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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 Pre-Hearing Brief

I. Introduction

In 1995, the State Water Resources Control Board issued Order 95-10, in which the State Board found that California American Water Company (Cal-Am) was illegally diverting more than 75 percent of the water it was taking from the Carmel River and the river's subterranean underflow. Order 95-10 and the subsequent orders modifying 95-10 repeatedly referenced the public trust values affected by these illegal diversions. These orders should not be characterized as an "authorization" to continue diverting water without legal entitlement. They constitute a directive to discontinue the illegal diversions and harm to public trust resources, with a concomitant list of conditions for accomplishing that purpose as expeditiously as possible.

Despite the repeated directive, thirteen years later, the basic purpose of Order 95-10 has still not been achieved. As the process drags on, public trust values continue to spiral downward. The entities responsible for developing alternative facilities to reduce draws on the Carmel River

have engaged in a "paralysis by analysis" which has resulted in a status quo benefiting water users and distributors who would rather not account for the costs of their actions. Moreover, the conditions for small water consumers and the Carmel River ecosystem continue to worsen. The whole process since the issuance of Order 95-10 might be characterized as a monument to deferring action while a private company increasingly seeks to characterize a trespassory diversion as some kind of an entitlement. Indeed, still more study and negotiation has been suggested to defer action on the proposed Cease and Desist Order. See letters from local California Assembly and Senate representatives attached to Sand City's joinder in brief filed on behalf of the City of Seaside, et. al.

The communities of the Monterey Peninsula and the people of California need a more focused call to responsible action. The paralyzed parties have proven that reasonable and responsible action can be inappropriately postponed in the absence of some sort of legal imperative.

The current proceedings are a much needed opportunity to end the 13-year delay in accomplishing the purpose of Order 95-10 and subsequent related decisions. The State Water Resources Control Board appropriately instituted proceedings for a Cease and Desist Order.

In a notice of a pre-hearing conference and at the conference itself, the Board requested public input on the issue of the appropriateness of the proposed Cease and Desist Order. At the conference and in subsequent briefing requested by the Board, various public interest organizations, including the Public Trust Alliance, maintained that the Board must consider the collapsing Carmel River ecosystem and the post-1995 listing of fish species under the Endangered Species Act as it formulates the Cease and Desist Order.

In its pre-trial brief, Cal-Am sought to exclude these issues, suggesting that the doctrines of res judicata and collateral estoppel preclude the Board from considering them.[1] Cal-Am's arguments seek to exclude relevant defense of fundamental public interests. The law simply does not operate in the way that Cal Am professes when long established public trust interests are involved. The doctrines of res judicata and collateral estoppel give way before the Board's affirmative duty to protect public trust resources whenever feasible.

In this case it is completely feasible to improve conditions for endangered species. Reasonable incremental facilities and conservation measures have been proposed that would at least serve current human needs. Our laws define public zones for responsible decision making that are not governed just by the private "rights" asserted by ambitious economic actors. It is clearly within the ordinary scope of Board authority in this sort of proceeding to adopt feasible measures to protect important and seriously endangered trust resources. The issue of timing or interim targets is a key practical detail that is necessary to prevent a wholesale ecological collapse.

II. Legal Argument

A. Doctrine of Collateral Estoppel Does Not Bar Consideration of Public Trust and Endangered Species Act Issues

Cal-Am suggests that the doctrine of collateral estoppel precludes an organization such as the Public Trust Alliance from raising public trust issues in the context of this hearing. It characterizes the attempt to include consideration of current public trust impacts as an improper attempt to "relitigate" the issue. However, this characterization flies in the face of the jurisprudence of the Supreme Court of California.

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[1] For purposes of responding to this argument, Public Trust Alliance adopts the following definitions of these doctrines: Under the doctrine of "res judicata," a judgment on the merits in a prior suit involving same parties or their privies bars a second suit based on same cause of action, while under doctrine of "collateral estoppels," such judgment precludes relitigation of issues actually litigated and determined in prior suit, regardless of whether it was based on same cause of action as second suit. See *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 325, 75 S.Ct. 865, 867 (U.S. 1955).

