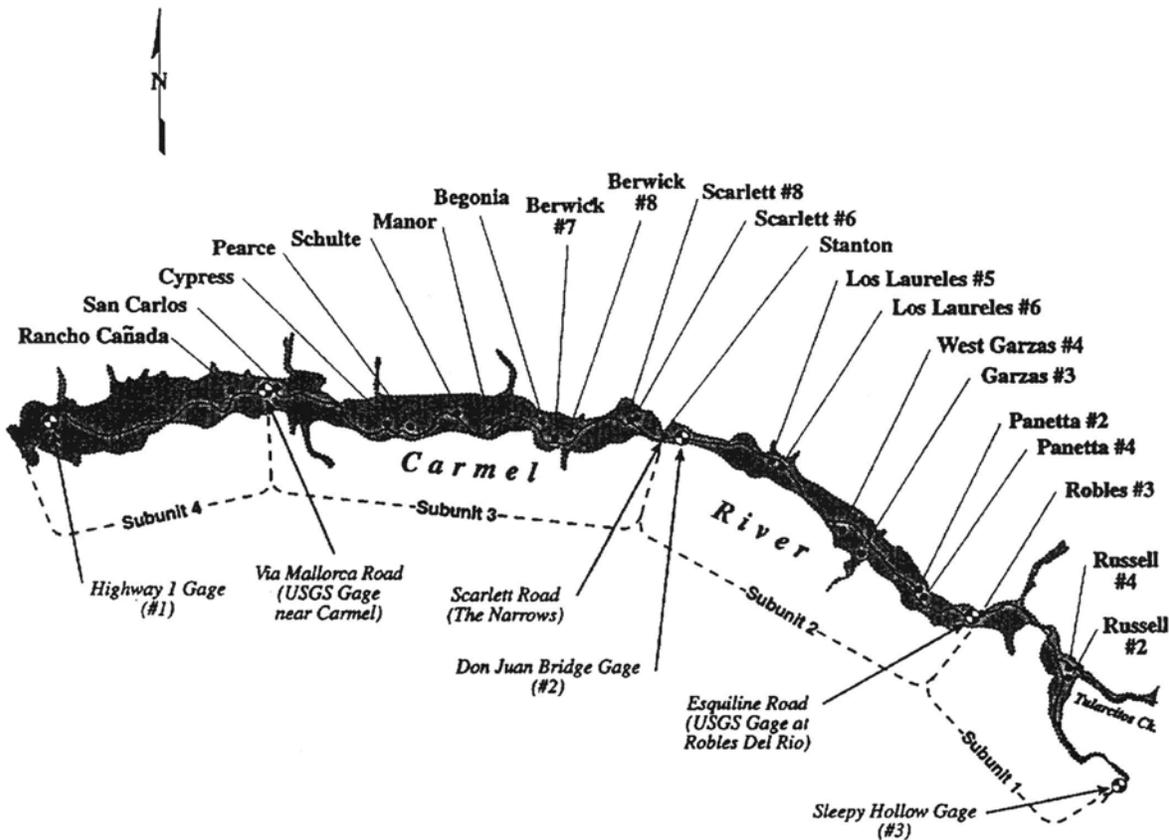


FIGURE 3

ALLUVIAL GROUNDWATER BASIN SHOWING THE LOCATION OF THE CALIFORNIA-AMERICAN WATER COMPANY WELLS



LEGEND

- Water Well
- ⊗ Gaging Station
- ▨ Alluvium
- - - Basin Subunit*

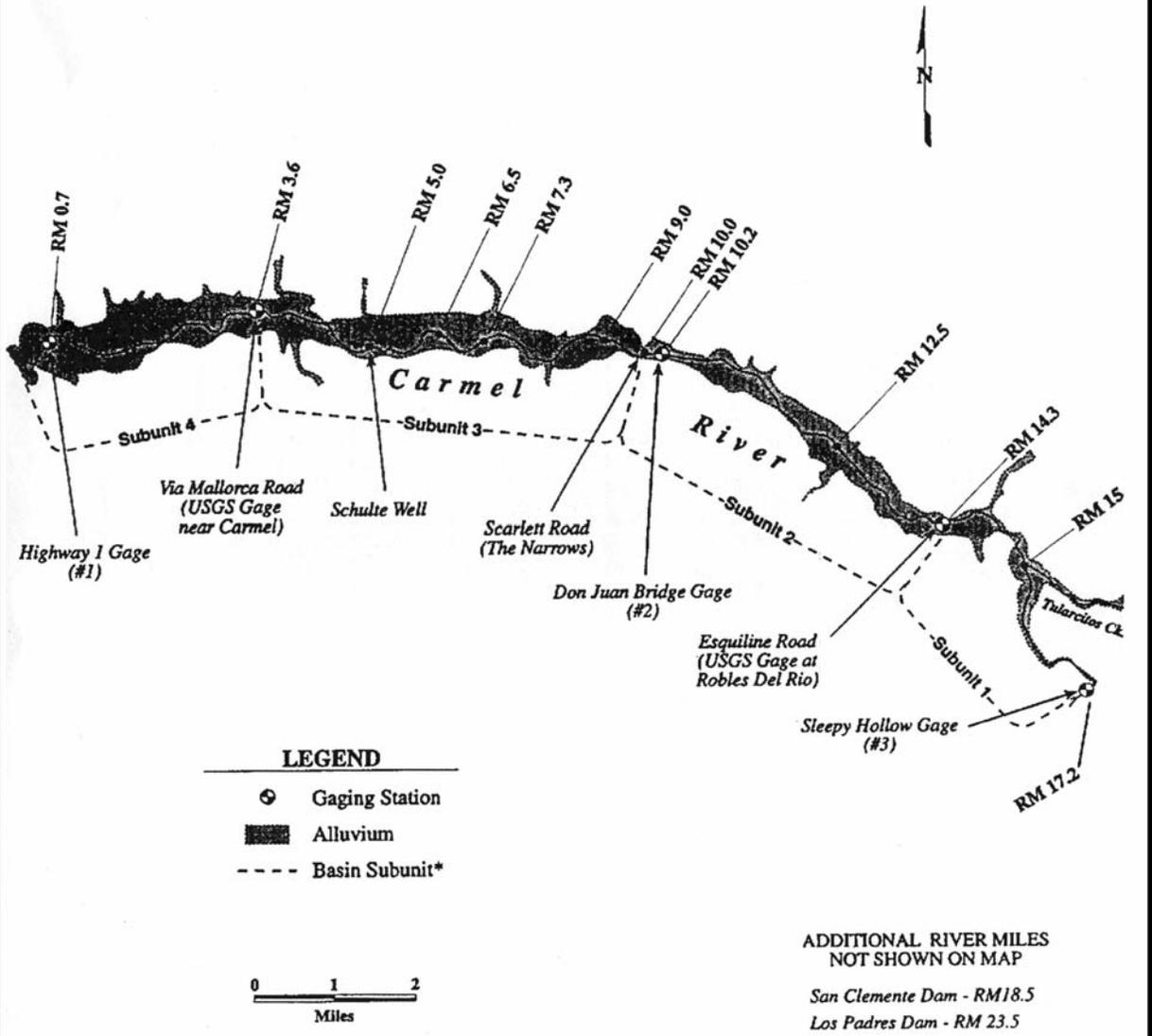
0 1 2
Miles

SOURCE: ORDER 95 - 10 (EXHIBIT SWRCB - 2)

* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage. Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).

FIGURE 4

**ALLUVIAL GROUNDWATER BASIN
IDENTIFYING RIVER MILES (RM)**



SOURCE: ORDER 95 - 10 (EXHIBIT SWRCB - 2)

* Subunits 1-4 form the Carmel Valley Groundwater Basin. The subunit boundaries are: 1. Via Mallorca Road (USGS Gage Near Carmel), 2. Scarlett Road (The Narrows), 3. Esquiline Road (USGS Gage at Robles Del Rio), 4. Sleepy Hollow Gage. Streamgaging will occur at the Highway 1 Gage (#1), Don Juan Bridge Gage (#2), and Sleepy Hollow Gage (#3).

5.3 Effects of Cal-Am's Diversions on the Carmel River in 1995

Order 95-10, section 5.0 (pp 25-29) found that fish and wildlife were being adversely affected by Cal-Am's legal and illegal diversions. Section 5.5 states:

To summarize, Cal-Am diversions have historically had an adverse effect on:
(1) the riparian corridor along the river below RM⁹ 18.5; (2) wildlife that depend on riparian habitat; and (3) steelhead and other fish which inhabit the river.

Cal-Am's combined diversions from the river have the largest single impact on instream beneficial uses of the river, although diversions by other water users also contribute to the adverse effects on fish and wildlife. (Order 95-10, 5.0 Effect of Cal-Am Diversion on Instream Beneficial Uses, p. 25.)

5.4 Conditions Imposed on Cal-Am by Order 95-10

The following conditions in Order 95-10 are particularly pertinent to this proceeding:

1. Cal-Am shall forthwith cease and desist from diverting any water in excess of 14,106 afa from the Carmel River, until unlawful diversions from the Carmel River are ended.
2. Cal-Am shall diligently implement one or more of the following actions to terminate its unlawful diversions from the Carmel River: (1) obtain appropriative right permits for water being unlawfully diverted from the Carmel River; (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, provided that water pumped from the Seaside Aquifer shall be governed by condition 4 of this Order not this condition; and/or (3) contract with another agency having appropriative rights to divert and use water from the Carmel River.
3. (a) Cal-Am shall develop and implement an urban water conservation plan. In addition, Cal-Am shall develop and implement a water conservation plan based upon best irrigation practices for all parcels with turf and crops of more than one-half acre receiving Carmel River water deliveries from Cal-Am. Documentation that best irrigation practices and urban water conservation measures have already been implemented may be substituted for plans when applicable.
(b) Urban and irrigation conservation measures shall remain in effect until Cal-Am ceases unlawful diversions from the Carmel River. Conservation measures required by this Order in combination with conservation measures required by the District shall have a goal of achieving 15 percent conservation in the 1996 water year and 20 percent conservation in each subsequent year.¹⁰ To the extent that this requirement conflicts with prior commitments (allocations) by the District, the Chief, Division of Water Rights shall have the authority to modify the conservation requirement. The base for measuring

⁹ "RM" means river mile. See Figures 3 and 4.

¹⁰ Footnote 23 of the Order provides that "[e]ach water year runs from October 1 to September 30 of the following year."

water conservation shall be 14,106 afa. Water Conservation measures required by the order shall not supersede any more stringent water conservation requirements imposed by other agencies.

Litigation followed the adoption of Order 95-10.¹¹ The parties negotiated changes to some of the conditions in Order 95-10. Accordingly, on February 19, 1998, the State Water Board adopted [Order WR 98-04](#), replacing Condition 4 of Order 95-10 with the following:

4. Cal-Am shall maximize production from the Seaside Aquifer for the purpose of serving existing connections, honoring existing commitments (allocations), and to reduce diversions from the Carmel River to the greatest extent practicable during periods of low flow. Cal-Am shall minimize diversions from the Seaside Aquifer whenever flow in the Carmel River exceeds 40 cfs at the Highway One Bridge from November 1 to April 30. The long-term yield of the basin shall be maintained by using the practical rate of withdrawal method.

5.5 Decision 1632

The State Water Board adopted [Decision 1632](#) and Order 95-10 on the same day, July 6, 1995. Decision 1632 approved Application 27614 by MPWMD and the issuance of a permit to appropriate water from the Carmel River via the New Los Padres Project.¹² Up to 42 cfs of water could be taken by direct diversion, and up to 24,000 afa could be diverted to storage. The decision included numerous conditions to mitigate (1) the effects of the proposed project on the fish and wildlife in the river and (2) the effects of existing diversions from the river. Condition 11, specifically prohibited the MPWMD from diverting water pursuant to Decision 1632 unless Cal-Am had obtained an alternate supply of water for its illegal diversion from the river. Condition 11 recognizes that a contract between Cal-Am and MPWMD could be one means by which Cal-Am could obtain a legal supply of water. This means of providing a legal water supply for Cal-Am did not become available, however, because in 1995 the voters of MPWMD rejected the bond issue proposed to finance the project. (CAW, Exb. 32, pp. 2, 5-7.)

¹¹ MPWMD, CAW, the Sierra Club, the Carmel River Steelhead Association and the California Sportfishing Protection Alliance filed petitions for writs of mandate in Monterey County Superior Court (*Monterey Peninsula Water Management District, et al. v. State Water Resources Control Board* (Monterey County Superior Court No. M 33519), *Monterey Peninsula Water Management District, California-American Water Company v. State Water Resources Control Board* (Monterey County Superior Court No. M 33520), and *Sierra Club, Inc. et al. v. State Water Resources Control Board* (Monterey County Superior Court No. 105610) against the State Water Board, challenging certain provisions in Decision 1632 and Order 95-10.

¹² See Figure 1.

5.6 Administrative Civil Liability Issued to Cal-Am

Condition 3(b) of Order 95-10 (p. 40) required Cal-Am to develop and implement an urban water conservation plan to conserve 15 percent during the 1996 water year and 20 percent during each succeeding water year. Cal-Am failed to conserve 20 percent during 1997 and on October 20, 1997, Administrative Civil Liability Complaint No. 262.10-03 (ACL) was issued to Cal-Am. (PT-4.) The ACL proposed the imposition of civil liability on Cal-Am in the amount of \$168,000 for its failure to conserve water as required by Condition 3(b) and for the continuing unauthorized diversion of water from the river. This ACL Complaint was superseded on August 19, 1998, by ACL Complaint No. 262.5-6. (PT-5.) Both ACL complaints allege that Cal-Am's ongoing diversions from the river are unauthorized and illegal. (PT-4, ¶¶ 1, 3-6; PT-5, ¶¶ 1, 3-6.)

The initial ACL complaint was superseded in response to a Cal-Am settlement proposal. Cal-Am proposed that, in lieu of paying the civil liability, it would join in a number of transactions and undertakings with the Pebble Beach Community Services District (PBCSD) that would increase the amount of potable water conserved within PBCSD by approximately 400 to 500 afa. Cal-Am's proposal took effect pursuant to ACL Complaint No. 262.5-6, which states that the increased conservation would help to reduce damage to and to restore the public trust resources of the river. (PT- 5, ¶ 10.) The proposed civil liability was suspended pending compliance with the measures Cal-Am was to undertake with the PBCSD. The final order also required Cal-Am to reduce its illegal diversions from the river by 15 percent.

5.7 Cal-Am is an Investor-Owned Public Utility

Cal-Am is an investor-owned public utility holding a Certificate of Public Convenience and Necessity from the California Public Utilities Commission (PUC). Cal-Am must obtain approval from the PUC to: (a) charge higher rates; (b) recover expenses which are appropriate and prudently incurred; and (c) provide a fair return on Cal-Am's invested capital. (Exb. CAW-029, p. 2, 4-10.)

6.0 OFFICIAL NOTICE

As a preliminary matter, we will address papers requesting that official notice be taken of the official acts of other agencies. The State Water Board may take official notice of such acts as may be judicially noticed by the courts of this state. (Cal. Code of Regs., tit. 23, § 648.2.) The courts may take official notice of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).) Factual statements contained in officially noticed papers are subject to the rules against hearsay. Neither the parties nor the State Water Board may rely upon statements of fact in officially noticed papers to bypass normal evidentiary rules.

6.1 Request for Official Notice by the Sierra Club

On November 10, 2008, the Sierra Club filed papers requesting that official notice be taken of five actions of the National Marine Fisheries Service (NMFS). (November 10, 2008, Sierra Club, Request for Official Actions of National Marine Fisheries Service etc.) The actions are:

- 1) The August 18, 1997 listing of the steelhead population within the California Central Coast as threatened under the Endangered Species Act¹³ (ESA). (62 Fed.Reg. 43937.)
- 2) The January 5, 2006 listing reaffirming the threatened status of the steelhead population within the California Central Coast under the Endangered Species Act. (71 Fed.Reg. 834, 859.)
- 3) The September 2, 2005 listing of the Carmel River as critical habitat for the steelhead. (70 Fed.Reg. 52488.)
- 4) The July 10, 2000 promulgation of a section 4(d) rule under the ESA defining exceptions to the “takings” prohibitions of the act. (65 Fed.Reg. 42422.)
- 5) The December 30, 1997 proposed rule under section 4(d) of the ESA pertaining to “takings” of West Coast Steelhead. (64 Fed.Reg. 73479 at 73483.)

