

1 REED SATO, Director (SBN 87685)
2 MAYUMI OKAMOTO, Staff Counsel (SBN 253243)
3 Office of Enforcement
4 State Water Resources Control Board
5 1001 I Street, 16th Floor
6 Sacramento, California 95814
7 Telephone: 916-341-5889
8 Fax: 916-341-5896
9 E-mail: rsato@waterboards.ca.gov

10 Attorneys for the Water Rights Prosecution Team

11 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

12 In the matter of)
13) REPLY TO CALIFORNIA AMERICAN
14) WATER REQUEST FOR CLARIFICATION
15) AND MOTION FOR TEMPORARY
16) POSTPONEMENT OF PROCEEDINGS
17)

18 **California American Water Company**
19 **Cease and Desist Order Hearing**

20 INTRODUCTION

21 California American Water Company (“Cal Am”) claims that the May 13 Ruling in this
22 matter creates an ambiguity as to the basis for Cal Am’s liability for the proposed cease and desist
23 order. Any ambiguity, however, is created solely by Cal Am’s own unique and unsupported
24 interpretation of the law. The Prosecution Team believes that the May 13 Ruling was clear that Cal
25 Am was entitled to divert only 3,376 acre feet per year (afa) as recognized in Order 95-10.
26 Moreover, Condition 2 of Order 95-10 required Cal Am to cease its illegal diversions of water from
27 the Carmel River. Any diversions in excess of that amount, whether characterized as an interim
28 physical solution or otherwise, subject Cal Am to liability for trespass pursuant to Water Code
section 1052 and its violation of Order 95-10.

**CAL AM IS LIABLE FOR A TRESPASS UNDER WATER CODE SECTION 1052 IF IT IS
DIVERTING OR USING WATER IN AN UNAUTHORIZED MANNER.**

Water Code section 1052(a) defines “trespass” as the diversion or use of water subject to
Division 2 of the Water Code in a manner other than as authorized by Division 2. (California
Water Code section 1052(a).) In its Request for Clarification, Cal Am concedes that it does not
have a valid appropriative water right to divert more than 3,376 acre feet annually (afa) from the

1 Carmel River. (Request by California American Water Company for Clarification, page 3; lines 8-
2 9.). Instead, Cal Am contends that the State Water Resources Control Board (State Board)
3 “authorized” Cal Am to continue to divert from the Carmel River in excess of its actual legal right
4 through the issuance of Order 95-10 so long as the conditions therein are satisfied. (*Id.*)
5 Additionally, Cal Am describes Order 95-10 as an interim physical solution. (*Id.*) Cal Am’s
6 contentions are both legally flawed and logically unsound.

7 Cal Am contends that it is only liable for a trespass under Water Code section 1052 if it has
8 not complied with Order 95-10. (*Id.*, page 3; lines 21-22.) That contention was clearly and
9 correctly rejected by the May 13 Ruling.

10 Liability for trespass under section 1052 is determined by the existence of a valid right to
11 divert water. If a diversion is not authorized pursuant to a valid right, then it is a trespass under
12 section 1052.

13 Cal Am contends that its valid right to divert in excess of its actual legal right is grounded
14 in Order 95-10. (*Id.*, page 3; lines 8-9.) However, under California law since 1913, a valid water
15 right by appropriation can be acquired only by filing an application with the state authorities and
16 pursuing it through the steps required by law. (*People of the State of California v. The United*
17 *States* (1956) 235 F. 2d 647, 660 citing Water Code, section 1225.)

18 Additionally, Water Code section 1225 states that no right to appropriate or use water
19 subject to appropriation shall be initiated or acquired except upon compliance with the provisions
20 of this division (Division 2). Section 1225 is under Article 2 of Division 2 and identifies
21 compliance with the statutory procedure as the exclusive method of acquiring appropriative rights
22 to water. (California Water Code, section 1225, emphasis added.) While Cal Am contends that
23 authorization [to divert water] can come from *any* action undertaken pursuant to Division 2 of the
24 Water Code (i.e. Order 95-10), the Supreme Court in *People v. Shirokow* determined that an
25 appropriation of water must comply with the *statutory procedure* set forth in Part 2 of Division 2 of
26 the Water Code. (26 Cal.3d 301, 306.) In other words, the authority to divert water is grounded in
27 compliance with the statutory requirements regarding acquisition of appropriative rights. Part 2 of
28 Division 2 provides a comprehensive scheme for the appropriation of water including applications

