

ORIGINAL

Decision No. 92369 NOV 4 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 WILLIAM EVERETT KANE and BARBARA JOAN)
 KELLY, husband and wife as joint)
 tenants, for annexation to the)
 Service Area of the Monterey Division)
 of the California American Water)
 Company.)

Application No. 59202
 (Filed October 15, 1979)

John M. Van Zander, for William Everett Kane
 and Barbara Joan Kelly, applicants.
Dinkelspiel, Pelavin, Steefel & Levitt, by
Lenard G. Weiss, Attorney at Law, for
 California-American Water Company,
 respondent.
Bruce Buel, for Monterey Peninsula Water
 Management District, interested party.

O P I N I O NStatement of Facts

On the northeastern side of the Carmel Valley Road, midway up the valley, but about two miles short of Carmel Valley Village, there is an affluent residential area which in part straddles Los Laureles Grade Road. The western portion is known as Los Ranchitos Del Carmels, and the eastern portion as La Rancheria Del Carmelo (La Rancheria). The two areas constituted the original Ranchitos Tract. Many retired people today live in the two subdivisions, and the area is characterized by fine home sites of one or more acres spread over the gently billowing, but steadily ascending slopes which make up this area between the Carmel River and the steep escarpment-like hillside which defines the northeastern side of the Carmel Valley in this area.

When annexed by California Water and Telephone Company (Cal-Water), La Rancheria subdivision's boundary on the east was

a residential street itself known as La Rancheria (road), and by a utility access road easement leading from La Rancheria road up to a large water storage tank site situated on a shelf cut into the escarpment above the Valley (see map, Appendix A). Detail maps prepared in 1952 and filed October 3, 1957 with this Commission depict the service area boundary as a dotted line on the eastern, or outer, sides of this residential street and easement. This continued to be the situation when in 1966 California-American Water Company (Cal-Am) purchased the water system from Cal-Water. Therefore, Cal-Am in turn inherited these same boundary lines. The currently filed service area maps still have them. When incorporated into the Cal-Water service area some 30 years ago, La Rancheria subdivision consisted of 25 multi-acre parcels. Since 1952 some of these parcels have been split into smaller lots. Among those so split was Parcel No. 25. Today it comprises 2 lots, Lot No. 25 and Lot No. 25-A. Lot No. 25-A, of 2½ acres, supports a residential structure. In October 1978 it was purchased from Mr. and Mrs. Kevin Walsh by Mr. and Mrs. William E. Kane, the applicants in this proceeding. The Kanes now reside there (63 La Rancheria, Carmel Valley, CA 93924), obtaining water service from Cal-Am, although they find it necessary to use a booster pump to obtain adequate water pressure.

La Rancheria road is a two-lane residential road looping east and south away from and then returning to Los Laureles Grade Road. The utility access road proceeds southeast up a draw in the hillside from La Rancheria road, forming a 230-foot arc to the east. After entering a locked utility gateway in a fence below a small hillside orchard in the draw, it doubles back to the northeast and continues, following the contour uphill across the steepening slope of the hillside escarpment, some 700 feet to the

shelf cut into the face of the hillside escarpment as the site for the 2 large Cal-Am water storage tanks. The utility access road is a narrow 1-vehicle-wide asphalt passage to the shelf (see the photograph in Appendix B (Exhibit No. 3 in this proceeding)). The escarpment slope in this area near the shelf is steep, becoming 25 to 30 degrees.

Adjoining Lot No. 25-A to the east across the utility road is another parcel of about 7 acres. This latter parcel is not within the La Rancheria subdivision and is outside Cal-Am's service boundaries. The 2 parcels of land share about 700 feet of common border, but are usefully separated by the 20-foot wide access road easement running the length of that border. The Kanes purchased this 7-acre parcel from the Walshs in 1978 at the same time they purchased their residence property. Except for a small area in the southern corner of the 7 acres, where the above-mentioned small hillside orchard dips into the draw running up the hillside, the 7-acre parcel for the most part is actually a precipitous slope forming part of the escarpment leading up into the low range of hills which divide the Carmel Valley from the Salinas Valley.