The State Water Board will take official notice of the requested actions. Some of the foregoing actions have been codified at 50 Code of Federal Regulations at sections 223.102 and 223.203. Official notice is also taken of these provisions.

6.2 Notices of Potentially Relevant Information by Sierra Club

On March 25, 2009, the Sierra Club filed a Notice of Potentially Relevant Information. The notice referenced and attached a report prepared by the MPWMD staff for the March 26, 2009

¹³ 16 U.S.C. § 1531, et seq.

board meeting of MPWMD. Entitled "Carmel River Fishery Report for February 2009," the report consists of three pages of summarizing information addressing (1) aquatic habitat and flow conditions in the Carmel River, (2) the breaching of the sand bar for the Carmel River Lagoon by Monterey County Public Works, (3) the adult steelhead count at the San Clemente Dam for the early months of 2009 (See Figure 1), (4) the adult steelhead count at Los Padres Dam for the same period, and (5) a report of fish released from the Sleepy Hollow Steelhead Rearing Facility on February 20, 2009. While not expressly requesting that official notice be taken of the MPWMD staff report, the Sierra Club expresses the view that official notice may be taken of the staff report. Thereafter, on April 10, 2009, counsel for Cal-Am filed a paper entitled "Partial Opposition to Sierra Club Notice of Potentially Relevant Information." Cal-Am objects to official notice being taken of the staff report on the basis that the report is not an official act of an agency.

On May 21, 2009, the Sierra Club filed a second Notice of Potentially Relevant Information. The notice referenced and attached a report prepared by the MPWMD staff for the May 21, 2009, board meeting of MPWMD. Entitled "Carmel River Fishery Report for April 2009," the report consists of three pages updating the information addressed in the previous report. Counsel for the Sierra Club contends, without supporting papers, that the staff report was prepared in the regular course of business by MPWMD employees. The State Water Board declines to take official notice of the reports offered by the Sierra Club. In our view, the nature of the information is such that Cal-Am should have the opportunity to fully test the offer of such information and to rebut the information before it is admitted into the record. In addition, it is late in this proceeding to attempt to augment the record in a material way. Further, reopening the evidentiary record would substantially delay reaching a decision on the evidentiary record that ended on August 8, 2008.

Finally, on July 16, 2009, the Sierra Club filed a Notice of Potentially Relevant Information. The notice identifies four items that are relevant to some of the issues in this proceeding. These documents are:

1. PUC Decision 09-07-023, dated July 9, 2009, which among other matters, provides that outdoor watering may be restricted, adopts a rationale for rationing the use of water for outdoor irrigation and authorizes the use of flow restrictors on water meters for the repeated waste of water. Appended to the PUC decision are:

- (a) Settlement Agreement between the Division of Ratepayers/Advocates, MPWMD and Cal-Am on Water Conservation and Rationing.
 - (b) Rule 14.1, Water Conservation and Rationing Plan, for MPWMD, as amended and effective on February 11, 2009.
2. PUC Decision 09-02-009, dated February 20, 2009, which among other matters provides that Cal-Am may provide confidential customer water use information to MPWMD.

Official notice is taken of these papers.

6.3 Request for Official Notice by Cal-Am

On February 3, 2009, Cal-Am filed a request for official notice. Cal-Am requests that the State Water Board take official notice of the draft Environmental Impact Report (EIR) for the Coastal Water Project published by the California PUC on January 30, 2009. Official notice is taken of the publication of the draft EIR.

6.4 Request by the Public Trust Alliance

On February 11, 2009, the Public Trust Alliance (PTA) filed a request for official notice. PTA requests that the State Water Board take official notice of the recent opinion of the California Supreme Court (Opinion No. S155589), *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731. The State Water Board takes official notice of the opinion.¹⁴

6.5 Request by the National Marine Fisheries Service

On August 26, 2009, NMFS filed written comments on the draft cease and desist order released by the State Water Board on July 27, 2009. Among other matters, the comments note that findings made in “Section 17.4 Mitigation Measures to be Implemented Pursuant to Settlement” of the draft CDO are based upon a 2006 agreement that is no longer in effect and that a new agreement, dated March 3, 2009, between the National Oceanic and Atmospheric Administration (NOAA), the California Department of Fish and Game (DFG) and Cal-Am is now

¹⁴ A request for official notice or other notification is not required for the State Water Board to consider decisional law of the courts of this state. (See Evid. Code, §§ 451, 455.)

the controlling agreement. The State Water Board will treat the letter as a request that official notice be taken of the 2009 agreement and official notice is taken of the agreement.

7.0 EVIDENCE PERTAINING TO PUBLIC TRUST RESOURCES

The May 13, 2008 Ruling on Procedural Issues provided that “consideration would be given to the public trust within the context of the enforcement proceeding. . .”¹⁵ (Evidence Pertaining to Public Trust Resources Within an Enforcement Proceeding, p. 4, § 4.0.)

Based upon the Notices of Intent¹⁶ filed by some intervening parties, it appeared that these parties would seek to have the State Water Board apply the public trust doctrine to Cal-Am’s legal diversions in addition to the unauthorized diversions subject to the notice of hearing. Cal-Am filed a motion seeking to exclude such testimony from this proceeding. (CAW, Prehearing Brief on Procedural Matters, III. Scope of Hearing, pp. 8-15.) The May 13, 2008, Rulings on Procedural Issues provided that any attempt to apply the public trust doctrine to Cal-Am’s legal diversions was outside the scope of the issues noticed for this proceeding. Further, the Hearing Officers declined to initiate an ancillary proceeding to consider whether to apply the public trust doctrine to Cal-Am’s legal diversions. (*Ibid.*)

8.0 HEARING HELD

On April 1, 2008, the State Water Board held a public hearing in Monterey to receive public policy statements from anyone concerned with the draft CDO issued to Cal-Am. Seven days of evidentiary proceedings were held in Sacramento on June 19 and 20; July 23, 24, and 25; and August 7 and 8, 2008.

¹⁵ “The extent of harm to the public trust may be relevant to determining how long the schedule should be for achieving compliance. A cease and desist order may also include measures to avoid or mitigate adverse effects on public trust uses during a period of continuing violations before full compliance is achieved. Where the parties propose different remedies, public trust impacts will also be relevant to the . . . choice of remedies.” (*Ibid.*)

¹⁶ Persons seeking to intervene in a State Water Board proceeding must file a Notice of Intent. The Notice of Intent requires the filer to indicate the name of proposed witnesses and the subject of proposed testimony.

9.0 CAL-AM HAS BEEN PROVIDED A FAIR HEARING

Alleging the State Water Board has failed to provide due process protection, Cal-Am requests that this action be dismissed. (October 9, 2008 Closing Brief, p. 25, 8-17; also see CAW April 23, 2008, Motion to Ensure Due Process.) In its April 23, 2008 Motion to Ensure Due Process, Cal-Am states the State Water Board must afford Cal-Am its constitutional due process protections and alleges, that “[t]he structure of the proceeding gives rise to concerns that such protections do not exist in this proceeding.” Cal-Am has not alleged that those participating in the proceeding are or may be biased; rather, Cal-Am seeks a hearing that contains no appearance of bias. In Cal-Am’s view, the specific matters giving rise to an appearance of bias include the involvement of the following persons in this proceeding: (1) Mr. James W. Kassel, Assistant Deputy Director for Water Rights; (2) Ms. Kathy Mrowka, Senior Engineer in the Compliance Unit of the Division of Water Rights; and (3) Mr. M. G. (Buck) Taylor, Senior Staff Counsel assisting the Hearing Officers in this proceeding. Cal-Am made no allegation of improper bias on the part of either Hearing Officer.

During the conduct of administrative proceedings, the adjudicative function must be separated from the investigative, prosecutorial, and advocacy functions within an agency. (Gov. Code, § 11425.10, subd. (a)(4).) Cal-Am’s appearance of bias claims arise out of the fact that some of the personnel in this proceeding have had responsibilities in other proceedings or other State Water Board activities that are claimed to be inconsistent with their roles in this proceeding. More specifically, Mr. Kassel, who is part of the Prosecution Team in this proceeding, has general managerial responsibilities over personnel who include staff assisting the Hearing Officers in this proceeding. In addition, Ms. Mrowka, a witness called by the Prosecution Team in this proceeding, assisted the Hearing Officers and the State Water Board at the time Order 95-10 was adopted, and has reviewed and drafted responses to quarterly compliance reports filed by Cal-Am since the adoption of Order 95-10.

Cal-Am’s fair hearing argument relies on the view that an appearance of bias, without evidence of actual bias, is sufficient to deny due process. In *Morongo Band of Mission Indians v. State*

Water Resources Control Bd (2009) 45 Cal.4th 731, the California Supreme Court rejected that view.¹⁷ The court concluded:

In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular. In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting *ex parte* communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.

(*Id.* at p. 741.)

Both separation of functions and *ex parte* prohibitions were in effect throughout this proceeding.

The March 5, 2008 Notice of Hearing included the following:

Hearing Officer and Hearing Team

State Water Board Members Arthur G. Baggett, Jr., and Gary Wolff will preside as hearing officers over this proceeding. Other members of the State Water Resources Control Board may be present during the pre-hearing conference, the meeting to receive public policy statements, and the hearing. State Water Board staff hearing team members will include Staff Counsel Buck Taylor, Engineering Geologist Paul Murphey, Water Resources Control Engineer Ernest Mona and Environmental Specialist Jane Farwell. The hearing staff will assist the hearing officers and other members of the [State Water Board] throughout this proceeding.

A staff prosecutorial team will be a party in this hearing. State Water Board prosecutorial team members will include Yvonne West, Staff Counsel, and Reed Sato, Director of the Office of Enforcement. Other members of the Prosecution Team from the Division of Water rights include Jim Kassel, Assistant Deputy Director for Water Rights, John O'Hagan, Supervising Water Resource Control Engineer, Mark Stretars, Senior Water Resource Control Engineer, and John Collins, Staff Environmental Scientist.

¹⁷ Cal-Am's appearance of bias test was supported by only one published opinion. (*Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 817 (*Quintero*)). In addition, Cal-Am inappropriately cited the Court of Appeal's opinion in *Morongo Band of Mission Indians v. State Water Resources Control Board*, even though California Supreme Court had granted review. (See Cal. Rules of Court, rule 8.1105, subd. (d)(1) [when the California Supreme Court grants review, the Court of Appeal's opinion is no longer considered published; see also *id.*, rule 8.1115 [unpublished opinions should not be cited or relied on].) In *Morongo Band of Mission Indians v. State Water Resources Control Board*, the California Supreme Court disapproved of *Quintero* to the extent that it is inconsistent with the Supreme Court's decision. (45 Cal.4th 731, 740.)

The Prosecution Team is separated from the hearing team, and is prohibited from having *ex parte* communications with the hearing officers, other members of the State Water Board and members of the hearing team regarding substantive issues and controversial procedural issued within the scope of this proceeding.¹⁸

In addition, on May 13, 2008, various procedural rulings were made addressing Cal-Am's *ex parte* concerns. The rulings enlarged and made more explicit the prohibition against *ex parte* contacts within the State Water Board as follows:

Cal-Am's motion may be understood as a request for clarification as to the role of the Board personnel who were copied on the email and of other personnel. Those persons are: Michael Lauffer, Andy Sawyer, Larry Lindsay, Les Grober, Vicky Whitney, Tom Howard, and Dorothy Rice. These persons and Chief Deputy Director Jonathan Bishop are not involved in the day-to-day work of this proceeding but as part of management will be kept advised of the work of this proceeding. Some of these persons also exercise authority over the work of members of the hearing team in this proceeding. As a matter of practice in this and other water right proceedings, the State Water Board applies the same *ex parte* rules to supervisors and managers who are substantially involved in an advisory function, either through their supervision on the work of the hearing team members in the proceeding or through advice to Board members in the proceeding, as apply to hearing team members. These supervisory and management personnel do not accept *ex parte* communications from the Prosecution Team or the parties.

(April 13, 2008, Rulings on Procedural Issues Involving Considerations of a Cease and Desist Order Against California American Water (Cal Am) for Unauthorized Diversion of Water from the Carmel River in Monterey County.)¹⁹

The separation of investigatory and prosecutorial and adjudicatory functions is facilitated by the manner in which the Division of Water Rights is organized. The Division is divided into three major sections: the Permitting Section, the Hearings and Special Programs Section and the Enforcement Section. The first point at which all three sections share common management is

¹⁸ In addition to the foregoing, the hearing notice included an attachment entitled "Information Concerning Appearance at the Water Rights Hearing." The attachment provided the following guidance re *ex parte* contacts:

7. *Ex Parte* Contacts: During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications between either the State Water Board members or State Water Board hearing staff and any of the other participants, including the members of the prosecution team, regarding substantive issues with the scope of this proceeding. (Gov. Code, §§ 11430.10-11430.80.) Communications regarding non-controversial procedural matters are permissible and should be directed to the State Water Board staff attorney on the hearing team, not State Water Board members. (Gov. Code § 11430.20.) A document regarding *ex parte* communications entitled "*Ex Parte* Questions and Answers" is available upon request or from our website at: <http://www.waterboards.ca.gov/docs/exparte.pdf>.

¹⁹ This discussions goes on to state that the hearing notice will be updated to make clear the role of supervisors and managers in this proceeding. The May 13, 2008 rulings on procedural issues were sent to all of the parties, but no subsequent hearing notice was issued regarding the *ex parte* issue.

at the level of the Assistant Deputy Director for Water Rights (Assistant Deputy Director), Mr. Kassel's position. (RT, Ph. 2, Vol.1, pp. 222, 17 - 223, 25.)

9.1 Mr. Kassel's Involvement in this Proceeding has not Violated Cal-Am's Due Process Rights

Mr. Kassel issued the draft CDO to Cal-Am. As the Assistant Deputy Director, he has managerial responsibilities over all the functions within the Division of Water Rights, including the Hearings and Special Programs Section and the Enforcement Section. However, his role as a manager over the Hearings and Special Programs Section is circumscribed once a notice of proposed cease and desist order is issued. That is, he is prohibited by *ex parte* rules from communicating with the hearing staff, the Hearing Officers and all the State Water Board members in regard to this matter. (CAW-10, p. 3, ¶ 4.)

Mr. Kassel testified during this proceeding at the request of counsel for Cal-Am. In response to questions from Cal-Am's counsel, Mr. Kassel testified to the following: (1) he approved the issuance of the draft CDO; (2) the draft CDO was prepared under his direction and the direction of Mr. O'Hagan; (3) before sending the draft CDO to Mr. Turner at Cal-Am, he discussed the draft order with Mr. O'Hagan and his counsel; (4) in accordance with his delegation of authority from the State Water Board (the delegation requires him to inform his superiors of controversial issues), copies of the draft CDO were provided to his supervisor (Ms. Whitney) and her supervisor (Mr. Howard); (5) following issuance of the draft order, he discussed the order with a number of persons outside of the State Water Board and the State Water Board's public affairs officer; (6) since issuance of the draft CDO order, Mr. Kassel has not spoken to anyone employed by the State Water Board about this matter other than members of the Prosecution Team and Enforcement Section; (7) his supervisor, Ms. Whitney, is responsible for supervising the Hearings and Special Programs Section with regard to an enforcement proceeding; and, finally, (8) that only he is responsible for the management and supervision of the Enforcement Section with regard to an enforcement proceeding. (RT, Ph. 2, Vol. 1, p. 216,13 – p. 231,25.)

