ALJ/KOT/wav

Mailed 6/8/98

Decision 98-06-025 June 4, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of CALIFORNIA-AMERICAN WATER COMPANY (U 210 W) for a Certificate that the Present and Future Public Convenience and Necessity Requires Applicant to Construct and Operate the 24,000 acre foot Carmel River Dam and Reservoir in its Monterey Division and to Recover All Present and Future Costs in Connection Therewith in Rates.	Application 97-03-052 (Filed March 28, 1997)

INTERIM OPINION

I. Summary

In today's decision, we affirm the December 19, 1997 ruling of the assigned Administrative Law Judge (ALJ), who is also the Principal Hearing Officer in this ratesetting proceeding. The ALJ's ruling had been appealed in part, and the appeal was referred to the full Commission by a ruling jointly issued on January 16, 1998, by the assigned Commissioner and ALJ. We find that the ALJ's ruling gives appropriate guidance to the parties on what issues are, and are not, before the Commission in this proceeding.

II. Historical Background[1]

California-American Water Company (Cal-Am) is a public utility and the largest supplier of water to consumers on the Monterey Peninsula. As such,

[1] This section summarizes only those facts necessary to an understanding of the ALJ's ruling and the appeal. A complete account of the Monterey Peninsula's water problems and the procedural posture of the present application would consume many pages and is beyond the scope of today's decision.

Cal-Am must ensure that it has a supply of water that is adequate in all respects (including quantity, quality, and reliability). In so doing, Cal-Am is subject to regulatory scrutiny by many agencies, notably (for present purposes) the Monterey Peninsula Water Management District (MPWMD), the State Water Resources Control Board (SWRCB), and this Commission.

The Monterey Peninsula has had water supply problems of long-standing. Rainfall is adequate in many years, but multi-year droughts are also common, and the Monterey Peninsula currently has limited capabilities for storing water within the watershed or acquiring water from sources outside the watershed. Conservation stretches supply, but Monterey Peninsula consumers already use considerably less water per capita than consumers elsewhere in California. The present proceeding is part of the effort to develop a long-term solution for the Monterey Peninsula's water supply problems.

Two recent events add urgency to this effort. The MPWMD had proposed to develop a new dam and reservoir on the upper Carmel River; the new dam was intended, in part, to create storage capability to ensure an adequate water supply under drought conditions. However, in November 1995, voters rejected the MPWMD's proposed bond measure needed to finance development and construction of the dam.

Earlier, in July 1995, the SWRCB had issued Order WR 95-10. The order found, in principal part, that Cal-Am's wells along the lower Carmel River were not drawing percolating ground water, but instead were drawing water from a subterranean stream associated with the Carmel River. Consequently, these wells, which were and are the main source of water supply for the Monterey Peninsula, were diverting water without a valid basis of right. To replace the water now supplied through unlawful diversions, the SWRCB concluded that Cal-Am must do one or more of the following: obtain appropriate permits for

water being unlawfully diverted from the Carmel River; obtain additional water supplies from sources other than the river or from a storage project similar to the dam project proposed by the MPWMD; or contract with the MPWMD for supply from the proposed project.

The subsequent voter rejection of the bond measure mooted the latter alternative. However, Cal-Am has chosen to pursue the dam project itself. To that end, Cal-Am seeks to obtain, under license, the related permits previously awarded to the MPWMD. In addition, by this application, Cal-Am asks this Commission to issue a certificate of public convenience and necessity to construct and operate the proposed dam.

III. Procedural Posture

To date, this proceeding has involved public participation hearings, prehearing conferences, extensive workshops, and environmental analysis. A principal focus of these activities has been the development and consideration of water supply options that might be available to Cal-Am in addition to or instead of the proposed dam.

The proceeding has attracted many participants, several of whom filed timely notices of intent (NOIs) to claim compensation for costs incurred in their participation. The ensuing assigned ALJ's ruling addressed eligibility for compensation and other issues raised by the NOI filings. The appeal we consider today is by one of the NOI filers, viz., the Alliance of Citizens with Water Alternatives (ACWA), and it concerns part of the assigned ALJ's critique of ACWA's NOI.[2]

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[2] We consider this interim appeal pursuant to Rule 65 of our Rules of Practice and Procedure, which says:

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In referring the appeal to the full Commission, the assigned Commissioner and ALJ allowed other parties an opportunity for comment. Four parties took this opportunity: Cal-Am, SWRCB, MPWMD, and our own Water Division. We turn now to the substance of the ALJ's ruling and ACWA's appeal.