Having acquired their two parcels of land the Kanes approached Cal-Am to have the 7-acre parcel annexed to Cal-Am's service area so that they could obtain water. Cal-Am refused the annexation, pointing out that Decision No. 89195 dated August 8, 1978

in Case No. 9530^{1/} prevents such annexations without prior Commission approval. Consequently, the Kanes filed the instant application seeking an exception, and a duly noticed public hearing was held in Monterey on April 2, 1980 before Administrative Law Judge John B. Weiss.

At that hearing Mr. Kane testified that it was his understanding, derived from representations assertedly made by his real estate agent and the sellers at the time of his purchase, that the 7-acre parcel was really part of La Rancheria but had been left out of the original subdivision annexation by "inadvertent clerical error or accident" when the Rancheria subdivision was annexed about "13 or 14 years earlier," and that a letter and petition to rectify this alleged omission purportedly had been sent by a predecessor owner to the Walshs to a vice-president of Cal-Am, but that no reply had been received. Mr. Kane now wishes to erect a guest house to be used by his aged mother (now resident in Georgia) and a small hydroponic experimentation structure on the property.

1/ In the early to mid-1970's period a very abnormal and severe drought condition was experienced in California, and the Cal-Am Monterey District involved herein was particularly adversely affected. In 1973 this Commission opened an order instituting investigation (Case No. 9530) into the area's plight. The deepening drought thereafter on June 10, 1975 led to Decision No. 84527 prohibiting additional service connections (with certain exceptions not applicable here) in Cal-Am's district. These restrictions were eased January 5, 1977 with respect to certain lot owners of record zoned for single-unit residential use, and later Decision No. 89195 lifted service connection restrictions within Cal-Am's service territory but provided, inter alia, that "Cal-Am shall not extend water service beyond the boundaries of its present service area in the Monterey Peninsula District without prior Commission approval."

He recognizes that he would have to install a pump system to bring water up to these structures if an annexation were granted. The Kanes presented evidence through a representative of the firm of Bestor Engineers, Inc. on the Carmel Valley Master Plan adopted by the Monterey County Board of Supervisors on January 15, 1980, which plan if implemented, apart from providing 3 "areas of development concentration," essentially would down zone much of the valley by changing zoning from 1 unit per acre to approximately 1 unit each 2½ acres. Kane asserts that this would reduce the demand upon Cal-Am's water resources since the number of potential dwelling units possible (3473 under provisions of an exhibit in Decision No. 89195 ,supra) under existing zoning would be lowered to something between 1,000 and 2,000 units. The plan proposes a complicated point and allocation system with many constraints. The thrust of Kane's presentation was that this new plan would make more water available and therefore his annexation should be allowed.

The general manager of the Monterey Peninsula Water Management District (MPWMD), an instrumentality created in 1978 by the Legislature (Statutes of 1977, Chapter 527, found at West's California Water Code Appendix, Section 118-1, et seq.), appeared to state that while MPWMD wants to protect the rights of existing customers within Cal-Am's service territory to the limited supplies of water currently available, it is also concerned with possible proliferation of mutuels and private wells in areas outside of Cal-Am's service territory, consequences that sometimes occur where annexations are denied. But then, with these admittedly conflicting interests in mind, MPWMD chose not to support or to oppose Kane's application in this proceeding. Its representative testified that while it desires to bring the individual application process to the local level, MPWMD has not yet considered how best to handle individual annexations.

Cal-Am took the position that it had no evidence that there had ever been any intimation by the utility or its predecessors at any time in the past that it would extend service to the area at issue here. It is concerned that there could again be excessive demand upon the existing limited water resources, demand beyond present obligations. It is also uncertain but that changed circumstances since Case No. 9530^{2/} might well serve to persuade the Commission that Ordering Paragraph 6 to Decision No. 89195 should be changed.