1. California Supreme Court Policy Re Public Interest/Public Trust Impacts

In a landmark case involving the public trust doctrine, the Court determined that the doctrine of collateral estoppel does not apply in a public trust dispute of great public importance. This policy rests in part on the Board's continuing role of supervision. A state, as administrator of public trust values, does not have the power to abdicate its role as trustee in favor of private parties. *Berkeley v. Superior Court*, 26 Cal. 3d 515, 520, fn. 5, 606 P.2d 362, 364, fn. 5; 162 Cal. Rptr. 327, 329, fn 5 (1980), *cert. denied, Santa Fe Land Improv. Co. v. Berkeley*, 449 U.S. 840 (rejecting the argument that legislation transferring the ownership of tidelands extinguished the public's right to assert public trust values). See also, *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 447; 658 P.2d 709, 728 (1983), *cert. denied* 464 U.S. 977: The state has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust.

The California Supreme Court's policy of refraining from applying the doctrine of collateral estoppel to important public trust disputes also rests on the fragility of the public trust resource. The People may not be estopped from asserting their interest in relevant, deteriorating public trust resources: "The exercise of the police power has proved insufficient . . . . . The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands." *State of California v. Superior Court (Fogerty)*, 29 Cal.3d 240, 247, 172 Cal.Rptr. 713, 717, 625 P.2d 256, 260 (1981), *cert. denied, Lyon v. California*, 454 U.S. 865 (1981) (addressing the shorezone).

In *City of Long Beach v. Mansell*, 3 Cal.3d 462, 500-501, 91 Cal.Rptr. 23, 51, 476 P.2d 423, 451 (1970), the Court indicated that estoppel theories should be applied to affect public trust

rights only if an estoppel is required in order to avoid "great injustice" to adjoining landowners (an extremely narrow precedent, as noted by the court).

2. Application of Collateral Estoppel to Legal Issues

Cal-Am also characterizes State Board Order 95-10 as an adjudication of Cal-Am's rights to Carmel River water. Pre-trial brief p. 12. This is a legal question. When matter at issue is a question of law rather than of fact, a prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. *Consumers Lobby Against Monopolies v. PUC*, 25 Cal. 3d 891, 902; 603 P.2d 41, 47; 160 Cal. Rptr. 124, 130; 1979 Cal. LEXIS 349 (1979). See also, *Louis Stores, Inc. v. Department of Alcoholic Beverage Control*, 57 Cal.2d 749, 757, 22 Cal.Rptr. 14, 18, 371 P.2d 758, 762 (1962), setting forth and adopting the pertinent provisions of the Restatement of Judgments: "An important qualification of the doctrine of collateral estoppel is set forth in section 70 of the Restatement of Judgments, which reads as follows: 'Where a *question of law* essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; *and in any event it is not conclusive if injustice would result.*' (Italics added in decision.) Comment f to this section explains: 'The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, *if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons.*' (Italics added in decision.)" The *Louis Stores* opinion also states that the public interest attached to the

resolution of a question of law may require that it be determined without restriction from the collateral estoppel effect of prior litigation. (57 Cal.2d at p. 758).

3. Collateral Estoppel and Changed Circumstances

The doctrine of collateral estoppel also does not apply as suggested by Cal-Am when circumstances have changed since the entry of a prior judgment. The grave and worsening situation for Carmel River constitutes a changed circumstance that precludes the application of the doctrine of collateral estoppel. See *United States Golf Assn. v. Arroyo Software Corp.*, 69 Cal. App. 4th 607, 616, 81 Cal. Rptr.2d 708, 713 (1999) (Collateral estoppel does not apply when there are changed conditions or new facts which did not exist at the time of the prior judgment). See also *People v. Carmony*, 99 Cal. App. 4th 317, 322 et seq., 120 Cal. Rptr.2d 896, 899 et seq. (2002), review denied, 2002 Cal. LEXIS 5945 (Cal. Aug. 28, 2002) (Under the doctrine of collateral estoppel, the estoppel effect of a judgment extends only to the facts in issue as they existed at the time the prior judgment was rendered) (For the purpose of the application of the doctrine of collateral estoppel, when a fact, condition, status, right, or title is not fixed and permanent in nature, then an adjudication is conclusive as to the issue at the time of its rendition, but is not conclusive as to that issue at some later time) (The limitation on collateral estoppel in changed circumstances in situations in which the rights of the parties are not static, but depend upon a current assessment of all the facts in light of applicable law).