IV. Summary of Positions

Pursuant to Public Utilities (PU) Code Section 1804(b)(2),[3] a ruling on NOIs to claim compensation "may point out similar positions, areas of potential duplication in showings, unrealistic expectations for compensation, and any other matter that may affect the customer's ultimate claim for compensation." In regard to ACWA's NOI, the assigned ALJ, at pages 5-6 of his ruling, pointed out the following matters:

> Section 1801.3 explains the intent of the Legislature in enacting this program to provide compensation for public participation in Commission proceedings. Section 1801.3(f) says that the program "shall be administered in a manner that avoids unproductive or unnecessary participation that duplicates the participation of similar interests otherwise adequately represented or participation that is not necessary for a fair determination of the proceeding."
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> * * *
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> The presiding officer shall rule on the admissibility of all evidence. Such rulings may be reviewed by the Commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the presiding officer may refer the matter to the Commission for determination.

Normally, appeals of rulings are considered only in final decisions. For reasons stated in Section V of today's decision, we accept the referral of ACWA's appeal. In doing so, we strongly affirm the presiding officer's duty to ensure that the issues addressed in a Commission proceeding are those issues, and only those issues, necessary to fully resolve the proceeding.

[3] Unless otherwise noted, all subsequent section citations are to the PU Code.

> The last of the three [statutory] standards regarding compensability, namely, that the participation be "necessary for a fair determination of the proceeding," means the Commission should not award compensation where the claimant has argued issues that are, e.g., irrelevant, outside the scope of the proceeding, or beyond the Commission's jurisdiction to resolve. This last point is particularly pertinent for [ACWA]. ACWA's NOI indicates that it wants to assert in this proceeding that (1) pueblo water rights "pre-empt SWRCB authority over [the] Carmel River," and (2) the Cal-Am pumping that the SWRCB found in its Order WR 95-10 to be an unauthorized diversion from the Carmel River is in fact percolating groundwater, "not part of the river [and] not subject to SWRCB jurisdiction...."
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> Whatever the merit of these assertions by ACWA, they cannot be resolved in this proceeding. The Commission lacks authority to adjudicate pueblo water rights, and it does not sit as a court of review of SWRCB orders. Issues that the Commission cannot resolve could not possibly be issues "necessary for a fair determination" of a Commission proceeding. (Footnote omitted.)

ACWA's appeal is limited to the text quoted above. ACWA argues that the Commission need not "resolve" issues regarding pueblo water rights or water properly considered part of the Carmel River. Instead, ACWA argues that the Commission is bound, under the California Environmental Quality Act, to consider "alternatives" to the proposed dam. Because of the Commission's obligation to consider alternatives in general, the Commission is further obligated, under ACWA's reasoning, to consider ACWA's preferred alternatives. ACWA then essentially makes an offer of proof to the effect that (1) pueblo water rights exist that cannot be overridden or allocated by the SWRCB, and (2) the SWRCB is just plain wrong in holding that Cal-Am's wells were pumping underflow of the Carmel River rather than percolating groundwater.

No party commenting on the appeal agrees with ACWA, although Water Division suggests a qualification to the ruling's discussion of pueblo water rights.

Regarding the SWRCB's holding in Order WR 95-10, the commenters all concur that the SWRCB is the agency charged by statute to determine the classification of the Carmel River basin. Moreover, Cal-Am asserts that, "Even when public agencies do have overlapping jurisdiction, in cases of conflict, it has been held that a statewide specialty agency, such as an air pollution control district, will prevail over the authority of the [Commission]," citing *Orange County Air Pollution Control District* v. *Public Utilities Commission* (1971) 4 C.3d 945, 953-54.