At conclusion of the hearing Cal-Am was instructed by the ALJ to provide the Commission with certain additional information^{3/} having particular reference to a possible question of delegation of Commission authority, or reconciliation of that authority with the nascent authority of MPWMD, as regards review of individual applications. Cal-Am complied, furnishing background materials, but then on May 1, 1980 by letter to the ALJ, Cal-Am advised that discussions with the Commission staff, which had not participated in the Monterey hearing, had suggested the advisability of Cal-Am's

2/ The changed circumstances referred to are: (1) the creation by the Legislature of the MPWMD with extensive powers to deal with water supply and use in the local area; (2) the creation of the Carmel Valley Master Plan which provides for reduced, but spread-out density requirements transcending Cal-Am's boundaries of record; and (3) the Radisavljevic - Bakun decision (Decision No. 90262 dated May 8, 1979 in Applications Nos. 58345 and 58464), the Edwards decision (Decision No. 90376 dated June 5, 1979 in Application No. 58450), the Saucito Land Co. decision (Decision No. 90508 dated July 3, 1979 in Application No. 58550), and the Millard - Mercurio decision (Decision No. 91734 dated May 6, 1980 in Applications Nos. 58935 and 58984).

3/ Including copies of MPWMD's Resolution 80-1 (Establishing Interim Municipal Unit Allotments) and Ordinance No. 1 (Establishing Rules and Regulations for the water management district). These were submitted April 9, 1980.

making a formal separate application to the Commission for modification of the ordering paragraph of Decision No. 89195 to provide for return to full and normal application of Section 1001 of the Public Utilities Code in contiguous situations. This procedure could serve to eliminate most of the individual case-by-case complaints arising out of contiguous annexation situations. Filing of a separate application would open the issue and provide opportunity and notice to all interested parties, including those of Case No. 9530, to provide input. The matter was submitted May 2, 1980.

Discussion

This proceeding serves to present an unusual combination of issues to this regulatory body. We will begin with the more conventional one of jurisdiction. The question here is whether the 7-acre parcel owned by the applicants is within or without the service area the utility has dedicated itself to serve. If the parcel is outside the service area boundaries Cal-Am cannot be compelled to render service (Cal. Water & Tel. Co. v PUC (1959) 51 C 2d 489). As will be seen, in this instance we conclude that applicants' 7 acres are outside the utility's service area.

When La Rancheria and Los Ranchitos Del Carmelo subdivisions were first proposed to Cal-Water as the Ranchitos Tract for annexation to the utility's service territory, the subdivisions were considered and accepted as one entity. This entity was clearly set forth on a subdivision map. From the utility viewpoint it was a natural. It was logically defined to fit within natural boundaries, avoiding small unserved enclaves or peninsulas. It was so designed that the water system to service the tract would be within a first pumping lift capability zone, a zone above the utility's then existing gravity-served zone across the Carmel Valley County Road. The parcels included within La Rancheria subdivision were clearly set forth and marked from No. 1 to No. 25 on the tract map filed with

the Commission. Applicants' 7-acre parcel was outside the annexation area. The map depicts the included tract service area carefully circumscribed by a dotted line. Water to serve the tract was to be pumped up and stored in a 50,000-gallon storage tank (since augmented by a second much larger tank) located on a shelf cut into the hillside escarpment above the service area, from whence delivery would be by gravity to the respective parcels. A utility road easement to the tank site was provided; it naturally followed, not a direct impossibly steep uphill route, but rather a contoured route from La Rancheria road. That contour route is a logical and natural boundary to the floor of the valley and to the service area. It includes the uppermost level of land that can be served, even marginally, by gravity from the tank on the hillside. Even so, applicants' home below the tank and the utility access road still requires booster pump assistance to provide adequate pressure. Anything higher up, including applicants' 7 acres, would require pumping and water storage facilities, or a main extension with a second lift capability, were it to be adequately served. Beyond the 7 acres of applicants lie the hundreds of acres of the Fleming Ranch, extremely rough in terrain. Any service to the hillside parcels south and east of the water storage tank would require additional facilities obviously not contemplated by the utility. Its predecessor filed Service Area and Pumping Lift Maps for the Carmel Valley as early as 1961. These maps bore this legend:

"Service in the Carmel Valley will be furnished under the company's rules and regulations as on file with the Public Utilities Commission of the State of California to properties that can be served by gravity flows from existing facilities without the installation of additional booster pumps or storage facilities. The service area boundaries as shown hereon for the Carmel Valley are approximate only."

Clearly the utility did not intend dedication to include service to areas gravity flow would not cover.