Mr. Kassel's testimony shows that he and the management of the Division of Water Rights have separate duties and responsibilities with regard to the (a) adjudicative and (b) investigative, prosecutorial and advocacy function in enforcement proceedings and that the separated duties and responsibilities are consistent with the *ex parte* prohibitions set forth in the March 5, 2008 Notice of Hearing and with the separation of functions required by the due process requirements of the Administrative Procedures Act. (See Gov. Code, §§ 11425.10, subd. (a)(4), 11425.30.)

We conclude that Mr. Kassel's involvement in this matter has not violated Cal-Am's due process.

9.2 Ms. Mrowka's Involvement in this Proceeding has not Violated Cal-Am's Due Process Rights

Ms. Mrowka is a Senior State Water Board Engineer. She was a member of the hearing team that assisted the State Water Board when Order 95-10 was adopted in 1995. (PT-2, p.2, Order 95-10 and Decision 1632, ¶ 1.) Among other matters, Condition 13 of the Order 95-10 required Cal-Am to file quarterly compliance reports. Ms. Mrowka reviewed the reports and drafted correspondence to Cal-Am for the Division. (PT-2, p. 6, *Compliance With the Order.*) Cal-Am did not introduce testimony or other evidence nor does the record contain testimony or other evidence demonstrating that Ms. Mrowka's evaluations of Cal-Am's quarterly compliance reports were prepared as part of an investigation leading to the issuance of the draft CDO.

For some years, Ms. Mrowka has served within the Permitting Section of the Division of Water Rights. (PT-1; RT, Ph. 1, Vol. 1 p. 31, 21 – p. 32, 6.) No one in the Enforcement Section has any managerial or supervisory responsibility over the Permitting Section. (*Id.*, p. 23, 8-18.) Finally, no one within the Division of Water Rights consulted with Ms. Mrowka before issuance of the draft CDO. (*Id.*, p. 91, 24 – p. 92, 4.)

Ms. Mrowka's direct testimony consists of a series of statements summarizing: (1) her professional background; (2) a description of the Carmel River watershed; (3) the background and history leading up to Order 95-10; (4) the contents of Order 95-10 and changes to the order; (5) her views on the intent of Order 95-10, as amended; and (5) Cal-Am's compliance, or lack thereof, with the requirements of Order 95-10. With minor exceptions, her testimony is no more than a summary of information found in the State Water Board's public records. The staff of the Enforcement Office discussed the draft CDO with Ms. Mrowka only after she was asked if she would appear as a witness. (*Id.*, p. 94, 5-25.) Ms. Mrowka was asked to be a witness shortly before the Notices of Intent to appear were due, that is after the draft CDO was already issued.²⁰ (*Id.*, p. 95, 1-4.) Ms. Mrowka, did not discuss her testimony or opinions on the draft CDO with any member of the hearing team. (*Id.*, p. 23, 15-19.)

Prior to this proceeding, Ms. Mrowka: (1) had not previously met or worked with Hearing Officer Wolff or any other member of the State Water Board as part of a hearing team other than

²⁰ The March 5, 2008, Notice of Hearing required the Notices of Intent to be filed by March 14, 2008.

Hearing Officer Mr. Baggett; and (2) had not worked with Mr. Baggett as part of a hearing team since 2004. (*Id.*, p. 20, 23-25.)

Ms. Mrowka's testimony shows she did not participate in an investigation leading to the issuance of the draft CDO for this proceeding, nor has she participated in the advocacy or prosecution of this case other than as a witness. Further, she has not assisted the State Water Board in its adjudicative functions for four years. Accordingly, we conclude that Ms. Mrowka's participation as a witness in this proceeding has not violated the requirement that the State Water Board must separate its (a) adjudicatory function from its (b) investigative, prosecutorial and advocacy functions and that her involvement in this proceeding has not violated Cal-Am's due process.

9.3 Other Due Process Concerns

Cal-Am contends that its due process rights were violated when Cal-Am's compliance with Order 95-10 was discussed during a meeting with State Water Board staff and Mr. Turner, the President of Cal-Am, because both Ms. Mrowka and Mr. Taylor were present. (October 9, 2008, Closing Brief, p. 25, 14; RT, Ph. 1, Vol. 1, p. 92, 16 -19; RT, Ph. 1, Vol. 2, p. 455, 19 – p. 456, 23.) The meeting occurred on December 13, 2007, before the draft CDO was issued. (RT, Ph. 1, Vol. 1, p. 92, 16-19.) The draft CDO was issued on January 15, 2008. Cal-Am alleges that this meeting reflects an improper mixing of advisory and prosecutorial roles and the action should be dismissed. (October 9, 2008, Closing Brief, p. 25, 15-17.)

Cal-Am points to nothing in the transcripts or exhibits, nor have we found anything in the record, that shows that Mr. Taylor was involved in the investigation, prosecution or advocacy functions of this proceeding. Further, Cal-Am has not pointed to anything in the record showing that Ms. Mrowka was involved in the investigation leading up to the issuance of the draft CDO. Indeed, her testimony shows quite the opposite. Ms. Mrowka was not identified as a member of the Prosecution Team in the Notice of Hearing and only became involved in this proceeding when asked if she would testify as a witness. (See 9.2 above, Ms. Mrowka's Involvement in this Proceeding Does Not Violate Due Process, ¶ 3.) We conclude that Cal-Am's due process concerns with regard to Ms. Mrowka's and Mr. Taylor's participation in a meeting with Cal-Am are not supported by the record in this proceeding.

9.4 The State Water Board Complied with *Ex Parte* Prohibitions

In its April 23, 2008 Motion to Ensure Due Process, Cal-Am also made claims that certain communications among staff were *ex parte* communications and that the composition of the Prosecution Team creates an appearance of bias. These communications include:

(1) Mr. Kassel sending copies of the notice of proposed CDO sent to Cal-Am to Thomas Howard, State Water Board Chief Deputy Director, to Victoria Whitney, Deputy Director for Water Rights, and to Andy Sawyer, Assistant Chief Counsel; and (2) Mr. Larry Lindsay sending copies of an email sent to the parties to various members of State Water Board management. Cal-Am also contends that listing Mr. Kassel as a member of the Prosecution Team creates an appearance of bias. We find that our Hearing Officers' April 13, 2008 responses to these concerns are appropriate and, by reference, affirm and adopt those responses in this order. (April 13, 2008, Rulings on Procedural Issues Involving Considerations of a Cease and Desist Order Against California American Water (Cal-Am) for Unauthorized Diversion of Water from the Carmel River in Monterey County.)

9.5 Cal-Am's Request for Dismissal Denied

Cal-Am's request that this proceeding be dismissed for lack of due process is unsupported by either the law or the record in this proceeding. More specifically, the record demonstrates there has been no improper mixing of the: (a) adjudicatory and (b) investigatory, prosecutorial and advocacy functions of the State Water Board. We conclude that Cal-Am has been provided a fair hearing and that its request for dismissal should be denied.

10.0 ORDER WR 95-10 DOES NOT AUTHORIZE CAL-AM TO DIVERT WATER FROM THE RIVER IN EXCESS OF ITS WATER RIGHTS

The notice of proposed CDO alleged two bases for issuing a CDO: (1) violation of condition 2 of Order 95-10; and (2) unlawful diversion of water in violation of Water Code section 1052. (Draft CDO at p. 5, Staff Exhibit 7.) Cal-Am contends that a CDO may be issued only on the first basis, that is, for a violation of Order 95-10. Further, Cal-Am contends that Order 95-10 authorizes Cal-Am to divert water from the Carmel River (even though Cal-Am does not hold water rights for those diversions) and that a CDO may not be issued for a violation of Water Code section 1052.

Cal-Am contends that Order 95-10 required the imposition of a physical solution and authorized Cal-Am to continue its diversions from the river in exchange for the performance of mitigation measures. (April 23, 2008, CAW Opposition to Pre-Hearing Briefs, p. 5, 10 – 6, 15; Cal-Am's October 9, 2008 Closing Brief, B. The State Water Board Can Issue a CDO Against Cal-Am Only If The Board Finds Cal-Am is Threatening To Violate Or has Violated Condition 2 Of Order 95-10, p. 5, 13 - 7, 9.) Cal-Am states "Order 95-10 is a unique, interim physical solution, which provides CAW with a non-traditional authorization to extract water in excess of its water rights." (Oct. 9, 2008 Closing Brief, p.4, 22-p.5, 1.)

The concept of a physical solution is a judicial development following the adoption of article X, section 2 of California's Constitution in 1928. Article X, section 2 provides, in part:

The right to water or to the use of flow of water in or from a natural stream or water course in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable method of use or unreasonable method of diversion of water.

The judiciary, and the State Water Board in appropriate circumstances, may impose a physical solution, providing a practical remedy that avoids waste or unreasonable use and is consistent with the water rights of the parties. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1249.) This is an equitable remedy developed by the courts to comply with article X, section 2. (*Ibid.*) The doctrine is used to develop solutions that maximize the beneficial use that can be obtained from a limited supply of water among competing claimants who have valid water rights. (See [State Water Board Order WR 2004-0004](#) at p. 15.) The courts have never used the physical solution doctrine to authorize the diversion and use of water in the absence of a legal right to divert and use water. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 309 ["The rights not subject to the statutory appropriation procedures are narrowly circumscribed . . . and include only riparian rights and [pre-1914 rights]."]; *id.* at pp. 308-309 [water right permitting requirements are in furtherance of article X, section 2 of the California Constitution; Wat. Code, § 1025 [same]; cf. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243 [A physical solution must protect water right priorities to the extent those priorities do not lead to unreasonable use].)

The State Water Board has no power to authorize the diversion and use of water except in compliance with the Water Code. Section 1225 of the Water Code provides that "[n]o right to

appropriate or use water subject to appropriation shall be initiated or acquired except in compliance with the provisions of this division.” Persons seeking authorization to appropriate water must file an application with the State Water Board.²¹ (Cal. Code Regs. tit. 23, § 650.)

Even assuming that the State Water Board has the authority to authorize the appropriation of water as a physical solution – without following the statutory procedures for approving a new appropriation – nothing in Order 95-10 suggests that the State Water Board intended to do so.

Cal-Am cites language indicating that the State Water Board issued Order 95-10 instead of referring the matter to the Attorney General for enforcement, but that language merely indicates that the board was using its prosecutorial discretion, not that the board believed it was conferring a water right.

In conclusion, we find that the conditions in Order 95-10 requiring Cal-Am to mitigate the adverse effects of its unlawful diversions do not authorize Cal-Am to divert water from the river in excess of its water rights. Accordingly, the State Water Board may issue a CDO for the unauthorized diversion of water in violation of Water Code section 1052, even if the State Water Board concludes that Cal-Am is in compliance with Order 95-10.

11.0 ORDER 95-10 REQUIRES CAL-AM TO DILIGENTLY IMPLEMENT ACTIONS TO TERMINATE ITS UNLAWFUL DIVERSIONS

Condition 2 of Order 95-10 (p. 40.) states:

2. Cal-Am shall *diligently implement* one or more of the following *actions to terminate its unlawful diversions* from the Carmel River: (1) obtain appropriative right permits for water being unlawfully diverted from the Carmel River, (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River . . . and/or (3) contract with another agency having appropriative rights to divert and use water from the Carmel River. (Italics added.)

Notwithstanding the plain meaning of Condition 2, Cal-Am has taken the position that Condition 2 of Order 95-10 merely requires it to *pursue* actions to obtain supplemental water supplies.

(CAW-8, p.2, ¶1.) By the use of such semantics, Cal-Am seeks to convert the requirement to

²¹ Cal-Am has an application (A30215) to appropriate water from the Carmel River that might lead to a permit authorizing the diversions and use of water. In the absence of a final environmental impact report (EIR) prepared pursuant to the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), the State Water Board may not act upon the application. The MPWMD is the lead agency and has not certified a final EIR. (CAW - 032, pp. 2, 7-25.)

implement actions to terminate its unlawful diversions into a requirement that it merely pursue such actions.

Order 95-10 determined Cal-Am's water rights, or lack thereof, and the effect its diversions were having on fish and wildlife. (Order 95-10, pp. 25-29.) The order found that Cal-Am was diverting substantial amounts of water in excess of its rights (*id.* at pp. 17-24) and that its diversions, legal and illegal, were having an adverse effect on fish, wildlife and riparian habitat in and along the river. (*Id.* at pp. 24-29.)

Having found that Cal-Am was diverting water in violation of Water Code section 1052, the State Water Board could have initiated an enforcement action. (Wat. Code, § 1052, subds. (b)-(d).) But the State Water Board found that there were circumstances militating against the use of its enforcement options. The order states in part:

In the short term, Cal-Am cannot significantly reduce its extraction from the wells along the Carmel River. As previously stated, most of Cal-Am's supply is obtained from wells along the river. The people and businesses of the Monterey Peninsula must continue to be served water from the Carmel River in order to protect public health and safety.

Cal-Am introduced exhibits during the hearing which show that during 1980 and 1981, on the basis of available information the [State Water Board] was not of the opinion that the water pumped by the wells would require a permit from the Board. Further, Cal-Am does not contend that the wells are not extracting water from the subterranean stream. Indeed, Cal-Am has filed an application to appropriate water with the [State Water Board].

Cal-Am also supports the New Los Padres Project proposed by the District as one means for providing a reliable and legal supply of water for its customers. Finally, Cal-Am has cooperated with the District, [Department of Fish and Game], and others to develop and implement measures to mitigate the effect of its diversions on the instream resources of the river.

Under circumstances such as these, the imposition of monetary penalties makes little sense. Rather, the [State Water Board's] primary concern should be the adoption of an order which, until a legal supply of water can be developed or obtained, will require that Cal-Am: (1) minimize its diversions from the Carmel river, (2) mitigate the environmental effects of its diversions, and (3) prepare a plan setting forth: (a) specific actions to develop or obtain a legal supply of water and (b) the dates specific actions will have occurred so that progress can be objectively monitored.

(Order 95-10 at pp. 37-38 [citations omitted].)

Finally, the order states:

5. The [State Water Board] can request the Attorney General to take action under Section 1052. Alternatively, the [State Water Board] *can suspend such a referral provided that Cal-Am takes appropriate actions* to: mitigate the effect of its diversions on the environment and develop and diligently pursue a plan for obtaining water from the Carmel River on other sources consistent with California water law. The [State Water Board's] primary concern should be the adoption of an order requiring Cal-Am to (1) prepare a plan setting forth (a) specific actions which will be taken to develop or obtain a legal supply of water and (b) the dates specific actions will have occurred so that progress on the plan can be objectively monitored; (2) minimize its diversions for [*sic*] the Carmel River; and (3) mitigate the environmental effects of its diversions.

(*Id.* at pp. 39-40 [*italics added*].)

Condition 1 of the order places a cap on Cal-Am's diversions from the river until unlawful diversions are ended. Condition 2 requires Cal-Am to diligently implement one or more actions to terminate its unlawful diversion. (*Id.* at p. 40.) Condition 3 requires Cal-Am to implement water conservation measures to reduce its diversions from the river. Condition 4 requires Cal-Am to maximize production from the Seaside aquifer to reduce its diversions from the river. (*Id.* at pp. 40-41.) Conditions 5 through 10 are measures aimed at mitigating the adverse environmental effects of Cal-Am's diversions. (*Id.* at pp. 41-43.)

When the order is viewed in its entirety, we conclude that Condition 2 requires that Cal-Am diligently implement actions to terminate its unlawful diversions. We also conclude that Cal-Am's failure to comply with Condition 2 is adequate reason for the State Water Board to conclude that its suspension of an enforcement action for violations of section 1052 of the Water Code is no longer appropriate.