According to the SWRCB, ACWA did not participate on the classification issue in the proceeding that culminated in Order WR 95-10, nor did ACWA petition for reconsideration of that issue or seek a writ of mandate from the Superior Court. The SWRCB asserts that the time has expired for any challenge to the order's determination of the classification issue, and that ACWA is simply trying to have the issue reheard by the Commission.

Regarding pueblo water rights, Water Division says this issue was not raised before the SWRCB; however, if the issue arises from the SWRCB's having limited the legal rights of Cal-Am to divert water from the Carmel River, thereby giving rise to a paramount claim by any successor to pueblo rights, then (according to Water Division), successful assertion of such a claim might constitute an alternative to construction of the dam.

Water Division notes that only two cities (San Diego and Los Angeles) have successfully pursued pueblo water rights in the courts, and that in the case of the Monterey Peninsula, it is unclear what municipality would be considered a successor to the pueblo capable of asserting such rights. But since the possible existence of such rights cannot be foreclosed, Water Division urges that ACWA "be permitted to present a sufficient amount of information...for the Commission

to determine whether such...rights could be asserted by any municipality of the Monterey peninsula."

Cal-Am and the SWRCB submit that the SWRCB has specifically acted upon and determined the water rights claims in the Carmel River basin. SWRCB notes that ACWA did not raise the issue of pueblo water rights, and that Cal-Am itself did not claim to have or be operating under a pueblo water right.

However, on January 5, 1998, shortly *after* the date of the ruling from which ACWA appeals, ACWA members Lou and Martha Haddad wrote to the SWRCB. They requested that the SWRCB rescind Order WR 95-10, basing the request, in part, on their opinion that "a pueblo water right exists for Monterey, water is being utilized under the pueblo right and the SWRCB has no jurisdiction over utilization of a pueblo water right." Edward C. Anton, Chief of the SWRCB's Water Rights Division, responded; his response, insofar as it treats the pueblo water rights issue, is reproduced in the Appendix to today's decision. Briefly, the response concludes that the Haddads' showing is insufficient to demonstrate the existence of a pueblo water right for the City of Monterey.

Moreover, the SWRCB makes two further points in its comments on ACWA's appeal. First, if the Commission decides pueblo water rights should receive more attention, it should refer the issue to the SWRCB as the State agency with relevant expertise. Second, Order WR 95-10 addresses harm to "public trust resources" occurring in the Carmel River basin because of Cal-Am's unauthorized diversions, but even diversions pursuant to a pueblo water right would not be exempt from the public trust doctrine if the diversions were shown to be harmful. The SWRCB concludes that even if a pueblo water right were found to exist for Monterey, the public trust would still have to be protected.

V. Discussion

Precisely because this proceeding concerns, in large part, a critical evaluation of the proposed dam in relation to possible alternatives, the Commission and the parties must focus their efforts on the most likely alternatives and not engage in wishful thinking. We cannot pretend that continued production from Cal-Am's wells along the Carmel River constitutes a possible alternative when the legal predicate for such pumping has been squarely rejected by final order of the SWRCB. In other words, unlawful diversion of water is not an alternative.

Our entertaining such an alternative would not merely misuse our fact-finding resources, it would also violate legislative direction on how and where certain issues of public policy should be resolved. A utility project, such as that proposed by Cal-Am, commonly comes within the regulatory or licensing purview of many different government agencies at the state and local levels. Under the doctrine of concurrent jurisdiction, as explained by the California Supreme Court (*see*, e.g., the *Orange County* case, *supra*), a determination made by one such agency within its area of jurisdiction and expertise must be respected by the other agencies.[4] Were all such determinations to be subject to collateral attack

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[4] The *Orange County* case involved the interplay of air quality and public utility regulation. The California Supreme Court concluded that

> the Legislature has established one statutory scheme for the general regulation of public utilities, another for the general regulation of air pollution. As in the field of industrial health and sanitation, the [Public Utilities Commission] must share its jurisdiction over utilities regulation where that jurisdiction is made concurrent by another (especially a later) legislative enactment. Here the Legislature has itself enacted specific emission control standards and has erected a comprehensive statutory structure for the adoption of further controls. These controls without doubt apply to public utilities. The Legislature has delegated enforcement of these emission controls to air pollution control districts. Where the

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before other agencies, the jurisdictional wrangling would be endless, forum-shopping would be encouraged, and the finality of any agency's decisions would always be open to doubt.