But here we run into what at first glance appears to be an inconsistency. The small-scale service area map filed October 3, 1957 covering the annexations of La Rancheria and Los Ranchitos Del Carmelo subdivisions show the service area boundary as a dotted line. In the eastern part of the tract this line is shown as being on the outside side of both La Rancheria road and the utility access road easement. But in another area, up the Los Laureles Grade Road further west and north, this dotted line, after dipping down from the tanksite to the Los Laureles Grade Road, is shown as switching across Los Laureles Grade Road to the western side of the road and continuing on the western side, or innerside, of the boundary road. Furthermore, to the far western side of the tract where the boundary is again a road, the Carmel Valley County Road, the dotted line is also shown on the eastern, or innerside, of the boundary road. The location on the map of this dotted line, deliberately switched from side to side of the boundary road, is significant, we believe. It is a graphic word of art. It means, when taken in conjunction with the creation of a first lift capability above the existing gravity zone when the Ranchitos Tract was annexed, and as clarified by the specific limitations set forth in the above-quoted legend appearing on subsequent Service Area and Pumping Lift Maps for the Carmel Valley, that the utility undertook an obligation to serve all included parcels, and in addition would serve contiguous properties when the dotted boundary line was on their side of the boundary road, even though the bulk of such a property was outside the boundary line, when such service could be effected by means of a meter installation placed on the property line which is also the boundary line, and service can be provided without the need of additional booster pumps or storage facilities. Some parcels of land east of La Rancheria road are on the same level elevation in large part as that road and could be served by meters connected to the 4-inch main in La Rancheria road without need for booster

pumps and storage facilities. The utility has a service obligation to such lands as it has dedicated itself to them in establishing the annexation boundaries of the Ranchitos Tract. But the 7-acre parcel of the applicants across the utility access road easement (which has no water main in it) cannot be served from either that access road or from La Rancheria road without the addition of booster pump and water storage facilities. Therefore, we conclude that service was never intended to be extended to applicants' 7 acres when the Ranchitos Tract was annexed. There was no dedication to serve that parcel and the 7 acres are outside the utility's existing service area.

In some instances a utility will extend itself beyond its filed service area boundaries in order to voluntarily serve an extraneous customer or two. But when a public utility voluntarily determines to extend its service into an area outside its recognized or declared service area boundaries, the utility concurrently must accept an obligation that it serve all customers in that expanded area as it has then dedicated its service to said new area (Di Liberto v Park Water Co. (1956) 54 CPUC 639). Furthermore, that extended service area must be defined by logical natural boundaries, and must avoid small unserved enclaves or peninsulas; it must not gerrymander out customers or potential customers. Such was the problem in Radisavljevic and Bakun (supra, footnote 2), where over the years Cal-Am voluntarily had extended individual service to certain customers beyond La Rancheria and Los Ranchitos Del Carmelo in a small natural pocket east of Los Laureles Grade Road. Subsequently, when the neighbors of these added customers came to obtain service, their requests were denied. Noting that a public utility cannot discriminate (Section 453 of the Public Utilities Code), we ordered service to these remaining customers in that natural pocket below the escarpment, and below the water tank. There had been a de facto annexation.

However, in the instant proceeding there was no evidence presented of service having been extended beyond La Rancheria portion of the Ranchitos Tract to anyone above the level of the water storage tank on the hillside escarpment in the area east of the utility road easement and La Rancheria road, an extension which would have expanded the utility's service area as in Radisavljevic and Bakun. In the instant proceedings the evidence was to the contrary. Therefore, there has been no de facto dedication which would serve to include the 7-acre parcel of the applicants, and this Commission lacks jurisdiction to order Cal-Am to annex the parcel.

