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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Draft Cease and Desist Order Against California American Water Company For Its Unlawful Diversions From The Carmel River	Reply to Cal Am Request for Postponement of Hearing

I. Introduction

On May 21, 2008, California American Water Company ("Cal Am") filed a motion to postpone the impending June 19 hearing on Cal Am's liability for illegal diversions from the Carmel River. Cal Am cited, among other reasons, the need to respond to Robert Baiocchi's request to participate by telephone pursuant to the requirements of the Americans with Disabilities Act ("ADA"), and the complexity of the issues presented by the case.

The Public Trust Alliance believes that this request for delay is just one more instance in an endless set of unnecessary delays. The danger of Cal Am's ongoing posture of delay is that it promotes a convenient institutionalization of the status quo, which is utterly inconsistent with the protection of public interests profoundly endangered by

delay. Although this particular delay is relatively minor, we are concerned about a "death by a thousand cuts" future for public trust resources as Cal Am seeks to postpone endlessly the full implementation of a 1995 order. See, e.g., *Rock Creek Alliance v. U.S. Fish and Wildlife Service*, 390 F.Supp.2d 993, 1001 (D. Mont. 2005), describing the hundreds of no jeopardy BiOps that find only "minor" adverse harm to the Columbia River DPS of bull trout as "death by a thousand pin pricks." Time is of the essence if the Board is to respond effectively to the ecological crisis on the Carmel River. Mr. Baiocchi's testimony and full participation in the hearing squarely addresses the crisis conditions for Carmel River public trust resources and promotes a timely, effective solution. Therefore, we raise the following issues:

II. Legal Argument

A. Mr. Baiocchi Should Participate Fully by Telephone

A portion of the additional time requested by Cal Am apparently consists of the time needed to "screen" Mr. Baiocchi's testimony. Cal Am suggests that it might be willing to forgo its objection to Mr. Baiocchi's telephonic participation if it is given an opportunity to conduct a "review" to "determine whether Mr. Baiocchi's testimony is necessary to the proceeding, would be duplicative of the testimony of four other witnesses identified by CSSA's Notice of Intent to Appear ("NOI") or could be presented by one of CSSA's other witnesses." Cal Am Objection to CSSA Request to Participate Telephonically p. 2, line 6 et seq.

However, the role of excluding testimony as duplicative or "unnecessary" belongs to the Board, not Cal Am. We have found no case law authorizing opposing counsel to assume the role of assessing the propriety of a request for accommodation under the ADA. Moreover, a party's assumption of the right to pass judgment on the propriety of

Mr. Baiocchi's telephonic participation flies in the face of fairness and objectivity, creating an inherent conflict of interest. The proposed "veto" right could be used to prevent the taking of expert testimony that would be most adverse to Cal Am. It is an entirely inappropriate form of "expert shopping."

The proper procedure and standard for addressing Mr. Baiocchi's request is for the Board to determine whether accommodating the request would "fundamentally alter the nature of the service, program, or activity" provided by the Board, not whether opposing parties consent or find it convenient. The regulations promulgated pursuant to the ADA require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *Olmstead v. L. C. ex rel. Zimring*, 527 U.S. 581, 592, 144 L. Ed. 2d 540, 119 S. Ct. 2176 (1999). See also, California Rules of Court, Rule 1.100, stating that a request for accommodation must be granted, unless the request is not in compliance with the rule, or the proposed accommodation "would create an undue financial or administrative burden on the court" or "fundamentally alter the nature of the service, program, or activity."

Relevant guidance to courts indicates that telephonic participation does not fundamentally alter the nature of judicial proceedings. The California Judicial Council's guidance to judicial personnel states that accommodations that may be granted include "Hearings by telephone for persons who have environmental sensitivities or mobility or other limitations." See guidance at http://www.courtinfo.ca.gov/programs/access/documents/q&a1.pdf. See also, guidance to the Washington courts, noting that telephonic participation is a common

accommodation and noting further that Congress intended to make it *difficult* for government to avoid compliance with the ADA. Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts, http://www.wsba.org/atj/ensuringaccessguidebook.pdf (citing Gould, And Equal Protection for All...The Americans with Disabilities Act in the Courtroom, J. Law & Health, 123, 138 (1993-94). The Washington guidance notes further:

> Administrative hearing procedures vary from agency to agency, but are generally informal and flexible. Many hearings are conducted by telephone, involve pro se parties, and are held in a variety of locations (for example, nursing homes, an appellant's residence, hospital rooms, or jails) to meet special needs. Parties should have notice of the hearing date, time, location, and procedure early enough that a party or witness with special needs can ask to be accommodated. For example, if the hearing has been set for all parties to appear in person, an immobile party might request a change to a telephone hearing. If, on the other hand, the hearing is set by telephone conference call, a hard of hearing party could request a change to an in-person hearing with an interpreter. Along with the notice of hearing, agencies should provide information listing hearing rights and addressing the most frequently asked questions about the process, including the right to reasonable accommodation or special assistance. Contact information (including a TTY number) should be included.