12.0 THE STATE WATER BOARD IS NOT ESTOPPED FROM ISSUING A CEASE AND DESIST ORDER

Cal-Am contends that the State Water Board is equitably estopped from issuing a cease and desist order pursuant to Water Code section 1052 and that "[t]he Board must allow CAW to continue to extract in excess of its water rights." The contention is based on the *City of Long*

Beach v. Mansell (1970) 3 Cal.3d 462, 487-501. Four elements must be present in order to apply equitable estoppel:²²

- 1) the party to be estopped must be appraised of the facts;
- 2) the party to be estopped must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended;
- 3) the party asserting estoppel must be ignorant of the true state of facts; and
- 4) the party asserting estoppel must rely upon the conduct to his or her injury.

Cal-Am's contention founders on the second, third and fourth elements necessary to prove estoppel. Order 95-10 requires Cal-Am to diligently implement actions to terminate its unlawful diversions. As discussed in the Section 10.0, Order 95-10 does not authorize Cal-Am's unauthorized diversions, and the State Water Board never intended Order 95-10 to be interpreted that way. Cal-Am has been on continuous notice that its unlawful diversions are viewed as a violation of Water Code section 1052 and subject to enforcement since the adoption of Order 95-10.

Cal-Am contends that until it received the notice of proposed CDO that initiated these proceedings, it had not received any communication from the State Water Board indicating that Cal-Am might be in violation of the law. This contention is inconsistent with Order 95-10, which found that Cal-Am was illegally diverting from the Carmel River. However, even if it were true, it would not provide a basis for estoppel. Even where an agency has not taken an enforcement action for over a period of many years, it is not reasonable to assume the law will never be enforced. (*Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1369.)

Moreover, the State Water Board made clear in subsequent communications, not just in Order 95-10, that Cal-Am was in violation of Water Code section 1052. In 1997 and 1998 the State Water Board issued an ACL to Cal-Am for failing to comply with Condition 3(b) of Order 95-10. An ACL may be issued for violations of Water Code Section 1052. Both ACL's allege that Cal-Am is in violation of section 1052 and find that such violations are occurring. (PT-4, ¶¶ 1, 3-6; PT- 5, ¶¶ 1, 3-6). The ACL's were issued because Cal-Am failed to implement the conservation measures required by condition 3(b). In addition, on June 5, 1998, the Chief, Division of Water Rights, advised MPWMD that Order 95-10 ". . . is only an interim measure to provide some relief during development of a water supply project and does not provide a basis

²² *Lents v. McMahon* (1989) 49 Cal.3d 393, 399. Estoppel may be asserted against the government where justice and right require it, but will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public. (*Ibid.*)

of right for continued diversion of water.” (PT-6, p.3.) Mr. Larry Foy of Cal-Am was sent a copy of the letter. Thus, Cal-Am has been and is on notice that the State Water Board could take action under Water Code section 1052 if it was dissatisfied with Cal-Am’s progress in complying with Order 95-10.

Thus, the second and third elements for estoppel clearly have not been established. The State Water Board clearly did not intend for Cal-Am to believe its diversions were legal, and Cal-Am knew its diversions were illegal. The fourth element, detrimental reliance, has not been established, either. Cal-Am introduced evidence that it has invested in the planning of long-term water supply projects, but offers no explanation as to how it has been harmed by that investment.

Even if the four elements for estoppel have been established, estoppel will not be applied to a public agency if a strong public policy will be violated. (*Phelps v. State Water Resources Control Board* (2007), 157 Cal.App. 4th 89, 114.) In particular “[p]ublic policy must be considered where a party raises estoppel to prevent enforcement of environmental statutes.” (*Ibid.*) In providing authority for the State Water Board to issue CDOs, the Legislature has declared, “that the state should take vigorous action to . . . prevent the unlawful diversion of water.” (Wat. Code, § 1825.) Preventing the State Water Board from issuing a CDO would be inconsistent with this policy. This principle applies with particular force under the circumstances presented here, where Cal-Am’s claim of estoppel is based on a State Water Board decision to forego enforcement in reliance on an order intended to eliminate Cal-Am’s unlawful diversions, but those unlawful diversions have not been eliminated over a decade later.

The proposed CDO does not seek to punish Cal-Am for failure to diligently implement actions to terminate its unlawful diversions. Rather the proposed CDO seeks to bring Cal-Am into compliance by compelling Cal-Am to annually reduce the unauthorized diversions by specified amounts starting in water year 2008 and continuing through water year 2014. (CAW- 7.)

If the State Water Board cannot compel Cal-Am to reduce its unlawful diversions, Cal-Am will have obtained a de facto right to divert the water from the river in violation of the statutory requirements for obtaining appropriate water rights, a result contrary to law and public policy. As this State Water Board explained in Order WR 2004-0004:

[A]fter the enactment of the 1913 Water Commission Act, a water user cannot establish a new water right simply by using water; the water user either must have an existing water right under some theory or must acquire an appropriative right by complying with Division 2 of the Water Code. The exclusive means of obtaining an appropriative right to divert and use water from a surface stream is by complying with the provisions of Division 2 of the Water Code. (Wat. Code, § 1225.) Equitable estoppel is not available. The [State Water Board] cannot give the respondents, through equitable estoppel, a water right that it could not give them in the absence of following the statutorily prescribed procedures. (*American Federation of Labor v. Unemployment Insurance Appeals Board* (1996) 13 Cal.4th 1017, 1039 [56 Cal.Rptr.2d 109,122].)

Also, the California Supreme Court has made it clear that a water user cannot prescriptively acquire a water right against the state. (*People v. Shirokow* (1980) 26 Cal.3d 301 [162 Cal.Rptr. 30].) Based on the *Shirokow* decision, a water user cannot obtain equitable relief such as estoppel against the [State Water Board]'s enforcing the requirement that water users must obtain appropriative water rights under the Water Code if they do not have other water rights.

(*Id.* at p. 14.)

13.0 RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT A BAR TO ISSUING A CEASE AND DESIST ORDER

Cal-Am contends that the doctrines of *res judicata* and collateral estoppel preclude consideration of the same claims and issues raised by the draft CDO as were decided by Order 95-10.²³ (Oct 9, CAW Closing Brief, 3. The Law Bars a Finding by the State Water Board that CAW has Committed a Trespass if it Complies With Order 95-10, pp 7-10.) *Res judicata* is a doctrine providing that when there is a final judgment on the merits of an issue, the same parties may not relitigate the same issue, giving the former judgment conclusive effect in subsequent litigation. (*People v. Barragan* (2004) 32 Cal.4th 236, 252.)²⁴ In its primary aspect, known as claim preclusion, it operates to bar a second suit between the same parties on the same cause of action. (*Ibid.*) In its secondary aspect, known as collateral estoppel, the prior judgment operates in a second suit as a conclusive determination as to issues in the second suit that were actually litigated and determined in the first suit. (*Ibid.*) The elements for applying the doctrine are: (1) a claim or issue raised in the present action is identical to a claim or issue

²³ MPWMD and the Seaside Basin Watermaster (SBW) make the same contention. (Oct. 9, 2008 Brief, p. 2, 18 - p. 4, 7.)

²⁴ The doctrine of collateral estoppel has been applied to the decisions of administrative agencies. (*People v. Sims* (1982) 32 Cal.3d 468; see also *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.)

litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Ibid.*) The doctrine will not be applied if injustice would result or if the public interest requires that the new action not be foreclosed. (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App. 4th 1053, 1065; 71 Cal.Rptr. 2d 77.)

Cal-Am contends, correctly, that Order 95-10: (1) determined Cal-Am's rights to the use of water from the Carmel River; and (2) identified the effects of Cal-Am's diversions from the river on fish and wildlife along the lower 18.5 miles of the stream in 1995. (See sections 5.2 and 5.3 of this order.) Cal-Am also contends, correctly, that some of the parties to the first proceeding are also parties to this proceeding. Those parties include Cal-Am, MPWMD, the Pebble Beach Company (PBC), Sierra Club, Carmel River Steelhead Association (CRSA), and the California Sportfishing Protection Alliance (CSPA). While some of the issues presented in this case are identical to those adjudicated in Order 95-10, some of the issues clearly are not identical.

For example, the issues are identical, and findings in Order 95-10 are binding on Cal-Am and other parties to Order 95-10, insofar as the extent of Cal-Am's rights for water diversion and use from the Carmel River are concerned, except where Cal-Am obtained water rights through the State Water Board's issuance of a water right permit after Order 95-10 was issued. On the other hand, issues concerning the appropriate remedy for violations that are occurring or threatening to occur at the time of these proceedings are not necessarily identical to issues concerning the appropriate remedy for violations occurring when Order 95-10 was issued over a decade ago.

In particular, there is no basis for Cal-Am's claim that principles of *res judicata* or collateral estoppel preclude the issuance of a CDO for the unauthorized diversion or use of water in violation of section 1052 of the Water Code. That issue was not considered or decided in Order 95-10. At the time Order 95-10 was issued, the State Water Board did not have authority to issue a CDO for the unauthorized diversion or use of water. (See Stats. 2002, ch. 652, § 6 [amending Wat. Code, § 1831 to authorize issuance of a CDO for the unauthorized diversion or use of water or for violation of a State Water Board order]. See also Stats. 1980, ch. 933, § 13, p. 2968 [under the prior version of Wat. Code, § 1831, a CDO could be issued only for violation of a term or condition of a water right permit or license].) Obviously, the issue of whether a CDO may be issued under current law, based on violations that are occurring or are threatened

currently, presents a different issue from the issue whether a CDO could have been issued in 1995 based on violations then occurring and the law then in effect.

Cal-Am also contends that because its illegal diversions have continued unabated since the adoption of Order 95-10, no new evidence should be allowed as to the effects of its diversions from the river. Prior to the presentation of evidence on May 13, 2008, the Hearing Officers ruled that evidence as to the effects of Cal-Am diversions on the public trust resources would be considered within the context of this enforcement proceeding. Such evidence may be relevant to the State Water Board's consideration of what remedy may be most appropriate in this proceeding:

For example, the extent of harm to the public trust may be relevant to determining how long the schedule should be for achieving compliance. A cease and desist order may also include measures to avoid or mitigate adverse effects on public trust uses during a period of continuing violations before full compliance is achieved. Where the parties propose different remedies, public trust impacts will also be relevant to the . . . choice of remedies.

(May 13, 2008, Ruling On Procedural Issues at p. 4.)

This issue of how impacts on public trust resources should affect the remedy adopted in a CDO is somewhat different from the issue presented in Order 95-10. If Cal-Am's unauthorized diversions are continuing for a longer period than was anticipated in 1995 or those diversions are claimed to have impacts that differ from what those impacts were understood to be in 1995, those are relevant issues for the State Water Board's consideration.

Finally, the following events have occurred since the adoption of Order 95-10, on July 6, 1995:

- 1) The New Los Padres Project was not constructed. Order 95-10 was predicated, in part, upon the anticipated construction of the New Los Padres Project by MPWMD and Cal-Am's ability to use the water developed by that project to substitute a legal supply of water for its illegal diversions. (See Decision 1632, Cond. 11; Order 95-10, Cond. 2 (3).)
- 2) California Central Coast Steelhead has been determined to be a threatened species under the federal rare and endangered species act.
- 3) The Carmel River has been designated as habitat critical to the survival of the steelhead.
- 4) Cal-Am has made no meaningful progress in implementing actions to reduce its unlawful diversions from the Carmel River for 13 years. (See section 14.1 of this order.)

Because a CDO looks forward -- establishing appropriate terms to obtain compliance and to avoid or reduce impacts of threatened or continuing violations, as opposed to imposing penalties for past violations -- the State Water Board can and should consider this kind of evidence. The State Water Board is not limited to the facts as determined in Order 95-10. (See also Wat. Code, § 1832 [After notice and an opportunity for a hearing, the State Water Board may modify a CDO].)

We conclude that the doctrines of *res judicata* and collateral estoppel are not a bar to the Prosecution Team and other parties introducing evidence as to (1) whether a CDO should be issued, and (2) what modifications, if any, should be made to the remedies proposed in the draft CDO.

14.0 CAL-AM IS COMMITTING VIOLATIONS FOR WHICH A CEASE AND DESIST ORDER MAY BE ISSUED

14.1 Cal-Am has not Complied with Condition 2 of Order 95-10, and is Violating the Prohibition in Section 1052 of the Water Code Against the Unauthorized Diversion or Use of Water

As discussed above, the draft CDO alleges two bases for issuing a CDO: (1) Cal-Am is violating Condition 2 of Order 95-10, which requires Cal-Am to diligently implement actions to terminate its unlawful diversions; and (2) Cal-Am is unlawfully diverting water in violation of Water Code section 1052.

The Prosecution Team's case-in-chief that Cal-Am has not complied with Condition 2 may be summarized as follows:

- 1) Cal-Am has the legal right to divert only 3,376 afa from the Carmel River.
- 2) Cal-Am has annually diverted an average of 10,978 afa from the river since Order 95-10 was adopted. (PT Exb. 11A; RT, Ph. 1, Vol. 1, p. 40, 12-14.)
- 3) Cal-Am has diverted an average of 7,632 afa without a basis of right for the past 13 years.²⁵ (Id., p. 41, 12-14.)
- 4) Thus, Cal-Am has not diligently implemented actions to terminate its unlawful diversions as required by under Condition 2.

The Prosecution Team presented evidence sufficient to support all four contentions. Further, Cal-Am offered no evidence to rebut the first three contentions made by the Prosecution Team.

²⁵ Between 1995 and 2007 Cal-Am's unlawful diversions ranged between 9,471 afa and 7,007 afa. Water year 1998/1999 was the year in which unlawful diversions were lowest. (PT Exb. 11A, John Collins written testimony, Table 1.)

Notwithstanding the foregoing, Cal-Am contends that it is in compliance with Condition 2 and that if Cal-Am is in compliance with Condition 2, the State Water Board is precluded from issuing a CDO based on Cal-Am's violation of section 1052 of the Water Code.

Cal-Am advanced the following propositions in support of its contention that the State Water Board is precluded from issuing a CDO if Cal-Am is in compliance with condition 2 of Order 95.10:

- 1) Order 95-10 is an interim physical solution that authorizes Cal-Am to extract water in excess of that permitted under its water rights. (CAW Oct. 9, 2008, Closing Brief, pp. 4-6.)
- 2) Equitable estoppel precludes the issuance of a CDO. (CAW Oct. 9, 2008, Closing Brief, p. 15, 10 – p.17, 5.)
- 3) The doctrines of collateral estoppel and *res judicata* bar a finding by the State Water Board that Cal-Am has committed a trespass if Cal-Am has complied with Order 95-10. (CAW Oct. 9, 2008, Closing Brief, p. 7, 10 – p.10, 9.)

Each of these contentions is addressed and rejected earlier in this order. Thus, Cal-Am is in violation of the prohibition in section 1052 of the Water Code against the unauthorized diversion or use of water, which would establish adequate grounds for issuance of a CDO even if no violation of Order 95-10 had been proven.

We also conclude, as explained in section 14.2, below, that Cal-Am has not complied with Condition 2 of Order 95-10 requiring that Cal-Am diligently implement actions to terminate its unlawful diversions.²⁶ Violation of Condition 2 of Order 95-10 provides a second basis for issuing a CDO.

14.2 Efforts by Cal-Am to Comply with Condition 2 of Order 95-10

Cal-Am presented evidence that it has made efforts to comply with the requirements of Condition 2. Initially, Cal-Am looked to MPWMD to construct the New Los Padres Project approved by the State Water Board in Decision 1632 for a legal source of water. Before proceeding with the project, however, MPWMD sought to obtain public approval of the New Los Padres Project and authorization to fund the project. In late 1995, the project approval vote failed. (CAW-029, p.2, 21-25.)

²⁶ Cal-Am contends that Condition 2 of Order 95-10 does not require Cal-Am to reduce its unlawful diversions, so long as Cal-Am maintains an effort to acquire alternative water supplies. (CAW Oct 9, 2008 Closing Brief, pp. 10-12.) This argument is addressed and rejected in Section 11.0 above.