But the matter does not necessarily end there. Section 1001 of the Public Utilities Code contains language which has long been construed by this Commission as permitting a water corporation to make an extension of service, should the utility itself wish to do so, into territory contiguous to the utility's existing system in the ordinary course of its business without first seeking authority from this Commission to do so. Here, the only factor preventing Cal-Am from itself electing to extend service to the applicants' land is the prohibition appearing as Ordering Paragraph 6 in Decision No. 89195, supra (and see footnote 1), adopted as a consequence of the drought in the mid-1970's period. That restriction was adopted because studies at that time showed the availability of a water supply in a normal year apparently adequate only for the needs, existing and potential in a full build-out, of the existing Cal-Am service territory. The Board of Supervisors of Monterey County, effective January 1, 1980 adopted a comprehensive Carmel Valley Master Plan. This plan establishes both a 20-year quota and an annual allocation for the purpose of regulating residential subdivision activity. Taking into account existing residential units, it establishes a 20-year quota of 2,500 additional units to be allowed over the next 20 years, of which 1,029 units are already committed to existing unbuilt lots of record and other commitments. A key

factor in implementation of the Master Plan will be changes in the zoning to provide changed density requirements, flexible up to a maximum of 1 unit per 2.5 acres. Applicants argue that this new plan will result in a situation where, because of changed density requirements, full build-out within Cal-Am's present service area should substantially reduce the potential maximum demand upon Cal-Am's finite water supply. The Master Plan limits future construction and switches emphasis, with certain exceptions, from the valley floor up into the hillsides - areas now largely outside Cal-Am's service area. The argument is that if Cal-Am is to serve much of the future development, it will have to move up into the hillsides to do so.

It must be recognized that under the new Master Plan applicants' 7 acres are located within one of the three so-called "areas of development concentration" (adc) where future growth is to be directed on the valley floor, and where any development at a density greater than 1 unit per acre must be concentrated.^{4/}

4/ The very location of applicants' 7-acre parcel on the hillside escarpment above Cal-Am's water supply storage tanks would present service problems. In view of the precipitous nature of the slopes on applicants' property, and considering the Master Plan's slope/density policies which provide, in part, that no building site may be permitted on those portions of a parcel with a cross slope of 30 percent or greater, there is some question whether the applicants could even develop the property at all. However, that is a matter for the local authorities. If Cal-Am should elect to extend service, such individual service could not be connected directly to the utility's distribution system. An air break to avoid placing suction on the utility's distribution system, as well as a booster pump and an individual water storage tank would be required to lift the water and provide adequate pressure at the point of use. Such installations and their maintenance would be at applicants' expense.

Applicants' land would be exactly on the periphery of the "village area", an area defined as consisting of a concentrated commercial core having adjacent moderate-density residential uses as a transition to the more rural peripheral area, an area where direct integration of residential and commercial uses should be encouraged. From this it would therefore appear that application of the prohibition contained in Ordering Paragraph 6 in Decision No. 89195 might well be flexible to meet changing times and developing circumstances. Certainly in this time of flux it should not be applied to prevent Cal-Am from extending service to applicants' 7-acre parcel if Cal-Am desires to do so.^{5/}

One other involvement remains for discussion. During the protracted hearing in the mid-1970 period in Case No. 9530, the ALJ conducting the hearings and this Commission repeatedly suggested that the people of the entire Monterey Peninsula area should involve themselves in the problems of water supply for

^{5/} Certainly the pragmatic approach taken by this Commission in resolving the problems encountered in Edwards, Saucito, Millard, and Mercurio (supra, Footnote No. 2) is not contra-indicative. In Edwards the utility in annexing in the past had leapfrogged a parcel of land leaving it dry and utterly landlocked, surrounded by the utility's service area and a regional airport served in part by the utility and by its own water service. We decried the past gerrymandering annexation results and ordered the parcel served. In Saucito we merely authorized a trade-off of lands, putting some land in and taking an equal area out of the utility's service area, using as the measure of area the potential water usage of each area as determined by its zoning. Millard and Mercurio involved the obligation of a successor utility to honor service obligations and areas inherited from an acquired predecessor private water company.

their geographic area as the future rate and nature of growth in the area could most appropriately and effectively be determined locally through responsible local government agencies rather than by Cal-Am and this Commission doing it through restrictions on water service connections. There has since been activity in this regard. In 1978 the MPWMD came into existence as the result of legislative action and the vote of the electorate. MPWMD is steadily moving toward identification of and assumption of its appropriate role in managing local water resources. On January 14, 1980 MPWMD enacted Resolution 80-1 whereby it established interim allotments for Cal-Am of the available estimated annual 20,000-acre-foot water resource of the area, dividing the supply among the respective municipal units and the unincorporated areas of the county. On February 11, 1980 it adopted Ordinance No. 1 establishing rules and regulations for the district. Under its intended procedure, the district would make a determination whether or not a service connection to a property would be allowed at the time that the county reviews and approves a use permit application, assuming that this Commission allowed for expansion of Cal-Am's service area, and that the unincorporated area had not exceeded its MPWMD allotment. In the instant matter, at the time of our hearing, MPWMD was reviewing individual applications as they arose, but had chosen not to either support or oppose this particular application. ✓