Id. 12.

There is little time-consuming ambiguity regarding the Board's obligations. The duty of administrative agencies to provide disabled persons with access to judicial proceedings is clear. Because access to the courts is a fundamental right, the United States Supreme Court has held that Title II of the ADA "unquestionably is valid...as it applies to the class of cases implicating the accessibility of judicial services[.]" *Tennessee v. Lane*, 541 U.S. 509, 531; 124 S. Ct. 1978, 1993; 158 L. Ed. 2d 820 (2004). The Court observed that the "duty to accommodate is perfectly consistent with the well-established due process principle that 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard' in its courts." *Id.* at 1994 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). See also, *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135-1136 (9th Cir.2001), amended by, Rehearing denied by 2001 U.S. App.

LEXIS 21712, reprinted as amended at 12 Am. Disabilities Cas. (BNA) 558 (9th Cir. Oct. 11, 2001) (implicitly holding courts are places of public accommodation).

The obligation to provide access has nothing to do with the voluntary nature of a disabled person's participation. The regulations implementing Title II of the ADA provide: "A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 C.F.R. § 35.160(b)(1) (making no distinction between voluntary and involuntary participants). In accordance with the language of the statue, case law also defines accommodation in the general context of *participation* in the trial process. See, e.g., *Rafford v. Snohomish County*, 2008 U.S. Dist. LEXIS 8656 (participants in the trial process, including litigants and jurors); *Memmer v. Marin County Courts*, 169 F.3d 630 (9th Cir. 1999) (litigants); *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (mobility impaired parties and trial attendees). See also, *Ewbank v. Gallatin County*, 2006 U.S. Dist. LEXIS 1578 (addressing the needs of attorneys, meeting attendees, and employees of the County Clerk's office). Addressing the issue squarely, Washington state guidance on implementing the ADA states that "the ADA applies to all judicial programs and services, and to all participants: jurors, lawyers, parties, witnesses, and observers." Ensuring Equal Access for People with Disabilities: A Guide for Washington Courts, http://www.wsba.org/atj/ensuringaccessguidebook.pdf.

State and local government services, programs and activities — including those of administrative and judicial courts — must be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). "Auxiliary aids and services" must

be furnished "where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 C.F.R. § 35.160(b)(1). Courts must make "reasonable modifications in policies, practices, or procedures" if changes are necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7). And courts must assure that communication is as effective for people with disabilities as it is for others. 28 C.F.R. § 35.160(a). In determining what type of auxiliary aid is necessary, a public entity must give "primary consideration" to the accommodation requested by the disabled individual. 28 C.F.R. § 35.160(b)(2). Mr. Baiocchi is not making an extreme or unreasonable request. He is not asking the Board to provide expensive video conferencing equipment. He is not asking them to adjourn the proceedings to his house. He is simply asking for the very modest and well-established accommodation of participating by telephone.

B. The Board Should Not Postpone for Delays and Complexities Voluntarily Created by Cal Am and Affecting Cal Am's Ultimate Compliance

While we recognize that the Board has discretion to grant a reasonable request for procedural delay, we ask that the Board examine critically the reasonableness of Cal Am's request to grant extensions for delays and complexities that Cal Am voluntarily created. Cal Am has sought to forestall its ultimate compliance with Order 95-10 by petitioning for a hearing on liability that is beyond question and seeking to multiply the issues to be decided. We are concerned that any orders made in this hearing, creating new language "recognizing" existing practices, will spawn new attempts to blur the illegality of Cal Am's diversions and to "establish" new claims of "entitlement" outside

of the ordinary water rights permitting process. The major source of "complexity" is actually this latter use of Board proceedings to legalize otherwise illegal conduct. This process can be seen by Cal Am's reference to rights "established" by 95-10 when the Hearing Officers explicitly refer only to rights "recognized" by that Order. It is also clear in the initial attempt to "bifurcate" the proceeding as if there were actually doubt about liability or "unauthorized" diversions in the first place.