In 1996, Cal-Am began pursuing the Carmel River Dam and Reservoir Project. This project has not proceeded for a number of reasons, including but not limited to the following. First, in 1996 the United States Fish and Wildlife Service (USFWS) listed the California Red-legged Frog as a threatened species and in 1997 NMFS listed the steelhead population as a threatened species under the Endangered Species Act. Second, on August 6, 1998, the PUC required that Cal-Am prepare a long term contingency plan describing how the company would obtain a supply of water if the new dam project did not go forward. Third, in 1998 Assembly Bill 1182 was enacted. (Stats. 1988, ch. 797.) The bill requires the PUC, as opposed to Cal-Am, to study all available alternatives to the proposed Carmel River Dam and prepare a long-term contingency plan. (CAW-032, p. 2, 26 - p. 3, 2.) The PUC's planning process involved a four-step process culminating in Plan B in 2002. (CAW-032, p. 3, 7 - p. 4, 11.) In Plan B, the principal alternative to the Carmel River Dam Project is the Coastal Water Project, a proposed 10,370 acre-feet (af) desalinization project.²⁷ (CAW-029, p. 3, 1-3.) On February 11, 2003, Cal-Am requested the PUC to replace the proposed dam project with the Coastal Water Project. (CAW-032, p. 5, 25-27.) During the hearing, the PUC was preparing an EIR for the Coastal Water Project. On January 30, 2009, the PUC gave notice that a draft EIR was available for public comment for the Coastal Water Project. Project approval awaits a PUC decision on a final EIR and on the Coastal Water Project.

While pursuing the Coastal Water Project, Cal-Am has evaluated, to some degree, smaller project alternatives for obtaining a legal water supply including: (1) the evaluation of 3 million gallons per day (MGD) and 7 MGD desalinization plants; (2) additional groundwater production from the Paralta well in the Seaside groundwater basin (the inland area of the Seaside groundwater basin); (3) injection of treated wastewater at the mouth of the Carmel River and deep bedrock sources; (4) dredging the San Clemente and Los Padres Reservoirs; (5) importing water from the Arroyo Seco, Lower Salinas and Big (or Little) Sur Rivers; (6) purchasing water from the State Water Project and from local Carmel Valley holders of water rights; and (7) surface impoundments in the Seaside/Fort Ord area and Laguna Seca. (CAW-029, p. 4, 13-23.)

²⁷ CAW contributed substantial resources to the study of project alternatives required by the PUC (CAW-032, p. 5, 23-25; CAW-032C, p. 3, 2 - p. 6, 19; CAW-032D p. 3, 26 – p. 10, 18.) Subject to PUC approval, CAW can recover the cost for studying project alternatives.

Beyond mere evaluation, Cal-Am has gone forward on several projects, including: (1) gathering information for seeking approval of Cal-Am's water right Application 30215A, an application to appropriate up to 2,964 afa from the Carmel River; (2) negotiations seeking to obtain a temporary water supply from (a) the Margaret Eastwood Trust and Clint Eastwood from the Odello well fields and (b) water rights associated with the Rancho Cañada Golf Course; (3) a negotiated agreement to temporarily obtain water surplus to the needs of Sand City from the desalinization plant being built by the city; and (4) implementation of Phase I of the Aquifer Storage and Recovery project (ASR). (CAW-029, p. 3, 17- p. 4, 5; p. 4, 24 - p. 5,17.) Cal-Am's failure to complete negotiations to obtain a temporary water supply from the Eastwood Trust, Odello well fields and from the Rancho Cañada Golf Course is not explained.

On November 30, 2007, both MPWMD and Cal-Am jointly obtained an additional right to water from the river, Permit 20808A. This permit is a spin-off from the permit authorized in Decision 1632 in 1995 for MPWMD for the development of the New Los Padres. Permit 20808A authorizes the diversion of up to 2,426 afa of water from the Carmel River to underground storage in the Seaside groundwater basin from December 1 of each year to May 31 of the succeeding year at a maximum instantaneous rate of diversion of 6.7 cfs. The project is commonly identified as the Phase I ASR project. Thus, Cal-Am's current legal rights to water in the river that may be used to supply peninsula cities is the 3,316 afa recognized in Order 95-10²⁸ plus 2,426 afa under Permit 20808A, for a total of 5,742 afa. As will be discussed *infra*, the actual amount of additional water supply that may be generated by this project is uncertain, and certainly much less than the face value of the permit.

We are fully cognizant of the complex legal and institutional framework within which Cal-Am must operate to develop or obtain additional supplies of water. However, we find that nearly 14 years after the adoption of Condition 2 in Order 95-10, Cal-Am has implemented astonishingly few actions to reduce its unlawful diversions from the river. Most of Cal-Am's efforts toward obtaining additional water supplies have been directed toward large projects that could provide enough water both to offset its illegal diversions and to provide water for growth in its service area. We understand why such projects are desirable from the viewpoint of a utility, its customers and the PUC. Nevertheless, Cal-Am's only achievements toward reducing its illegal diversions have been the work done on two projects yielding small amounts of water. Significantly, these projects are in place largely due to the efforts made by other agencies, i.e.,

²⁸ 851 afa is subtracted from this number to adjust for storage loss due to siltation at Los Padres Reservoir.

MPWMD and the City of Sand City. But for the efforts of these agencies, Cal-Am would not have made any reductions in its illegal diversions from the river during the past 14 years, except conservation savings compelled by the ACLs issued by the State Water Board in 1997 and 1998. We conclude that Cal-Am should have made and should make greater efforts toward implementing smaller projects, and that Cal-Am should make such efforts irrespective of whether the PUC approves the Coastal Water Project or one of its alternatives.

Condition 2 of Order 95-10 requires Cal-Am to diligently implement measures to terminate its unlawful diversions, and not merely to evaluate, propose, or otherwise pursue lawful alternatives. While Order 95-10 requires Cal-Am to implement these measures diligently, not instantaneously, it has taken far too long, and the reductions in Cal-Am's unlawful diversions to date have been too small to satisfy the requirement for diligence. In reaching this conclusion, we are mindful that (a) the steelhead are threatened, (b) miles of the steelhead's critical habitat, the river, are dry five to six months of the year and (c) the manager of MPWMD estimates that the earliest that Cal-Am will be able to eliminate its illegal pumping from the river with deliveries from the proposed Coastal Water Project is 2016; 21 years after the adoption of Order 95-10. (RT, Ph. 2, Vol. IV, p. 953, 7 – p. 954, 23.)

15.0 CAL-AM'S DIVERSIONS CONTINUE TO HAVE AN ADVERSE EFFECT ON FISH, WILDLIFE AND RIPARIAN HABITAT OF THE CARMEL RIVER, INCLUDING THE THREATENED STEELHEAD

Order 95-10 found that fish and wildlife were being adversely affected by Cal-Am's legal and illegal diversions. (Order 95-10, pp. 25-29.) The order states:

Cal-Am's diversions, standing alone, are not the sole cause of current conditions in the Carmel River. Other causes include the diversion and use of water by other persons and, significantly, a series of dry and critically dry years during the late 1980s and early 1990s. Nevertheless, Cal-Am's combined diversions from the Carmel River constitute the largest single impact to instream beneficial uses of the river.

(Order 95-10, p. 25.)

Cal-Am is responsible for approximately 85 percent of the total water diversions from the Carmel River and its associated subterranean flow. (PT- 45, p. 1, ¶ 2.)

Wells supply about 69 percent of the water needs of Cal-Am's customers. The balance of the water supplied to Cal-Am customers is supplied from: (1) San Clemente Dam and Los Padres reservoirs in the upper reaches of the Carmel River and (2) pumped groundwater in the City of Seaside.

(Order 95-10, p. 2.)

Order 95-10 concludes

[t]o summarize, Cal-Am diversions have historically had an adverse effect on: (1) the riparian corridor along the river below RM 18.5, (2) wildlife that depend on riparian habitat, and (3) steelhead and other fish which inhabit the river.

(*Id.* at p. 28.)

A fisheries biologist for the National Marine Fisheries Service, Ms. Joyce Ambrosius, testified during the hearing that Cal-Am's diversions result in a number of adverse impacts to steelhead. (RT. Ph. 1, Vol. 1, p. 45, 18-21.) As a result of direct diversions of water by Cal-Am and others, the Carmel River usually goes dry downstream from the Narrows (River Mile 9.5) by July of each year. From July until the winter rains begin, the only water remaining in the lower river is in isolated pools that gradually dry up as the groundwater table declines in response to pumping. Surface flow into the Carmel River Lagoon normally recedes after the rainy season in late spring and ceases in summer as rates of water extraction from the river and alluvial aquifer exceed the flow in the river. (PT-39, p. 4.) This results in the loss of river habitat and food production needed by juvenile steelhead. Steelhead are stranded in pools, and predation increases. (RT. Ph. 1, Vol. 1, p. 65.) Competition for food increases in the areas of the river that remain wetted. (*Id.*, p. 44.) Cal-Am's illegal diversions also reduce the flow to the lagoon, which is very important to ocean survival of steelhead smolts. (*Id.*, p. 44; CRSA-3, p. 7. See also PT-39, p. 4; PT-45, p. 3, ¶ 2 and p. 7, last ¶ - p. 7, ¶ 1.)

Riparian vegetation along the Carmel River has died off due to Cal-Am's diversions, and this has caused bank erosion. To fix the bank erosion, many property owners have installed riprap to protect their property. Riprap is destructive to stream habitat because it decreases the amount of riparian vegetation allowed to grow on the bank. The erosion also increases sedimentation in the river that adversely impacts the fish, and there is a decrease in the availability of large woody debris to the river.²⁹ (RT, Ph. 2, Vol. 1, p. 45, 1-11; CRSA-3, p. 5.)

²⁹ Although not directly stated in the testimony, sedimentation is a problem because it (1) cements the gravel needed for spawning habitat and (2) settles and blankets bottom-dwelling organisms that are part of the food chain. Large woody debris is important because it provides cover for fish and reduces predation.

Since the adoption of Order 95-10, a number of regulations have been enacted for the protection of the South-Central California Coast (SCCC) steelhead Distinct Population Segment (DPS) (*Oncorhynchus mykiss*). These regulations include:

- 1) The August 18, 1997 listing of the steelhead population within the California Central Coast as threatened under the Endangered Species Act (ESA). (62 Fed.Reg. 43937.)
- 2) The January 5, 2006 listing reaffirming the threatened status of the steelhead population within the California Central Coast under the Endangered Species Act. (71 Fed.Reg. 834, 859.)
- 3) The September 2, 2005 listing of the Carmel River as critical habitat for the steelhead. (70 Fed.Reg. 52488.)

We find that Cal-Am's illegal diversions continue to have an adverse impact on fish, wildlife and the riparian habitat of the Carmel River. The regulations listing the SCCC steelhead as a threatened species and the Carmel River as critical habitat for the steelhead underscore the importance of reducing and terminating Cal-Am's illegal diversions from the Carmel River at the earliest possible date and of adopting conditions to mitigate the effect of the diversions.

16.0 PROJECTS AND ACTIONS THAT MAY AFFECT CAL-AM'S NEED TO DIVERT WATER FROM THE CARMEL RIVER

The following sections discuss projects and actions that may affect Cal-Am's need to divert water from the Carmel River.

16.1 Adjudication of the Seaside Groundwater Basin

Cal-Am produces water from the Seaside groundwater basin to serve customers in its main system. (MPWMD HS-13; RT, Ph. 2, Vol. V, p. 1324, 20 – p. 1325, 8.) Cal-Am gets approximately 25 percent of its supply from the Seaside basin. (RT, Ph. 2, Vol. III, p. 753, 11-12.) Currently, Cal-Am may extract up to 3,504 afa from the basin. However, the basin has been adjudicated.³⁰ (MPWMD-HS13, RT, Ph. 2, Vol. III, p. 754, 13-16.) The judgment ordered mandatory reductions of the operating yield by 10 percent triennially beginning in 2009 until the operating yield equals the natural safe yield. (SBW-1, p. 2, 17-21.) Each triennial reduction will be implemented unless: (1) the basin is replenished from new water sources or (2) the level of

³⁰ A judgment has been entered in the Monterey Superior Court case, *California American Water Company v. City of Seaside et al*, Monterey Superior Court, Case No. M66343, dated March 27, 2006. The judgment adjudicated and limited rights to produce groundwater from the Seaside Groundwater Basin and implemented a physical solution for the management and protection of the basin. (SBW-2, ¶ 2.)

the groundwater is sufficient to prevent seawater intrusion. (*Id.*) The watermaster appointed pursuant to the judgment in the adjudication anticipates that the 10 percent reduction will be ordered every three years, and that this will result in a 417 af reduction in the water available to Cal-Am in 2009, and eventually a reduction of 2,010 afa by 2021. (SBW-1, p. 3, 4-9.) The 417 afa reduction represents about a 2.8 percent reduction in the supply of water available to Cal-Am and its customers.³¹ We find that the adjudication will decrease the supply of water available to Cal-Am for its customers. Nevertheless, we conclude that Cal-Am should be prohibited from increasing its diversions from the river to offset the loss in production from the groundwater basin. Water to offset the loss of groundwater production may be found by aggressively implementing: (1) the retrofit program; (2) the program to reduce the use of potable water for outdoor irrigation; and (3) the main replacement program and demand management by programs such as MPWMD's Regulation XV, prohibiting waste and non-essential water use. (MPWMD-SP3.) Such efforts may offset the loss of groundwater production over a period of years.

16.2 Aquifer Storage and Recovery Project

Cal-Am and MPWMD have developed a small supplemental supply of water by diverting water from the river during periods of high flow for storage in the Seaside groundwater basin. Water diverted during periods of high flow is piped to the basin and injected via wells into the groundwater. Water stored in the basin can be subsequently recovered for use. Permit 20808A authorizes the diversion of up to 2,426 afa of water from the river to underground storage in the basin from December 1 of each year to May 31 of the succeeding year at a maximum instantaneous rate of diversion of 6.7 cfs. The average annual quantity of water that may be obtained by the operation of the ASR project is estimated to be 920 af. A witness for MPWMD estimated that 400 af per year will become available in 2009, with the remaining 520 af available in 2010. (MPWMD-HS14B; RT, Ph. 2, Vol. III, p. 814, 11-22, p. 822, 23 – p. 830,10.)

Cal-Am and MPWMD may only divert water from the river when minimum flow requirements in the river are being met. Depending upon the water year type, the quantity that may be diverted to storage can range from zero up to 2,426 af. When no carry-over storage is available from the

³¹ Between 1996 and 2007 Cal-Am diverted approximately 10,967 afa from the Carmel River. (MPWMD- Exhibit DF2.) This includes the legal and illegal diversions occurring within the limit set on diversions by Conditions 1 and 2 of Order 95-10. During 2008 Cal-Am could produce up to 3,504 afa from the Seaside basin. (MPWMD- Exhibit DF5, slide 7, Status of Cal-Am's Compliance with Seaside Basin Adjudication in WY 2008.) These combined sources provide a supply of 14,471 afa to Cal-Am.

previous year and no water may be diverted from the river in the current year, no water will be available from ASR operations. (RT, Ph. 2, Vol. III, p. 816, 16 -21.)

Permit 20808A is derived from and based upon Permit 20808 issued to MPWMD for the construction of the New Los Padres Dam. Permit 20808 was authorized by Decision 1632. Condition 11 of the decision provides: "Permittee shall not divert water under this permit unless and until California American Water Company (Cal-Am) has obtained an alternate supply of water for its illegal diversions from the Carmel River." Accordingly, any new water supply derived from Permits 20808 and 20808A must first be applied to reduce Cal-Am's illegal diversions from the river. We conclude that water developed by the ASR project should be used to reduce illegal diversions from the river. Although the operation of the ASR project under Permit 20808A is outside the scope of this proceeding, the water diverted illegally from the river by Cal-Am is within the scope of the proceeding. Accordingly, we conclude that Cal-Am's illegal diversions from the river should be reduced to the extent that water is available from the ASR project to supply Cal-Am customers.