Findings of Fact

1. La Rancheria subdivision at the time of being annexed into Cal-Water's service area as part of the Ranchitos Tract comprised 25 parcels of land all clearly delineated on a map filed with this Commission. Some of these multi-acre parcels have since been split.

2. The eastern boundary of La Rancheria subdivision annexation to the Cal-Water service territory was and is La Rancheria road and a utility access road easement extending from La Rancheria road to the utility's water storage tank site on the hillside escarpment overlooking La Rancheria subdivision.

3. Cal-Am is the successor public utility water company to Cal-Water, serving portions of the upper Carmel Valley including the Ranchitos Tract.

4. Neither Cal-Am nor its predecessor Cal-Water have taken any actions or have evidenced any tangible intentions to extend public utility water service beyond the eastern boundary of the La Rancheria subdivision annexation up the hillside escarpment.

5. Any service extension to the east above the utility access road easement would necessarily require special provisions to supply such service; these include an air break in the service line, booster pump, and storage tank facilities.

6. Applicants' 7-acre parcel of land, exclusive of the utility access road easement, is located east of and above the utility access road easement.

7. Applicants' 7-acre parcel of land is situated within the "village area", one of three "areas of development concentration" provided for under the Carmel Valley Master Plan adopted by the Monterey County Board of Supervisors to be effective January 1, 1980.

8. Changing and more stringent zoning and density requirements involved for the future under the Carmel Valley Master Plan adopted effective January 1, 1980, and the emerging regulatory procedures of MPWMD, indicate the desirability of extending more flexibility to Cal-Am in determining individual small parcel annexation applications involving contiguous territory than that presently permitted under the provisions of Ordering Paragraph 6 of Decision No. 89195 dated August 8, 1978 in Case No. 9530.

9. Modification of Ordering Paragraph 6 of Decision No. 89195 dated August 8, 1978 in Case No. 9530 should be the subject of a separate proceeding in order to provide for the broadest local participation after notice.

10. MPWMD has taken no position in this proceeding whether the annexation request made by the applicant should be approved or denied by this Commission.

Conclusions of Law

1. The 7-acre parcel of land owned by applicants and the subject of this application is situated outside of the existing service territory of Cal-Am. Cal-Am has not dedicated itself to serve this parcel.

2. Since Cal-Am has not dedicated itself to serve applicants' 7-acre parcel, this Commission lacks jurisdiction to order Cal-Am either to annex the parcel or to extend service to the parcel.

3. Should Cal-Am determine, pursuant to the contiguous territory provisions of Section 1001 of the Public Utilities Code, that it voluntarily wishes to annex the 7-acre parcel owned by the applicants, Cal-Am should not be prevented in this instance from doing so by the prohibition contained in Ordering Paragraph 6 of Decision No. 89195 dated August 8, 1978 in Case No. 9530.

O R D E R

IT IS ORDERED that:

1. The application, insofar as it seeks an order from this Commission that California-American Water Company annex or extend service to the 7-acre parcel of land of William Everett Kane and Barbara Joan Kelly, is denied.

2. Should California-American Water Company voluntarily wish to annex the 7-acre parcel of applicants under the contiguous territory provisions of Section 1001 of the Public Utilities Code, Ordering Paragraph 6 of Decision No. 89195 dated August 8, 1978 in Case No. 9530 will not apply.

3. Should California-American Water Company proceed and annex applicants' 7-acre property, within thirty days after providing service, California-American Water Company shall file a revised service area map indicating this new service area boundary.