We also ask that the Board view Cal Am's request against the backdrop of the already extensive delay in implementing Board Order 95-10 and the ongoing serious harm to public trust resources. We ask that the Board draw the line sooner rather than later.

We also raise the issue that acceding to Cal Am's ongoing strategy of delay makes the Board complicit in an unreasonable administrative delay in violation of its public trust duties. "The scope of discretion [of the Water Board] always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action. . . .' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion . . . ." *City of Sacramento v. Drew*, 207 Cal.App.3d 1287, 1297-98, 255 Cal. Rptr. 704 (1989) cited by *California Trout, Inc. v. Superior Court of Sacramento County*, 218 Cal. App.3d 187, 202-203, 266 Cal. Rptr. 788 (1990). In the Cal Am matter, the public trust doctrine is one of the applicable principles of law. An agency cannot unreasonably delay in implementing a public trust mandate, and implementation of public trust protections cannot be "disregarded while the matter of compliance is subjected to protracted study." *California Trout*, 218 Cal. App.3d at 782, 797 (addressing primarily a statutory mandate applicable to waters in specific counties and, in footnote 4 and accompanying text and elsewhere, the Board's general authority

and duty under Cal. Fish & Game Code § 5937 to protect public trust fisheries). See also, *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) (Complexity of the issue is not always sufficient reason for lengthy delays. Agency justifications become less persuasive as delay continues and must always be balanced against potential for harm.).

The fact that an agency lacks resources and accomplishing an objective requires action, cooperation and approval of third parties cannot justify a "glacial pace." *Morris v. Harper*, 94 Cal. App. 4th 52, 60-61, 114 Cal. Rptr. 2d 62 (2001) (finding that a 14-year delay could not be characterized as a good faith effort to comply with the law). *See also, Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (addressing constituent's characterization of rate proceedings as "an interminable proceeding, the principal function of which has been that of a giant regulatory wastebasket"). The *Morris* decision noted that "if we were to accept this argument [regarding the need for third party action], no public agency could be held to the requirements of state law."

The lengthy delays in agency action that will protect public trust values affect not only the Board's water rights duties, but also its water quality duties, specifically the obligation to protect designated uses of the Carmel River pursuant to the federal Clean Water Act. The following cases address the role of environmental harm in determining whether there has been unreasonable delay under federal statutes:

The Hells Canyon Preservation Council v. Richmond, 841 F.Supp. 1039, 1048-49 (D. Or. 1993) held that even in the absence of a statutory timetable, Forest Service's four year delay in issuing regulations governing use of private and public lands in a national recreational area was unreasonable because the lack of regulation allowed continued ecological damage. In the context of EPA's 19-month delay in preparing its own

proposed water quality standard after disapproving a state standard, a court considered the seriousness of the resulting ongoing harm to water quality and aquatic life in deciding that the delay was unreasonable. *Raymond Profitt Foundation v. U.S. EPA*, 930 F. Supp. 1088, 1103-04 (E.D. Pa. 1996). See also, *Friends of the Wild Swan v. U.S. Forest Service*, 910 F. Supp. 1500, 1508 (D. Or. 1995), in which the court found evidence of unreasonable delay in protecting the endangered bull trout. The Forest Service had known for two years that the trout was significantly threatened by activities on federal land but had not responded definitively to information received about the trout's threatened status, even though status of an entire species was at stake.

III. CONCLUSION

Cal Am supplies water as a public service and is using rights granted because of that role. It has had more than 10 years to make reasonable progress in dealing with the complexities of the case in good faith. Instead, it continues to seek delay on every possible pretext. The current request to delay the hearing is particularly unreasonable in light of the fact that Cal Am has created much of the complexity and false "ambiguity" that it now invokes to justify still more delay. Meanwhile, public trust resources continue to decline, perhaps irretrievably. For this reason, we need the effective participation of advocates like Mr. Baiocchi, who has the regional, public-interest-based perspective that will expedite a genuine solution.

The Public Trust Alliance objects to the delaying tactics of Cal Am and respectfully asks that the Board consider case law on unreasonable agency delay as a basis to terminate the delays that are actually emanating from Cal Am.

Respectfully submitted,

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