We express no opinion on whether or how ACWA might still challenge the SWRCB's Order WR 95-10. What is certain is that this proceeding does not provide a forum for such a challenge.

At first blush, the pueblo water rights issue seems distinguishable, in that the SWRCB addressed the classification issue, but not pueblo water rights. According to the SWRCB's comments on ACWA's appeal, there was no assertion that such a right exists for Cal-Am or for the City of Monterey and the surrounding area, so Order WR 95-10 simply does not discuss the topic. Despite the silence of Order WR 95-10, it is clear that this Commission is not the place to assert a pueblo water right.

Assume, for the sake of argument, that the City of Monterey or some other municipality on the Monterey Peninsula had duly perfected its claim as successor in interest to a Mexican or Spanish pueblo, and had received a "patent" from the Board of Land Commissioners, pursuant to the relevant Act of Congress.[5] Assume, further, that the municipality ignored or forgot about its pueblo water right in the ensuing years, but that ACWA is now able to make, to our satisfaction, at least a colorable case for the existence of such a right. Even with all these assumptions, there would still be vital questions that we would refer

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> district has found that a proposed or existing facility does not comply with applicable regulations, the [Public Utilities Commission] may not order a utility to violate district rulings. *Id.*, 4 C.3d at 953-54, footnote and citation omitted.

[5] Regarding the process for obtaining such a patent, see the Appendix to today's decision.

back to the SWRCB before we could assess whether exercise of such a right might constitute an alternative to the dam.

For example, may or must the municipality holding the right exercise it for the benefit of water users on the Monterey Peninsula but outside the municipality? Further, would the municipality's exercise of the right run afoul of the public trust doctrine? Depending on the answers to these questions, the existence of a pueblo water right may have little bearing on the fundamental issue in this proceeding, i.e., the development of a long-term water supply strategy for the Monterey Peninsula. These questions fall within the jurisdiction and expertise of the SWRCB, which is the agency charged by statute with providing for the orderly and efficient administration of the State's water resources. *See* Water Code Section 174.

We conclude that the existence of pueblo water rights and the consequences that might follow from such rights are matters to be determined, in the first instance, by the SWRCB, subject to such judicial review as statutes may provide.

In short, the assigned ALJ was correct in concluding that litigation in this proceeding of asserted pueblo water rights or the legality of Cal-Am's pumping from its wells along the Carmel River would not be necessary or productive, within the meaning of Section 1801.3(f). To the extent ACWA has appealed from his ruling, that ruling is affirmed.

Findings of Fact

1. The subject of this proceeding is developing a long-term solution for the Monterey Peninsula's water supply problems. One such possible solution is Cal-Am's proposed dam, and one of the main tasks for the Commission and the parties to this proceeding is to critically evaluate the proposed dam in relation to possible alternatives.

2. Such critical evaluation neither requires nor authorizes relitigation at the Commission of matters resolved by the SWRCB in the exercise of its jurisdiction. Such critical evaluation neither requires nor authorizes litigation at the Commission of asserted pueblo water rights, which should be presented in the first instance at the SWRCB.

Conclusions of Law

1. Under the doctrine of concurrent jurisdiction, the various government agencies involved in the licensing and regulation of a particular utility project should give due deference to relevant determinations that each agency makes in the exercise of its specific jurisdiction and expertise.

2. To the extent ACWA has appealed from the assigned ALJ's ruling on NOIs to claim compensation for costs of participation, the ruling should be affirmed.

3. This order should take effect immediately in order to ensure efficient use of time and effort in this proceeding.

INTERIM ORDER

The December 19, 1997 Ruling of the Administrative Law Judge assigned to this proceeding, to the extent that Alliance of Citizens with Water Alternatives has appealed therefrom, is affirmed.

This order is effective today.