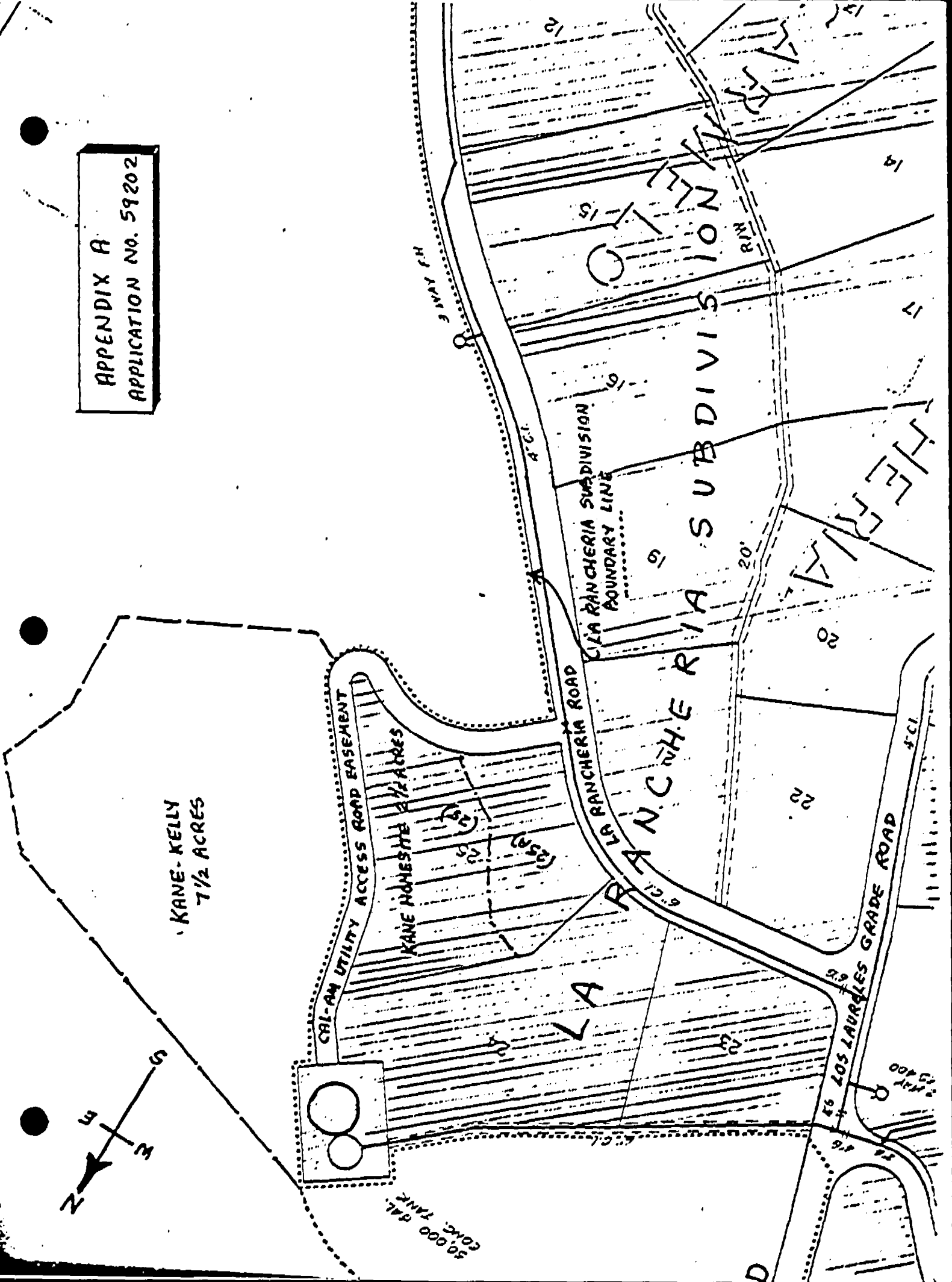
4. Should California-American Water Company proceed, it shall provide water service within its revised service area boundaries pursuant to its filed tariffs.

The effective date of this order shall be thirty days after the date hereof.

Dated NOV 4 1980, at San Francisco, California.

John E. Byrne
President
Debra S. Sturgeon
Richard D. Hoyle
Philip J. DeLoach
Donald W. Smith
Commissioners

APPENDIX A
APPLICATION NO. 59202





APPENDIX B
APPLICATION NO. 59202