16.3 Sand City Desalinization Project will Reduce Cal-Am's Diversions from the Carmel River

The City of Sand City is constructing a 300 afa desalinization plant. The plant was scheduled to deliver water to Cal-Am in the first quarter of 2009. (Sand City-1, p. 1, 20-23.) Of the 300 afa, 94 afa will be used to replace water being diverted from the Carmel River by Cal-Am for existing water use within Sand City; thus, once the plant becomes operational the city should no longer receive water illegally diverted from the Carmel River. The balance of the plant's production, 206 afa, is for future growth. Pending the need for the remaining 206 afa, Cal-Am may use the water to meet the needs of its customers. (Sand City 1, p. 3, 16-21.) Thus, using the production from the Sand City desalinization plant, Cal-Am can permanently reduce diversions from the river by 94 afa and, temporarily, by another 206 afa. Assuming the desalinization plant is operated at a constant rate and no production is used for future growth, the plant could reduce diversions from the river by about 0.8 af per day, or about 0.4 cfs.

16.4 Reduction of System Losses

Unaccounted loss is defined as the difference between metered production and metered consumption. (RT, Ph. 2, Vol. IV, pp. 1004-1005.) As a general statement, all large water supply systems have losses between the point where water is diverted and the point where

water is delivered for use; such losses may be referred to as real losses. Cal-Am is no exception. The industry standard for unaccounted losses is 10 percent of total annual production. Cal-Am's losses are about 12 percent. (RT, Ph., 2, Vol. III, p. 746, 4 - 9.)

MPWMD has adopted a regulation requiring Cal-Am to reduce its losses to 7 percent. (MPWMD-SP3, p.1, Rule 160, G.) The prosecution team estimates that 549 afa could be saved if Cal-Am reduced its system losses from 12 percent to 7 percent. (RT, Ph. 2, Vol. 1, p. 53, 24 - p. 54, 4; PT-49, p. 2.) Some unknown fraction of Cal-Am's losses may be due to faulty meter readings. (RT, Ph. 2, Vol. III, p. 811, 1 - p. 812, 1.) The General Manager of MPWMD is of the opinion that water supply mains must be replaced to reduce Cal-Am's real system losses. (RT, Ph. 2, Vol. III, p. 811, 21 – p. 812, 1.) Cal-Am proposes to undertake a 10 to 12 year program to replace its larger mains. However, Cal-Am is seeking PUC approval before commencing work on its main replacement program. (*Id.*, p. 812, 2-7; *id.*, p. 812, 9-17.) No evidence was introduced to substantiate that 10 or more years would be required to reduce system losses to an acceptable level.

Given the chronic shortage of water available for supply within Cal-Am's service area, evidenced by the nearly 14 years of ongoing illegal diversions from the river, about half of the 12 percent system loss may be viewed as preventable "waste or unreasonable use or unreasonable method of diversion" under Water Code section 100. The State Water Board has authority to compel Cal-Am to reduce its system losses. (Cal. Const., art. X, § 2; *Environmental Defense Fund v. East Bay Muni. Dist.* (1980) 26 Cal. 3d 183.) We are of the opinion that Cal-Am can proceed with a main replacement program at any time and that Cal-Am's wish to obtain PUC approval before proceeding with a main replacement program is only to assure that the funds expended for main replacement may be recovered from its customers.³²

We conclude that Cal-Am should be required to: (a) reduce its system losses by about 549 afa; and (b) immediately commence work to reduce the losses. Further, we are of the opinion that with the application of sufficient resources it should be feasible for Cal-Am to accomplish the

³² In general, private businesses acting illegally are not excused from immediately complying with the law in order to make sure they can recoup their costs from their customers.

work of replacing its mains within eight years.³³ Thus, Cal-Am should be required to reduce its diversions from the river by about 68 af per year until it has achieved 549 afa of savings.³⁴

16.5 Water Conservation

Order 95-10 included a condition requiring Cal-Am to develop and implement an urban water conservation plan. (Condition 3.) The condition required that conservation measures have a goal of achieving a 15 percent reduction in water usage in 1996 and 20 percent in each subsequent water year. Compliance with this condition is not at issue in this hearing. However, ten years have passed since the 20 percent reduction goal was ordered, and consideration should be given to how additional conservation measures may reduce the need to illegally divert water from the river. MPWMD and Cal-Am work together to implement conservation measures in the peninsula cities. (PUC Decision 09-07-023, pp. 1-2; Attachment 1 [Settlement Agreement Among the Division of Ratepayer Advocates, MPWMD and Cal-Am On Water Conservation and Rationing Issues for the Monterey Peninsula; Attachment 2, Rule 14.1 [Water conservation and Rationing Plan, Monterey District'.]) MPWMD has a greater array of regulatory tools. (MPWMD-SP12, p.10, 15 – p.11, 26 and p. 20, 3-5.) Block rate pricing of water also affects the use of water. Cal-Am must obtain approval from the PUC to impose or modify block rates. MPWMD has a retrofit program for toilets, showerheads and faucets. Retrofits are required for all title changes and for use and expansion changes. An estimated 664 afa has been saved since 1987. About two-thirds of the properties within MPWMD have been retrofitted. (MPWMD-SP12, p. 9, 8-16; RT, Ph. 2, Vol., IV, p. 1066, 12 - p. 1068, 11.) In our view, most of the remaining properties will probably be retrofitted within the next eight years, i.e., within 30 years of 1987. Over eight years, as much as 330 afa of water may be saved through continued retrofitting of properties, or roughly 41 af of additional savings per year for eight years.³⁵ We conclude that water saved by retrofitting properties should be used to reduce Cal-Am's diversions from the river.

Reduction in the use of potable water for outdoor use offers the possibility for additional water savings. (MPWMD-SP12, p. 7, 15 -20.) Outdoor water usage is estimated to be about 500 afa;

³³ Time can be saved on reducing system losses if Cal-Am does not wait for PUC approval before beginning work.

³⁴ The State Water Board recognizes that it is unlikely that exactly 68 af will be saved for each year Cal-Am replaces system mains to reduce losses and that during any given year the water saved may be more than or less than 68 af.

³⁵ The State Water Board recognizes that the actual amount of water saved by the retrofitting program during any given year may be more or less than 41 af.

less than 5 percent of total potable water use. (RT, Ph. 2, Vol. IV, p. 1062, 8-23.) MPWMD recognizes that reductions in outdoor irrigation could save about 100 afa. (MPWMD-SP12, p. 8, 6-9.) Service addresses that use less water are rewarded with a lower block rate. An increasing block rate structure has been in place since 1997. Cal-Am has requested additional blocks for non-residential users in the current General Rate Case filing with the PUC (MPWMD-SP12, p.18, 6-9.) We conclude that the use of potable water for outdoor irrigation should be reduced. Greater efforts to minimize the use of potable water for outdoor irrigation will result in incremental water savings. We are of the opinion that it may be feasible to save 100 af over eight years, or roughly 12 af per year.³⁶ We also conclude that the water saved by reducing the use of potable water for outdoor irrigation should be used to reduce Cal-Am's diversions from the river.

16.6 Demand Management

Water conservation is a concept that encompasses a wide variety of potential actions in addition to retrofit programs and reducing the use of potable water for outdoor recreating. Water conservation also includes programs to encourage or require people to use less water. MPWMD has enacted regulations that may be used to manage user demand. (MPWMD-SP3 [MPWMD Regulation XV].) Cal-Am has entered into an agreement with MPWMD for the coordinated exercise of their respective powers in order to manage user demand. (PUC Decision 09-07-023, attachment [Settlement Agreement Among the Division of Ratepayer Advocates, MPWMD, and Cal-Am On Water Conservation and Rationing Issues].) In the agreement, Cal-Am agrees to implement Rule 14.1 Water Conservation and Rationing Plan as set forth in Appendix A in accord with MWPMD's Regulation XV as modified by Ordinance 137. Among other matters, the agreement provides that demand management or rationing may be initiated in response to a final CDO by the State Water Board. Joint Cal-Am and MPWMD efforts to manage user demand may be used to reduce Cal-Am's need to illegally divert water from the river. We conclude that Cal-Am, in conjunction with MPWMD, should undertake demand management to reduce Cal-Am's need to illegally divert water from the river.

³⁶ The State Water Board recognizes that the actual amount of water saved by reducing the quantity of water for outdoor use may be greater or less than 100 af and that the quantity of water saved in any given year may be more or less than 12 af.

16.7 Small Projects

Cal-Am introduced evidence that it had entered into negotiations to obtain a temporary supply of water from the Margaret Eastwood Trust and Clint Eastwood from the Odello well fields and from the Rancho Canada Golf Course. Cal-Am's failure to complete negotiations was not explained. (See section 14.2, ¶ 5, supra.) Other small projects that could provide a temporary supply of water may also be available. The addition of temporary small water supply projects would reduce Cal-Am's need to illegally divert water from the river. We conclude that Cal-Am should be required to develop small projects to provide a temporary supply of water for its customers and to reduce the illegal diversions from the river.

16.8 Cal-Am has Options for Responding to the Loss of Supply.

The subjects discussed in Section 16.2 through 16.7 illustrate the range of projects and actions that are available to Cal-Am to respond to the provisions in this order requiring that illegal diversions from the river be reduced (Condition 2) and for the loss of supply from the Seaside Groundwater Basin. In general, it is up to Cal-Am and to determine how it may best serve its customers while reducing its unlawful diversions from the Carmel River. Efforts to reduce the use of potable water may aid Cal-Am efforts to serve its customers while reducing illegal diversions from the river. Cal-Am can also seek to serve its customers and reduce illegal diversions by developing and operating temporary water supply projects until the proposed Coastal Water Project or the Regional Project sponsored by the Marina Coast Water District is constructed and becomes operational.

17.0 EFFORTS TO MITIGATE THE EFFECTS OF CAL-AM'S DIVERSIONS ON FISH AND WILDLIFE

This section addresses efforts to mitigate the effects on fish and wildlife of diversions, principally Cal-Am's, from the Carmel River. Mitigation efforts must be viewed in a larger context because the effects of Cal-Am's illegal diversions cannot be isolated from its legal diversions and the diversions of others. The following discussion is relevant to an understanding of what actions may be appropriate for consideration in the CDO adopted by the State Water Board.

17.1 Releases from San Clemente Dam³⁷

Because the Carmel River usually goes dry downstream from the Narrows (River Mile 6.5) by July of each year, DFG annually negotiates with Cal-Am and MPWMD a flow bypass for San Clemente Dam. The objective of the negotiations is to keep as much stream channel wetted below San Clemente Dam as possible during the low flow season. Per the agreements, releases from SCD are generally around 5 cfs during late summer. (PT-39, p. 4, ¶ 2.) The operation of San Clemente Dam pursuant to the bypass flow agreements with DFG is outside the scope of this proceeding.

17.2 Steelhead Rescue Efforts

Because the Carmel River bed begins to go dry in July downstream from the Narrows, MPWMD and the CRSA³⁸ make organized efforts to rescue steelhead stranded in pools. Rescue efforts are labor-intensive. Fish are scooped into buckets and transported to the lagoon or to upstream areas that have water. (CRSA-3, p. 6.) MPWMD annually rescues steelhead stranded due to dewatering between the Narrows and the Lagoon. From 1995 through 2005, a total of 208,015 juvenile steelhead were rescued. (PT-39, p. 5.)

The annual rescue effort only saves a portion of the steelhead lost in the lower river. Further, once rescued, the fish are subject to mortality due to a variety of factors such as capture, adverse conditions from competition and overcrowding in upper river segments or in the Sleepy Hollow Fish Facility (facility). MPWMD has spent over \$300,000 to improve rearing operations at the facility. The improvements, involving operational protocols, have resulted in increasing rearing survival. (MPWMD-KU1, pp.1, 6.) Nevertheless, fish mortality has been over 50 percent at the facility for a variety of reasons including high water temperatures, disease and predation. The fish that survive the summer and fall are released back into the river once winter flow reconnects the lower river to the lagoon. The State Water Board lauds the efforts being made by MPWMD and CRSA to rescue juvenile steelhead, but rescuing juvenile steelhead and rearing them over the summer cannot assure the recovery of steelhead populations and is not an acceptable long-term solution. (PT-39, p. 5, 12-14.) We find that these desperate efforts

³⁷ See Figure 1 for the location of San Clemente Dam.

³⁸ For more than 35 years, volunteers associated with the Carmel River Steelhead Association have been rescuing and rearing steelhead stranded on the Carmel River. (CRSA-3, pp. 5-6.) A voluntary effort of this duration is an extraordinary achievement.

and their tenuous success underscore the importance of reducing Cal-Am's diversions from the river by all practicable measures. Further, we conclude that Cal-Am should be prohibited from increasing diversions from the river and should be required to reduce the quantity of water diverted from the river for existing service connections.

17.3 Preservation of Riparian Vegetation

A close connection has been demonstrated between groundwater diversions and both the health of the riparian vegetation and channel stability. Plant stress is directly related to soil water availability and depth to groundwater. MPWMD determined that mitigation in the form of irrigation can be used to prevent plant mortality along the riparian corridor, thus contributing to habitat for wildlife and stable riverbanks. A monitoring system was implemented to measure plant stress, soil moisture, and depth to groundwater. When necessary, supplemental irrigation is applied to help mitigate the effects of unacceptable vegetation stress. (MPWMD-TC16, pp. 3-4.) For example, in 2007 MPWMD applied a total of 11.81 af of supplemental irrigation water to offset stress to riparian vegetation associated with water diversions from the Carmel River. (*Ibid.*, p.18.) We find that the recovery of riparian habitat and associated channel stability in the lower part of the river will not occur until the level of the underflow in the river is close enough to the surface of the river bed to supply water to the roots of riparian vegetation. Thus, significant improvements in the preservation of riparian habitat and increased channel stability will not be possible until Cal-Am's illegal pumping from the river is terminated. Some marginal improvement to riparian habitat and channel stability may be possible if Cal-Am is required to reduce its pumping from the river. Thus, we conclude that Cal-Am should be prohibited from increasing its diversions from the river. In addition, we find that Cal-Am should be required to reduce the quantity of water diverted from the river for existing service connections.

18.0 WATER NECESSARY FOR PUBLIC HEALTH AND SAFETY

Under the heading titled "8.1 Considerations Mitigating Against the Use of Punitive Enforcement Options," Order 95-10 found that "[i]n the short term Cal-Am cannot significantly reduce its extraction from wells along the Carmel River." The order went on to state "[t]he people and businesses on the Monterey Peninsula must continue to be served water from the Carmel River to protect public health and safety." The order did not make a finding of what quantity of water was necessary for public health and safety in Cal-Am's service area. Indeed,

condition 3 of the order required a 20 percent reduction in the quantity of water diverted from the river. No single fixed quantity of water per customer will protect public health and safety in all water supply systems. The quantity of water required to protect public health and safety will vary from system to system and will vary, over time, within a particular system depending upon how the water supply system is built, modified and operated, and upon measures taken by the end users of water to conserve the use of water. Fourteen years have passed since Order 95-10 was adopted, making it appropriate to consider requiring Cal-Am to further reduce its illegal diversions from the river, even without a substitute supply.

Cal-Am contends that reducing the quantity of water currently being diverted from the river would jeopardize its ability to deliver water to its customers. (Nov. 11, 2008, CAW Reply Brief, p. 17.) Having sufficient water to operate a water treatment and supply system is a valid concern. Simply stated, sufficient water must be taken into the treatment system to meet daily user demand for water. If water is not available to supply user demand, some areas of Cal-Am's system will not have enough water to maintain pressure for delivery to users or for an emergency, such as a fire. We should not give too much weight to this contention, however, for three reasons. First, Cal-Am continues to make new connections to its system. If Cal-Am were truly concerned that the existing supply of water is inadequate, it could act to end new connections pursuant to Water Code section 350, et. seq., or seek an order from the PUC prohibiting new service connections in accordance with Public Utility Code section 2708. Second, having sufficient water to operate its system reliably is typically a problem for one day a year, although it could be for as long as 3 to 5 days at a time. (RT, Ph. 2, Vol. V, p. 1292, 2-7.) Finally, having enough water to meet user demand can also be accomplished by reducing user demand. Such reductions can be accomplished by water conservation and standby rationing programs similar to that administered by MPWMD. (MPWMD - SP12, p. 4, 17-25; MPWMD - SP3, Regulation XV.)