Dated June 4, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

APPENDIX

EXTRACT FROM SWRCB LETTER
REGARDING PUEBLO WATER RIGHTS

CalEPA

State Water Resources Control Board

Division of Water Rights

Mailing Address:
P.O. Box 2000
Sacramento, CA
95812-2000

901 P Street
Sacramento, CA
95814
(916) 657-1359
FAX (916) 657-1485

Pete Wilson
Governor

FEBRUARY 3, 1998

Lou and Martha Haddad
5 Deer Stalker Path
Monterey, CA 93940

Dear Mr. and Mrs. Haddad:

PUEBLO WATER RIGHTS AND PERCOLATING GROUNDWATER – CARMEL RIVER IN MONTEREY COUNTY – 266.0

By letter dated January 5, 1998, you requested that the State Water Resources Control Board (SWRCB) rescind Order WR 95-10. The basis for requesting that the order be rescinded is your opinion that a pueblo water right exists for Monterey, water is being utilized under the pueblo right and the SWRCB has no jurisdiction over utilization of a pueblo water right. Furthermore, in your opinion the Carmel River subterranean stream should be classified as a percolating groundwater basin over which the SWRCB has no jurisdiction.

Pueblo Water Rights

In general, a pueblo water right is the paramount water right of a city as the successor in interest to a Mexican or Spanish pueblo to use all the water that naturally flowed through the original pueblo. A city, as successor in interest to a Mexican or Spanish pueblo, can claim a pueblo water right only if all of the following prerequisites are satisfied. First, the city must be a successor in interest to a former Mexican or Spanish pueblo[1]. Second, the city must have presented its claim before the Board of Land Commissioners pursuant to the "Act to Ascertain and Settle the Private Land Claims in the State of California."[2] (Act). Third, it must be shown that the city has a need for water[3]. Fourth, a judgment has been or will be issued determining the existence of pueblo rights.

California water law does not recognize claims based on pueblo water rights other than those confirmed by patents issued pursuant to the Act. Therefore, any land that became part of the public domain could not subsequently be granted pueblo water rights[4]. Thus,

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[1] San Diego v. Cuyamaca Water Co., supra. 209 Cal. 105, 287 P. at 481.

[2] Act of Congress March 3, 1851 ch. 41, 9 Statè 631 ("Act"); San Diego v. Cuyamaca Water Co., supra. 209 Cal 105, 287 P. 475; Los Angeles v. Los Angeles Farming & Milling Co. (1908) 152 Cal. 645, 648-653, 93 P. 869; see 62 Cal Jur.3d, Water, § 184, pp. 211-12.

[3] Los Angeles v. Glendale (1943) 23 Cal. 2d 68, 73-74, 142 P.2d 289; Feliz v. Los Angeles (1881) 58 Cal. 73, 80.

[4] See Cal. Water Code Section 1225.

if you want to provide evidence to the Division that a pueblo right may exist for Monterey, you need to submit documentation that Monterey filed the appropriate documents with the Commissioners before March 3, 1853 and subsequently received a patent pursuant to the Act. None of the documentation required by the Act has been submitted for our review, and your letter gives no indication that the city of Monterey possesses the required patent issued pursuant to the Act.

The January 5 letter states that a patent was signed by President Benjamin Harrison on November 19, 1891, and recorded in Monterey County in 1896. The date of the patent is 38 years after the final date for submittal of Spanish or Mexican land claims to the Commissioners. The patent has not been provided for our review, however, we note that whenever lands are removed from the federal domain, patents are issued. Thus, it appears that the Monterey lands remained in federal ownership during the 40-year period between passage of the Act in 1851 and federal patenting of the land in 1891.

In conclusion, the mere fact that there is a patent for land does not infer pueblo land status and certainly does not infer the existance of a pueblo water right. As noted above, one of the critical elements in documenting the existence of a pueblo right is a judgment by the courts determining the validity of the claimed right. To date, the courts have only affirmed the existence of two pueblo water rights in California for the cities of Los Angeles and San Diego. The courts have not affirmed the existence of a pueblo water right for Monterey. The January 5 letter and attachments are inadequate for purposes of documenting the existence of a pueblo water right, because the information does not document that Monterey has met all four prerequisites for a pueblo water right.

(REMAINDER OF SWRCB LETTER NOT REPRODUCED)

(END OF APPENDIX)