1 for permits, granting permits, collecting fees, and issuing licenses. (*Id.*)

2 A valid right or authorization, within the meaning of Water Code section 1052, to divert
3 water from the Carmel River in excess of 3376 afa does not exist because the Cal Am has not
4 satisfied the statutory scheme in Division 2 of the Water Code. It is neither reasonable nor credible
5 that Order 95-10 substitutes for this statutorily-required process and that compliance with Order 95-
6 10 insulates Cal Am from liability under Water Code section 1052. To the extent that the May 13
7 Ruling could be interpreted otherwise, the Hearing Officers should take this opportunity to reiterate
8 the scope of the hearing and the basis for Cal Am's liability under proposed cease and desist order.

9
10 **CAL AM'S CHARACTERIZATION OF ORDER 95-10 AND ITS INTERPRETATION OF**
11 **THE LEGAL EFFECT OF ITS ALLEGED COMPLIANCE WITH THE ORDER DO NOT**
12 **COINCIDE WITH THE ORDER'S ORIGINAL INTENT AND GOAL.**

13 Cal Am's characterization of Order 95-10 as an interim physical solution and its contention
14 that it is "authorized" to divert up to 14,106 afa as long as the conditions are satisfied are
15 contradictory in nature. According to Cal Am's logic, if Cal Am satisfies the conditions in
16 perpetuity, then it will continue to be "authorized" under Order 95-10 to unlawfully divert water in
17 excess of its actual legal right of 3376 afa. Rather than being an "interim" physical solution, Cal
18 Am's view of Order 95-10 would have the effect of allowing for an unlawful diversion of water
19 over Cal Am's valid right of 3376 afa for an indefinite time period. This was not the intent of
20 Order 95-10. The overarching purpose of Order 95-10 was to reduce Cal Am's illegal diversions
21 from the Carmel River to the point of termination in a manner that would benefit public trust
22 resources and have the least adverse impact on public health and safety. This intent is reflected in
23 the State Board's recognition that significant short-term reduction or termination of diversions from
24 the Carmel River could have adverse impacts on public health and safety but also that the
25 diversions, if left unregulated, would continue to have an adverse impact on the riparian corridor
26 and steelhead habitat. (Order 95-10, page 37-39.)

27 Providing Cal Am with an interim ability to use water in the Carmel River until it perfected
28 its water rights or acquired another supply source was the balance struck, at that time, to
accommodate the competing interests of public health and public trust resources. However,

1 termination of Cal Am's unlawful diversion from the Carmel River remains the ultimate goal. At
2 the time it was issued, Order 95-10 was a mechanism chosen to achieve this goal. However, Order
3 95-10 was not adopted to the exclusion of other and future remedies, such as those provided for in
4 the proposed cease and desist order, so long as the unlawful diversion continued.

5 **CONCLUSION**

6 In response to Cal Am's motion, the Hearing Officers should confirm that Cal Am's
7 liability is based on whether it is diverting more than 3,376 acre feet per year from the Carmel
8 River as recognized by Order 95-10. Such instruction is consistent with the Hearing Officers'
9 instruction to seek a factual stipulation regarding the amount of Cal Am's diversions in excess of
10 3,376 acre feet per year as determinative of the liability issue. As stated in the proposed cease and
11 desist order, the Prosecution Team contends that Cal Am's diversion of more than 3,376 acre feet
12 per year also is a violation of Condition 2 of Order 95-10.

13 Respectfully submitted,

14 

15 REED SATO
16 Attorney for the Water Rights Prosecution Team

17
18
19
20
21
22
23
24
25
26
27
28
5/27/08
Date

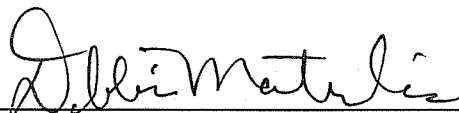
PROOF OF SERVICE

I, Debbie Matulis, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 16th Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within document:

**THE WATER RIGHTS PROSECUTION TEAM'S REPLY TO CALIFORNIA AMERICAN
WATER REQUEST FOR CLARIFICATION AND MOTION FOR TEMPORARY
POSTPONEMENT OF PROCEEDINGS**

X	BY ELECTRONIC MAIL: I caused a true and correct copy of the document(s) to be transmitted by electronic mail compliant with section 1010.6 of the California Code of Civil Procedure to the person(s) as shown on attached Service List, to any party who has consented to email service..
X	BY FIRST CLASS MAIL TO ALL PARTIES LISTED: I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service by placing a true copy thereof in separate, sealed envelopes. See attached Service List, to any party who has not consented to email service.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on May 27, 2008 at Sacramento, California.