MPWMD is a special-purpose district created to provide water resource management in the Monterey Peninsula area. It regulates all water distribution systems within its boundaries, including Cal-Am's. (MPWMD-1, p. 4, 1 – p. 6, 21; RT, Ph. 2, Vol. IV. p. 925, 14-25.) In the interim between the adoption of Order 95-10 and the hearing for this proceeding, MPWMD has treated the quantity of water that Cal-Am is taking from the river as part of the supply of water available to serve the needs of peninsula communities. (RT, Ph. 2, Vol. IV, p.1008, 25 – p.1011, 24; p. 936, 5 - 21.) During this proceeding, MPWMD and many peninsula cities took the position that all of the water being diverted from the river by Cal-Am is necessary for public

health and safety. (RT, Ph. 2, Vol. IV, p. 1046, 13-21.) Further, MPWMD and many peninsula cities also wish to have water for growth. MPWMD's water allocation program sets aside water for growth within the limits of the supply of water available within its jurisdiction, including the water being illegally diverted from the river by Cal-Am. (RT, Ph. 2, Vol. IV, p. 953, 7 – p. 954, 23; p. 1046, 13 – p. 1047, 21; Carmel-1, p. 2, 3-22; Monterey-1, p. 2, ¶ 4; City of Seaside-4, p. 3, 19 - 24.) An unintended consequence of this arrangement may be that because the peninsula cities have had water both for existing uses and for growth, their residents have had little incentive to support or pay for a project or projects to obtain a legal supply of water that can be substituted for the illegal diversions from the river. In addition, diverting water from the river for growth is unacceptable when (a) Cal-Am has no legal right to divert the water, (b) the steelhead in the river has been declared a threatened species, (c) the river has been designated critical habitat for the steelhead and (d) miles of the river bed are dry for five to six months a year. Accordingly, we conclude that water should not be diverted from the river for growth and that the quantity of water that is illegally diverted by Cal-Am should be reduced over a period of years until illegal diversion from the river is ended.

The water available to supply Cal-Am's customers, from all sources (including Cal-Am's illegal diversions from the Carmel River), is in rough equilibrium with current customer needs. MPWMD's regulations to encourage conservation, the reduction of losses within Cal-Am's water system, and other measures can offset modest reductions in supply that are gradually implemented without presenting a threat to public health and safety. An immediate and substantial reduction in the quantity of water that Cal-Am diverts from the river could present a threat to public health and safety unless Cal-Am's customers can be required to scale back their use of water by an amount equal to the quantity of reduced diversions. MPWMD's regulation adopted to curtail consumption within the peninsula communities depends heavily upon public education and the cooperation of water users. (MPWMD-SP12, p. 18, 21 - p. 20, 11; RT, Ph. 2, Vol. IV. p. 1029, 4 – p. 1036, 6.) Effective control over the quantity of water used by many thousands of users through voluntary cooperation is an uncertain undertaking at best. Thus, an immediate and substantial reduction in the quantity of water that Cal-Am diverts from the Carmel River could present a threat to public health and safety.³⁹ The State Water Board concludes that an order requiring Cal-Am to immediately make substantial reductions in the

³⁹ The peninsula area economy is also dependent upon the vitality of the hospitality industry. A marked and substantial reduction in the quantity of water that Cal-Am may divert from the river would, in all likelihood, affect the number of visitors that can be served by the hospitality industry and the economy of the area. (MPHA-001, p. 4, 9-17; MPHA-010, p. 3, 14-25.)

quantity of water illegally diverted from the river could present an unacceptable risk to public health and safety. On the other hand, modest reductions in the quantity of water Cal-Am diverts from the river that are gradually implemented can be offset by the types of projects and actions previously described in this order⁴⁰ and do not present a threat to public health and safety. Thus, the State Water Board also concludes that Cal-Am should be required to make modest and continuing reductions in the quantity of water diverted from the Carmel River until such time as it has developed a project or projects capable of providing a new source of water to supply the needs of its customers to substitute for its unlawful diversions of water from the Carmel River.

19.0 OTHER MATTERS

19.1 Pebble Beach Company should be Subject to Limitations Imposed upon Cal-Am's Diversions from the Carmel River

The State Water Board strongly supports the use of recycled water for nonpotable water uses where recycled water is available in order to maximize the beneficial use of the state's scarce water supplies. In the past, the State Water Board has required that recycled water be used, instead of potable water for nonpotable uses, such as irrigation, pursuant to Water Code sections 13550 and 13551. (E.g., Decision 1625; see also Decision 1623-Amended; see also Order WQ 84-7 [requiring dischargers in water short areas who propose to discharge treated wastewater to the ocean to evaluate the potential for water reclamation].) Water recycling promotes the constitutional policy that the water of the state be put to beneficial use to the maximum extent possible. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.)

Pebble Beach Company (PBC) has a 365 afa water entitlement⁴¹ from MPWMD for developing properties within Del Monte Forest. The entitlement is used for making new service connections to Cal-Am's water system. The entitlement was granted as part of a contractual arrangement wherein PBC agreed to financially guarantee public financing of a wastewater reclamation project. PBC seeks to have its water entitlement for new growth excluded from any limitation that may be placed upon Cal-Am's withdrawals from the Carmel River. (Oct. 14, 2008, Closing Brief of PBC, p. 13, 20-22.). In addition, PBC contends that, during 2005-06, it relied upon findings and representations by the State Water Board when undertaking additional financial

⁴⁰ Section 16.0. Projects and Actions that may Affect Cal-Am's Need to Divert Water from the Carmel River, subsections 16.1 – 16.4.

⁴¹ In addition to PBC's 365 afa, the entitlement includes 10 afa for S. Lohr and 5 afa for W. Griffin, who are subject to conditions contained in this order.

arrangements to further upgrade the wastewater reclamation plant and when acquiring a reservoir to store reclaimed wastewater.

The Pebble Beach Community Services District (PBCSD) and the Carmel Area Wastewater District (CAWD) operate the CAWD-PBCSD Wastewater Reclamation Project. (PBC-2, p. 1, 25-27.) The project provides reclaimed wastewater for irrigation of the golf courses and other recreational open spaces located in the unincorporated Del Monte Forest area of Monterey County. (PBC 1, p. 2, 7-9.) The project was designed to deliver not less than 800 afa of reclaimed water and to free an equal amount of potable water for other uses. Operationally, some potable water was necessary to control salinity levels in the reclaimed water used for golf course irrigation and to meet irrigation needs during times of peak demand. (PBC-1, p. 2, 16-23.) During 13 years of operation, between 1994-95 and 2006-07, the project supplied an average of 706 afa of reclaimed water; 267 afa of potable water was required for salinity control and to meet peak irrigation demand. (PBC-2, p. 3, 1-28.) Public project financing was facilitated by private financial guarantees. The PBC guaranteed: (a) \$33.9 million in capital costs for the project, and (b) net project operating deficiencies. In return for the financial guarantee, PBC was granted a 365 afa potable water entitlement by MPWMD for future development of lands owned by PBC. (PBC-1, p. 3, 19 – p. 4, 2.) Based on this entitlement, water has been sold to over 500 homeowners in the Del Monte Forest. (RT, Ph. 2, Vol. II, p. 556, 14-15.)

During 2005-2006, the project was upgraded through the addition of 325 af of storage for reclaimed water and by improvements to the wastewater treatment plant to reduce the level of salinity in the reclaimed water. During 2009, these improvements should result in the project being able to operate without the need for potable water. (*Id.*, p. 4, 1-17.) The upgraded project cost \$34 million. PBC obtained the funds for the upgrade by selling 175 afa of the entitlement obtained from MPWMD to landowners in Del Monte Forest. (PBC-1, p. 3, 25 – p. 4, 2.)

A footnote in Order 95-10 recognizes the supply of water made available to Cal-Am customers by the project:

In addition to supplies from the Carmel River and pumped ground water in the area of Seaside, reclaimed water is available to some Cal-Am users from the Carmel Area Wastewater District Pebble Beach Community Services District Wastewater Reclamation Project. The Project will provide 800 acre-feet of reclaimed water for the irrigation of golf courses and open space in the Del Monte Forest. In return for

financial guarantees, the Pebble Beach Company and other sponsors received a 380 af of potable water entitlement from the District for development within Del Monte Forest. As of the end of fiscal 1993-1994, the District had not allocated the remaining 420 af of project yield.

(Order 95-10 at p. 6, fn. 2.)

On March 27, 1998, the Chief, Division of Water Rights, wrote MPWMD and Cal-Am concerning the relation of the project to the water being diverted from the river by Cal-Am and Order 95-10.

(PBC-7.) The letter states, in part:

The [State Water Board] has recognized that the Pebble Beach Company and other sponsors were project participants in, and assisted in funding, the wastewater reclamation project which enabled Cal-Am to reduce its delivery of potable water to Del Monte Forest property and thereby reduce the demand on the Carmel River by at least 500 afa and potentially 800 afa. Upon completion of the Del Monte Forest property, 380 afa will be diverted from the Carmel River by Cal-Am for delivery to these lands. Thus, there will be no net increase in Carmel River diversions in the future over the level of past documented diversions as a result of developing these projects. As a result of the reclamation project and especially during the interim period while the Del Monte Forest property is being developed, the net diversion from the Carmel River to serve Del Monte Forest properties will be less than the level that would have occurred if the wastewater reclamation project had not been developed. Thus under Footnote 2 of Order WR 95-10, the 380 afa is available to serve the projects.

As a result, Order WR 95-10 does not preclude service by Cal-Am to the Del Monte Forest property under the 380 afa entitlement granted by the District. As you are aware, the [State Water Board] is requiring Cal-Am to maintain a water conservation program with the goal of limiting annual diversions from the Carmel River to 11,285 afa until full compliance with Order WR 95-10 is achieved. While Cal-Am has been exceeding the limit, it is not the intent of the [State Water Board] to penalize the developers of the wastewater reclamation project for their efforts to reduce reliance upon the potable water supply via utilization of treated wastewater.

Thus, the [State Water Board] will use its enforcement discretion to not penalize Cal-Am for excess diversions from the Carmel River as long as their diversions do not exceed 11,285 afa plus the quantity of potable water provided to the Pebble Beach Company and other sponsors under this entitlement for use on these lands. This enforcement discretion will be exercised as long as the wastewater reclamation project continues to produce as much as, or more than, the quantity of potable water delivered to the Del Monte Forest property, and the reclaimed water is utilized on lands within the Cal-Am service area.

Footnote 2 of Order 95-10 deals with the issue of water use for purposes of projects in the Del Monte Forest. Consequently, the order does not provide discretion to address any projects involving the use of the unassigned 420 afa (800 afa minus 380 afa identified in the footnote equals 420 afa) developed by the wastewater treatment facility.

On October 18, 2001, the Chief, Division of Water Rights, sent another letter to MPWMD concerning this subject. The letter stated in part:

You specifically asked whether the use of a portion of the original Pebble Beach Company water entitlement from the CAWD reclamation project can be used on non-Pebble Beach Company properties within (1) the Del Monte Forest and (2) outside the Del Monte Forest. Cal-Am may distribute the new potable water supply anywhere in its service area, subject to the Carmel River diversion requirements of Order 95-10 (and any subsequent modification approved by the State Water Resources Control Board) and requirements (a) and (b) above.⁴²

(PBC-8.)

The letter expresses an intent not to penalize Cal-Am for excess diversions from the Carmel River to supply Pebble Beach as long as their diversions do not exceed 11,285 afa plus the quantity of potable water provided to the PBC and other sponsors under the entitlement from MPWMD.⁴³

The letters cannot be understood as a binding commitment that the State Water Board will never take an enforcement action that might affect PBC or others relying on the entitlement from MPWMD. Because the March 27, 1998 letter expressly identifies the State Water Board's action as an exercise of enforcement discretion, it serves as a warning that Cal-Am's excess diversions constitute an ongoing violation and that the State Water Board could take enforcement action. Nevertheless, as noted in the March 27, 1998, letter to MPWMD, the reclamation project constructed with PBC funding guarantees will not result in a net increase in diversions from the Carmel River and, in the interim before while Del Monte property is being developed, the net diversions from the river to serve Del Monte Forest properties will be less than the level that would have occurred if the reclamation project had not been developed.

⁴² The reference to the "requirements of (a) and (b) above" refers to the following: "Continual records must be maintained, on both a monthly and total annual basis, to document that (a) the new use of potable water does not exceed the historic quantity of potable water provided by the California-American Water Company (Cal-Am) to the Del Monte property and (b) the quantity of treated wastewater put to beneficial use equal or exceeds the potable water use."

⁴³ The letter of October 18, 2001, is also problematic. It should be noted, however, that the letter expressly states that Cal-Am's diversions from the river for the PBC are subject to Order 95-10 and any subsequent modification to the order approved by the State Water Board. This order is such a modification.

We conclude, therefore, that the State Water Board should not prohibit any increased diversions from the river by Cal-Am for deliveries made under PBC's entitlement from MPWMD. Nevertheless, any water users who receive water under the PBC entitlement should not be exempted from any conservation program or other effort to reduce Cal-Am's unauthorized diversions.

19.2 Any Monterey Peninsula Community that Wishes to Develop Water from a New Source for Growth Must First Apply Water from the New Source to Reduce its Share of the Water Being Illegally Diverted by Cal-Am; Only after its Share of Illegal Diversions from the River is Ended may Water from the New Source be Used for Growth

Some additional water has been developed for growth in Cal-Am's service area since entry of Order 95-10. The City of Sand City independently made an effort to develop water for growth within its jurisdiction. The city sought assurances from the State Water Board that any new water it developed would not be reduced to offset Cal-Am's illegal diversions from the river. (Sand City -1, Attachment A.) Whatever assurances may have been provided in the past, such assurances should not be provided in the future. All communities receiving water from Cal-Am are obtaining some portion of that water from illegal diversions from the river. Any community or combination of communities seeking to develop a new source supply must first apply water from a new source to reduce its share of the water being illegally diverted by Cal-Am. Water from a new source of supply should not become available for growth until after the community has fully substituted water from the new source for its share of the water being illegally diverted from the river by Cal-Am. Monterey Peninsula communities and their residents have little incentive to support efforts to develop new water supplies to replace the water being illegally pumped from the river by Cal-Am if water can be obtained for growth without having to reduce their pro-rata share of water illegally pumped from the river. Nearly 14 years after the adoption of Order 95-10, Cal-Am is unable to tell the State Water Board what project may be built to end its illegal diversions, when a project will be approved or when construction might be commenced. Indeed, there is no assurance that any project will be approved during the next several years.

19.3 Affirmation and Adoption of Rulings by the Hearing Officers

Unless otherwise expressly addressed in this order, all rulings of the Hearing Officers are affirmed and adopted by this order.

CONCLUSIONS

Order 95-10 does not authorize Cal-Am to divert water from the Carmel River in excess of its water rights, and Cal-Am is illegally diverting water from the Carmel River in violation of Order 95-10 and Water Code section 1052. The doctrines of *res judicata* and collateral estoppel are not a bar to the State Water Board's adoption of a CDO.

Condition 2 of the Order 95-10 requires Cal-Am to diligently implement actions to terminate its unlawful diversions. Cal-Am has diverted an average of 7,602 afa from the river without a basis of right for the past 14 years, and in the roughly 10-year period since it achieved the 20 percent reduction required by Condition 3 of Order 95-10, Cal-Am has not made any meaningful progress toward reducing the amount of its unlawful diversions. Further, Cal-Am has not diligently implemented smaller water supply projects that could have enabled Cal-Am to reduce its illegal diversion from the river and to alleviate the serious condition affecting the survival of steelhead.

