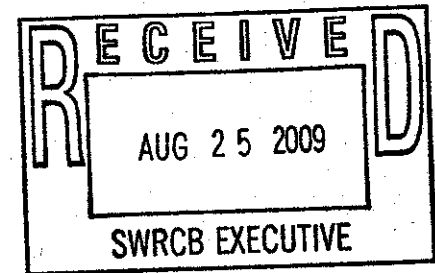


DT: August 25, 2009

TO: State Water Resources Control Board
Attn: Jeanine Townsend, Clerk to the Board
Email address: commentletters@waterboards.ca.gov.

FR: Michael E. McPherson
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RE: **Comment Letter: Cal Am CDO Hearing Workshop**

I am a homeowner in Monterey, California (where I live much but not all of the time) with a yard that reflects more than four decades of loving landscape efforts by, in sequence, my mother, her sister, and her son. By way of an article by Larry Parsons in the August 21st edition of the Monterey County Herald, I learned for the first time the following:

In a company press release, (Cal Am General Manager) Anthony said that (your proposed CDO) would likely mean a moratorium on new water connections and *a ban on outdoor water use*. [Emphasis added.]

While I remember during the rationing my aunt diligently collecting for her plants in plastic bowls any unused water, such as that which runs awaiting the hot to arrive, and while I have myself cut-back considerably my water use so as to conserve our supplies, we both, sequentially, have managed to keep my mother's landscape both loving and living. But while I knew about Cal Am's problems on the Carmel River, Friday's Herald published the first I knew about such a ban. Now it appears that an outright ban on outdoor watering is in the offing, thereby dooming to die more than forty years of hopes and hard work at my home. Hence, the following comments are submitted pursuant to Mr. Parson's report that they must be emailed by noon on the 26th. This little time left was confirmed on your Website, with its instructions to submit my comments to Ms. Townsend.

I therefore limit my comments to but one subject and one related request. Hopefully, others amongst the thousands who will suffer similarly from your proposed order will voice the concerns left unsaid here for sake of simplicity. My one subject was hurriedly found on the Internet: Apparently, almost everybody concedes that the City of Monterey has pueblo rights to the waters of the Salinas River, but almost nobody wants to take them into account. My one request is that you cast your schedule for enforcement of your order such as to allow a reasonable time to prove up and provide for substituting, under that paramount pueblo right, Salinas River water to take the place of the Carmel River water that will be lost thereunder.

As for the right, there was apparently at some point a question raised by your staff as to whether the pueblo status of Monterey had been confirmed by the Lands Commission. Two decisions

available on the Web, one by the California Supreme Court, *City of Monterey v. David Jacks* (1903) 139 Cal. 542, 544-545, and the other by the United States Supreme Court, *City of Monterey v. Jacks* (1906) 203 U.S. 360, both long ago left no room for that question. In confirming the finding of pueblo status by the highest court in our State, the following observation was made by the highest Court in our United States:

Plaintiff alleged title in fee simple, and contends that such title has come to it as successor of the pueblo of Monterey of Upper California. There is no dispute that the land was part of the pueblo of Monterey, and that, after proper proceedings had in pursuance of acts of Congress, the title of the city of Monterey was confirmed by a decree of the Board of Land Commissioners and a patent issued to the city November 19, 1891. *City of Monterey v. Jacks*, 203 U.S. at 360.

No question left as to the pueblo status, the issue as to the pueblo right has already been raised somewhat sloppily in the course of Cal Am's problems on the Carmel River. For example, there was found on the Web the following excerpt from what appears to be a supplemental environmental impact report of some sort by the Monterey Peninsula Water Management District:

A pueblo water right is the highest priority water right of a California city to use all the water that flowed naturally through an original Mexican or Spanish pueblo. . . .

The SWRCB has responded to a suggestion that the City of Monterey may have pueblo rights to the Carmel River. In April 1998, *the SWRCB concluded that "it does appear that there is evidence to support a pueblo right for the City. However, the pueblo right would not include the right to divert and use the water of the Carmel River or the Carmel Valley subterranean stream because neither source is located within the boundaries of the pueblo" (Anton pers. comm.). Documents submitted by the City of Monterey more than a century ago indicate that the Salinas River may be included in the original pueblo boundaries.* [<http://www.mpwmd.dst.ca.us/seir/dap/a-pt4ed.htm>. Emphasis added.]

A second Internet entry was found that appears to put forth Cal Am's assessment of Monterey's pueblo right thusly:

This category ("Plan B Legal Strategies Component") focused on determining whether there are measures that could be taken to legalize a portion of CAW's unauthorized diversions from the Carmel River or obtain rights to a new diversion from the Salinas River (one theory that has been suggested over the years is assessing Pueblo Rights to the Salinas and Carmel rivers). A

pueblo water right entitles a municipal successor to a Spanish/Mexican pueblo to the water lying within the boundaries of the historic pueblo. The amount of water available from pueblo water rights is limited to the amount that may be put to reasonable and beneficial uses within the present boundaries of the successor city. The successor in interest to any pueblo rights is the City of Monterey. The Carmel River does not touch the boundaries of the original pueblo, which is generally a requirement of a pueblo right. *The Salinas River did serve the pueblo*, but Plan B's investigation concluded that the City of Monterey would have to pursue pueblo water rights with the SWRCB and that there is not a reasonable likelihood of success due to lack of support of such a theory by the SWRCB and the shortage of water in the Salinas Basin for existing uses. [<http://www.coastalwaterproject.com/pdf/FOR%20OCB%20%20Coastal%20Water%20Project/Main%20Document%20CD/SECT%2009.00%20ALTERNATIVES.pdf>. Emphasis added.]

These two excerpts, along with all of the finely researched work of the Mr. Haddad, the submittal to you of which is fairly documented on the 'Net, should suffice to establish for purposes of your consideration of this comment that Monterey has a "paramount" (*i.e.*, superior to all others) pueblo right to the waters of the Salinas River. As for the foregoing assessment of Cal Am, the significant sloppiness thereof is that (1) pueblo rights are pursued in *court*, not "with the SWRCB"; (2) whether the SWRCB supports such pursuit is *irrelevant* in the legal establishment thereof; and (3) the shortage of water for existing rights is *also irrelevant* because that is the time when the priority of pueblo rights is most important and most valuable.

Lastly, in anticipation of the raising thereof, it needs noting here that Mr. Parson also reported that Cal Am's Catherine Bowie "said a ban on outdoor water could unfold over the next decade," but also reported Mr. Anthony's observation that "the order could limit customers to 30 to 50 gallons of water a day . . .," down from "about 70 gallons daily, Bowie said." The point here is, of course, that purportedly spreading the ban on outdoor use over ten years is no favor when a fifty percent reduction in an already low per capita usage will result in an up-front *de facto* ban thereupon.

In sum, before your order destroys my long-loved yard and those of thousands of others here in Monterey, we should have at least a reasonable opportunity to pursue our Salinas River pueblo right, a pursuit that, in the face of your proposed order with its irreversible results, surely makes sufficient sense now.

Very Respectfully Submitted,

Michael E. McPherson (mikemcp111@aol.com)