Debbie Matulis

Proof of Service

CAL AM SERVICE LIST

[for purposes of this ruling; persons denied party status by this ruling will not be included in the service list for other matters requiring service on all parties]

California American Water
Jon D. Rubin
Diepenbrock Harrison
400 Capitol Mall, Suite 1800
Sacramento, CA 95814
(916) 492-5000
jrubin@diepenbrock.com

State Water Resources Control Board
Reed Sato
Water Rights Prosecution Team
1001 I Street
Sacramento, CA 95814
(916) 341-5889
rsato@waterboards.ca.gov

Public Trust Alliance
Michael Warburton
Resource Renewal Institute
Room 290, Building D
Fort Mason Center
San Francisco, CA 94123
Michael@rri.org

Sierra Club – Ventana Chapter
Laurens Silver
California Environmental Law Project
P.O. Box 667
Mill Valley, CA 94942
(415) 383-7734
larrysilver@earthlink.net
jwill@dcn.davis.ca.us

Carmel River Steelhead Association
Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
(530) 283-1007
mjatty@sbcglobal.net

Calif. Sportfishing Protection Alliance
Michael B. Jackson
P.O. Box 207
Quincy, CA 95971
(530) 283-1007
mjatty@sbcglobal.net

City of Seaside
Russell M. McGlothlin
Brownstein, Hyatt, Farber, Schreck
21 East Carrillo Street
Santa Barbara, CA 93101
(805) 963-7000
RMcGlothlin@BHFS.com

The Seaside Basin Watermaster
Russell M. McGlothlin
Brownstein, Hyatt, Farber, Schreck
21 East Carrillo Street
Santa Barbara, CA 93101
(805) 963-7000
RMcGlothlin@BHFS.com

Monterey Peninsula Water Management
District
David C. Laredo
606 Forest Avenue
Pacific Grove, CA 93950
(831) 646-1502
dave@laredolaw.net
[did not agree to accept electronic service]

City of Sand City
James G. Heisinger, Jr.
Heisinger, Buck & Morris
P.O. Box 5427
Carmel, CA 93921
(831) 624-3891
jim@carmellaw.com
[did not agree to accept electronic service]

Pebble Beach Company
Thomas H. Jamison
Fenton & Keller
P.O. Box 791
Monterey, CA 93942-0791
(831) 373-1241
TJamison@FentonKeller.com

Monterey County Hospitality Association
Bob McKenzie
P.O. Box 223542
Carmel, CA 93922
(831) 626-8636
info@mcha.net
bobmck@mbay.net

Planning and Conservation League
Jonas Minton
1107 9th Street, Suite 360
Sacramento, CA 95814
(916) 719-4049
jminton@pcl.org

George T. Riley
1198 Castro Road
Monterey, CA 93940
(831) 645-9914
georgerriley@hotmail.com

Division of Ratepayer Advocates
Andrew Ulmer
505 Van Ness Avenue
San Francisco, CA 94102
(415) 703-2056
eau@cpuc.ca.gov

City of Monterey
Fred Meurer, City Manager
Colton Hall
Monterey, CA 93940
(831) 646-3886
meurer@ci.monterey.ca.us

City of Carmel-by-the-Sea
Donald G. Freeman
P.O. Box CC
Carmel-by-the-Sea, CA 93921
(831) 624-5339 ext. 11
mlaughlin@ci.carmel.ca.us

California Salmon and Steelhead
Association
Bob Baiocchi
P.O. Box 1790
Graeagle, CA 96103
(530) 836-1115
rbaiocchi@gotsky.com

National Marine Fisheries Service
Christopher Keifer
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
(562) 950-4076
christopher.keifer@noaa.gov

Defenders of Wildlife
Josh Basofin
1303 J Street, Suite 270
Sacramento, CA 95814
(916) 313-5800 ext. 108
jbasofin@defenders.org

California Department of Fish and Game
Chandra Ferrari
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
(916) 654-3819
cferrari@dfg.ca.gov