Thus, Cal-Am has not diligently implemented actions to terminate its unlawful diversions under Condition 2. Cal-Am's only action reducing its illegal diversions has been the work done on two projects yielding small amounts of water: the ASR project and the Sand City Desalinization Plant. Significantly, these projects are in place due largely to the efforts made by other agencies, i.e., MPWMD and the City of Sand City.

The lower 6.5 miles of the riverbed are dry for five to six months of each year, due primarily to Cal-Am's diversions.⁴⁴ Cal-Am's diversions from the river continue to have an adverse effect on the fish, wildlife and riparian habitat of the river, including the threatened steelhead. Since the adoption of Order 95-10, the California Central Coast steelhead has been declared as threatened under the Endangered Species Act, and the Carmel River has been declared as critical habitat for the survival of the steelhead.

⁴⁴ See discussion under Section 15.0, *supra*.

The adjudication of the Seaside groundwater basin will decrease the supply of water available to supply Cal-Am's customers by 417 af in 2009, or by about 2.8 percent of the available supply. Other projects or regulatory actions can make additional water available to Cal-Am, including: (1) the Phase I and II ASR project; (2) the City of Sand City Desalinization Project; (3) the development of temporary small water supply projects (4) the reduction of system losses within the Cal-Am distribution system; (5) the retrofit program; (6) reducing the use of potable water for outdoor irrigation; and (7) other measures to reduce consumer demand for potable water.

MPWMD's water allocation program sets aside water for growth within the limits of the supply of water available within its jurisdiction. MPWMD views water illegally diverted from the river by Cal-Am as available water supply for growth. Because water has been available for growth, the peninsula cities and their residents have had little incentive to support or pay for a project or projects to obtain a legal supply of water that can be substituted for the illegal diversions from the river.

In consideration of the foregoing, we conclude that Cal-Am should be prohibited from further degrading conditions in the river by diverting water from the river for new service connections, and that Cal-Am should be required to reduce the amount of water being diverted from the river to serve existing service connections.⁴⁵ In reaching this conclusion, we are particularly mindful that (a) the lower 6.5 miles of the Carmel River bed are dry for 5 to 6 months of each year, (b) the steelhead is a threatened species, (c) the river has been declared to be critical habitat for the steelhead, and (d) the earliest date which Cal-Am's illegal diversions may be brought to an end is 2016, some 21 years after the adoption of Order 95-10.

⁴⁵ Cease and desist orders are exempt from the requirements of CEQA. (*Pacific Water Conditioning Ass'n., Inc. v. City Council* (1977) 73 Cal. App.3d 546,556.)

ORDER

NOW, THEREFORE, IT IS ORDERED THAT Cal-Am shall cease and desist from the unauthorized diversion of water from the Carmel River in accordance with the following schedule and conditions.⁴⁶

1. Cal-Am shall diligently implement actions to terminate its unlawful diversions from the Carmel River and shall terminate all unlawful diversions from the river no later than December 31, 2016.
2. Cal-Am shall not divert water from the Carmel River for new service connections or for any increased use of water at existing service addresses resulting from a change in zoning or use. Cal-Am may supply water from the river for new service connections or for any increased use at existing service addresses resulting from a change in zoning or use after October 20, 2009, provided that any such service had obtained all necessary written approvals required for project construction and connection to Cal-Am's water system prior to that date.⁴⁷
3. At a minimum, Cal-Am shall adjust its diversions from the Carmel River in accordance with the following:
 - a. Commencing on October 1, 2009,⁴⁸ Cal-Am shall not divert more water from the river than the base of 10,978 afa,⁴⁹ as adjusted by the following:
 - (1) Immediate Reduction: Commencing on October 1, 2009, Cal-Am shall reduce diversions from the river by 5 percent, or 549 afa.

⁴⁶ Attachment 1 to this order, "Table 1, Projected Reductions in Illegal Diversions from the Carmel River," shows the reductions in illegal diversions from the Carmel River that should result from conditions 1, 2 and 3 of this order.

⁴⁷ Multiunit residential, commercial or industrial sites may currently be served by a single water meter. The installation of additional meters at an existing service will not be viewed as a new service connection provided that the additional metering does not result in an increase in water use. Metering each unit of a multiunit building tends to increase accountability in the use of water and the effectiveness of water conservation requirements.

⁴⁸ Each water year runs from October 1 to September 30 of the following year.

⁴⁹ Cal-Am diverts 3,376 afa under legal rights and, on average, 7,602 afa without a basis of right. (3,376 + 7,602 = 10,978 afa).

- (2) Annual Reductions: Commencing on October 1, 2011, the base shall be further reduced by 121 af per year through savings that will accrue from reduced system losses, the retrofit program, the reduction of potable water used for outdoor irrigation, demand reduction and similar measures. The 121 af reduction shall be cumulative. For example, 121 af shall be reduced in the first year and 242 af shall be reduced in the second year. Commencing on October 1, 2015, annual reductions shall increase to 242 af per year. The 242 af per year reduction shall also be cumulative. Annual reductions shall continue until all unlawful Cal-Am diversions from the river have been terminated.
- (3) ASR Project: The amount of water diverted to underground storage under Permit 20808A (Application 27614A) as of May 31 of each year and which will be supplied to Cal-Am customers after that date shall be subtracted from the base.⁵⁰ On June 1 of each year, Cal-Am shall submit an operating plan to the Deputy Director for Water Rights specifying the quantity of water it intends to supply from ASR Project for its customers after May 1 of each year. Water pumped from the project for delivery to customers should be consistent with the requirements of paragraph "c" below.
- (4) Sand City Desalination Plant: Once the Sand City Desalinization Plant becomes operational, 94 af shall be subtracted from the base. In addition, based on actual production from the plant, any other water that is produced and not served to persons residing within the City of Sand City shall be subtracted from the base amount for each water year.
- (5) Small Projects: Water produced from new sources developed pursuant to Condition 4 of this order shall be subtracted from the base.
- (6) Pebble Beach: Within 90 days following adoption of the order, the Pebble Beach Company shall certify, under penalty of perjury, the total quantity of water annually used under its water entitlement from MPWMD (for the funding assurances provided for the construction and expansion of the CAWD-PBCSD

⁵⁰ This condition shall apply to Phase I and Phase II of the ASR project.

The sentence in bold below shows the amendment to the last sentence of condition 3. a. (6) that is directed by Order WR 2010-0001.

wastewater reclamation project).⁵¹ Ten percent (10%) of the amount reported shall be added to the adjusted base to allow Cal-Am to divert water from the river to supply water for PBC water entitlements initiated in the following 12 months. Thereafter, the PBC shall annually submit, on September 30, a report to the Deputy Director for Water Rights accounting for any additional water that is diverted from the Carmel River as the result of an increased use of its MPWMD water entitlement. Increased diversions from the river by Cal-Am to satisfy PBC entitlements from MPWMD shall be added to the adjusted base, and are not subject to section 2 of this order. Water Diverted from the river by Cal-Am for PBC entitlements can only be served to properties that have received a PBC entitlement from MPWMD and which are located in the Cal-Am's service area. **After December 31, 2016, Cal-Am shall not illegally divert water from the river to supply the holders of PBC entitlements.**

- b. Either Cal-Am or the MPWMD may petition the State Water Board Deputy Director for Water Rights for relief from annual reductions imposed under condition 3., a (2). No relief shall be granted unless all of the following conditions are met: (a) Within 18 months of the adoption of this order, Cal-Am has imposed a moratorium on new service connections pursuant to Water Code section 350 or has obtained an order prohibiting new connections from the PUC pursuant to Public Utility Code section 2708 or MPWMD has imposed a moratorium on new service connections under its authority; (b) the demand for potable water by Cal-Am customers has been reduced by 13 percent;⁵² and (c) a showing is made that public health and safety will be threatened if relief is not granted. Any relief granted shall remain in effect only as long as (a) a prohibition on new service connections remains in effect, and (b) the 13 percent conservation requirement remains in effect.
- c. ASR project water stored in the Seaside groundwater basin under Permit 20808A (Application 27614A) should be used to mitigate the effect of Cal-Am's illegal diversions from the river. ASR water should be supplied to Cal-Am customers only during months when water is most needed in the river to preserve steelhead.

⁵¹ Water currently diverted from the river by Cal-Am to supply PBC entitlements is accounted for in the existing base.

⁵² For purposes of measuring compliance, the 13 percent reduction shall be measured against the adjusted base required by this condition for the year in which the conservation requirement is imposed.

Commencing no later than June 1 of each year, Cal-Am should use stored groundwater to supply the needs of its customers and reduce diversions from the river. Consistent with Cal-Am's operating plan, water should be pumped from the groundwater basin at the maximum practicable rate for as long as possible. This condition shall apply to both Phase I and Phase II of the ASR project. The river's habitat and fish may receive greater benefits from a substitution regime that differs from that called for by this condition, a regime requiring that substitution commence at a different date, at a different rate or be coordinated with the level of flow in the river. In addition, it may be desirable to hold stored water from one year to the next to assure that more water is available for the steelhead and its habitat in years when the potential for steelhead survival may be greater. Several substitution trials may be necessary to determine which regime will have the greatest benefit. The National Marine Fisheries Service and the California Department of Fish and Game are encouraged to negotiate different substitution regimes with Cal-Am. The State Water Board will honor such agreements, provided Cal-Am submits the written agreement to the Deputy Director for Water Rights no later than May 1 of each year and the written agreement is approved by the Deputy Director.

4. Cal-Am shall reduce its illegal diversions from the river at the same rate ASR Project water is pumped from the groundwater basin as long as stored water is available under the operating plan.
5. Cal-Am shall implement one or more small projects that, when taken together, total not less than 500 afa to reduce unlawful diversions from the river. Within 90 days of entry of this order, Cal-Am shall identify to the Deputy Director for Water Rights the projects that it will implement and shall implement the projects within 24 months of entry of this order. Cal-Am may petition the Deputy Director for additional time in which to implement the projects. However, no time extension shall be considered unless the petition is accompanied by detailed plans and time schedules for each project. Detailed justification shall be provided for additional time. Detailed justification shall be provided for any request for an extension to allow Cal-Am time to obtain prior approval from the PUC. To the maximum practicable extent, small projects shall be operated to reduce illegal diversions from the river during the months when surface flow in the river begins to go dry and through the months when surface flow in the river disappears below river mile 6.5.

6. Starting three months following adoption of this order, Cal-Am shall post quarterly reports on its website and file the quarterly reports with the Deputy Director for Water Rights. The quarterly reports shall include the following:
 - (a) Monthly summaries of the quantity of water it diverts from the river.
 - (b) Monthly summaries of the quantity of ASR project water diverted from the river under Permit 20808A and stored in the Seaside ground water basin. The monthly reporting shall also state the quantity of water beneficially used under Permit 20808A and the current balance of water in storage.
 - (c) Monthly summaries of the quantity of water being produced by the Sand City desalinization plant. The reporting shall identify new service connections within Sand City and thereafter report the quantity of water being delivered to the new connections. The monthly reports shall specify the quantity of water used to reduce diversions from the river during the reporting period.
 - (d) Monthly summaries of the quantity of water saved by reducing system losses.
 - (e) Monthly summaries of reductions in demand for potable water due to conservation actions such as increased water rates, MPWMD's retrofit program, efforts to reduce potable water for outdoor water use and demand reduction initiatives.
 - (f) Monthly summaries identifying all new service connections. The report shall include the Cal-Am account number, the service address, the name of each authority granting any approval required for connecting to Cal-Am's system and the name of each authority granting any approval required before commencing construction; the issuer of the each approval and the date of each approval shall be separately listed for each service address.
 - (g) Monthly summaries identifying existing service addresses that receive an increased supply of water due to a change in zoning or use. The report shall include Cal-Am account number, the service address and the name of each authority authorizing a change of use or of zoning and the date of such change.

- (h) Each quarterly report submitted by Cal-Am shall be certified under penalty of perjury and shall include the following declaration: *“I declare under penalty of perjury, under the laws of the State of California, that all statements contained in this report and any accompanying documents are true and correct, with full knowledge that all statements made in this report are subject to investigation and that any false or dishonest statement may be grounds for prosecution.”*
7. Starting six months after adoption of this order, Cal-Am shall file quarterly reports of its progress toward implementing Condition 3 (small project implementation) and note specifically any problems with its schedule of implementation.
 8. The Deputy Director for Water Rights is authorized to modify the timing and the content of the reporting required by all of the provisions of this order to more effectively carry out the intent of this order.
 9. Cal-Am shall comply with all requirements of Order 95-10, except as follows:
 - (a) Condition 1 of Order 95-10 is superseded by Condition 2 of this order.
 - (b) Condition 3(b) of Order 95-10 is superseded by Condition 2 of this order.
 - (c) The last sentence of Condition 4 is deleted because the Seaside groundwater basin watermaster will determine the manner in which water may be withdrawn from the groundwater basin.
 - (d) All other conditions of Order 95-10 shall remain in full force and effect until fully implemented.
 10. The Deputy Director for Water Rights is directed to closely monitor Cal-Am’s compliance with Order 95-10 and this order. Appropriate action shall be taken to insure compliance with these orders including the issuance of additional cease and desist orders under Water Code section 1831, the imposition of administrative civil liability under Water Code section 1055, and referral to the Attorney General under Water Code section 1845 for injunctive relief and for civil liability. If additional enforcement action becomes

necessary, the Deputy Director is directed to consider including in such actions all Cal-Am's violations of Water Code section 1052 since the adoption of Order 95-10.

11. The conditions of this order and order 95-10 shall remain in effect until (a) Cal-Am certifies, with supporting documentation, that it has obtained a permanent supply of water that has been substituted for the water illegally diverted from the Carmel River and (b) the Deputy Director for Water Rights concurs, in writing, with the certification.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 20, 2009.

AYE: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Arthur G. Baggett, Jr.

NAY: Board Member Tam M. Doduc

ABSENT: None

ABSTAIN: Board Member Walter G. Pettit



Jeanine Townsend
Clerk to the Board

ATTACHMENT 1

TABLE 1
PROJECTED REDUCTIONS IN ILLEGAL DIVERSIONS FROM THE CARMEL RIVER
(all amounts are in acre-feet)

Water Year (Oct - Sept)	Base Amount ¹	Mandatory Cumulative Annual Reduction ²	Estimated ASR Project Operational Yield ³	Estimated Sand City Desalinization Plant ⁴	Estimated Small Project Output ⁵	Estimated Coastal Water Project Output ⁶	Total to Base Amount	Total Estimated Amount Diverted from Carmel River	Estimated Amount Diverted w/o Valid Basis of Right
2009-10	10,978	549	145	75	0	0	769	10,209	6,833
2010-11	10,978	549	145	290	0	0	984	9,994	6,618
2011-12	10,978	670	145	280	0	0	1,095	9,883	6,507
2012-13	10,978	791	145	270	0	0	1,206	9,772	6,396
2013-14	10,978	912	145	260	0	0	1,317	9,661	6,285
2014-15	10,978	1,033	145	250	0	0	1,428	9,550	6,174
2015-16	10,978	1,275	145	240	0	0	1,660	9,318	5,942
2016-17	10,978	1,517	145	230	0	11,730	1,892	3,376	0

- 1) Cal-Am diverts 3,376 afa under legal rights and, on average, 7,602 afa without a valid basis of right (60 afa of the 3,376 afa is assumed diverted under riparian right to riparian vegetation along Carmel River).
- 2) Reduction in 2009-2010 and 2010-2011 is initial amount of 5% (549 ac-ft). Starting October 1, 2011, add 121 af each year until October 1, 2015, when the annual reduction becomes 242 afa.
- 3) Average amount diverted for Phase 1 ASR project from water year 1994-1995 to 2006-2007 (R.T. Phase 1, Vol. I pp. 41-42). Amount may increase when Phase 2 of the ASR project becomes operational.
- 4) Number may vary based on actual production from desalinization plant. Assumes 3 months of operation in 2009-10.
- 5) Production from small projects cannot be estimated at this time.
- 6) Estimated production of Coastal Water Project (R.T. Phase 2, Vol. V, p. 1333).