B. The Doctrine of Res Judicata Does Not Preclude Consideration of Public Trust and Endangered Species Act Developments.

Cal-Am's pre-trial brief maintains that the doctrine of res judicata precludes the parties from maintaining a "second suit between the parties on the same cause of action." Cal-Am pre-trial brief p. 11.

1. Res Judicata and Changed Circumstances

The California principle of changed circumstances precludes the application of res judicata, just as it precludes the application of collateral estoppel. See *Starr v. City and County of San Francisco*, 72 Cal. App.3d 164, 178-79, 140 Cal.Rptr. 73, 81-82 (1977). (The doctrine of res judicata does not apply where there are changed conditions and new facts which were not in existence at the time of the prior judgment). See also, *In re Fain*, 139 Cal. App.3d 295, 301, 188 Cal. Rptr. 653, 657 (1983). (The doctrine of res judicata was never intended to operate so as to prevent a reexamination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants).

2. Res Judicata and Post-Judgment Conduct

Closely related to the principle of changed circumstances is the principle that a judgment or consent decree cannot preclude actions that are based on claims based on conduct occurring after the entry of judgment.

The U.S. Supreme Court has held that "a judgment . . . cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Lawlor v. Nat'l Screen Service*, 349 U.S. 322, 328 (1955) (holding that a prior judgment does not constitute res judicata as to actions occurring after the judgment in the prior action, even if the cases are closely related). This decision notes that the same course of wrongful conduct may frequently give rise to more than a single cause of action. A judgment, while precluding recovery on claims arising prior to its entry, cannot be given effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon at time of earlier suit.

California courts have adopted the same reasoning. *Eichman v. Fotomat Corp.*, 147 Cal.

App. 3d 1170, 1177, 197 Cal. Rptr. 612, 615 (1983) (citing *Lawlor*). The Ninth Circuit has held similarly, finding that when a lawsuit is based on conduct that occurs after the entry of an earlier consent decree and that did not arise out of the same facts as those brought in a previous case, *res judicata* does not bar subsequent litigation. *Int'l Techs. Consultants, Inc. v. Pilington PLC*, 137 F.3d 1382, 1387 (9th Cir. 1988). See also, *Apotex, Inc. v. FDA*, 364 U.S. App. D.C. 187, 393 F.3d 210, 218 (D.C. Cir. 2004) ("Res judicata does not bar parties from bringing claims based on material facts that were not in existence when they brought the original suit.").

3. Res Judicata in the Administrative Context

The *Louis Stores* decision also addressed the application of res judicata to administrative decisions. That decision concluded that greater flexibility is required in applying the doctrine of res judicata in the context of administrative decisions (citing *Hollywood Circle, Inc.* v. *Department of Alcoholic Beverage Control,* 55 Cal.2d 728, 732, 361 P.2d 712, 714; 13 Cal. Rptr. 104, 106 (1961), which quoted from 2 Davis, Administrative Law Treatise 568 (1958), noting that "the last clause of section 70 of the Restatement concerning injustice is a qualification which 'necessarily ought to apply to any set of rules concerning application of res judicata to administrative determinations,' that the doctrine is weaker as to questions of law than as applied to questions of fact, and that it should be 'qualified or relaxed to whatever extent is desirable for making it a proper and useful tool for administrative justice.' (See 2 Davis, Administrative Law Treatise (1958) 558-559.)"

The *Louis Store* opinion noted further that res judicata should not be applied "because of an adverse effect with respect to third persons not parties to the litigation or because public interest requires that relitigation not be foreclosed." Third persons who were not parties to the prior Carmel River litigation and whose interests may be adversely affected by a narrow

interpretation of the present proceedings include tribal interests who assert rights in Indian trust or public trust fisheries. 57 Cal. 2d at 758 (citing the Davis Administrative Law Treatise pp. 561-66).

The state has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 447; 658 P.2d 709, 728 (Cal. 1983), *cert denied*, 464 U.S. 977.

C. Intervenors Are Entitled to Raise Public Trust Issues.

Cal-Am suggests that public interest parties are not entitled to raise public trust and Endangered Species Act issues because considering those issues would change the scope of the hearing. However, it has been observed that "the intervener does not take the case entirely as he finds it," and in any case, intervenors may participate in the main case on the terms that the court deems appropriate. *Hausmann v. Farmers Ins. Exchange*, 213 Cal. App. 2d 611, 617, 29 Cal.Rptr. 75, 79 (1963) (citing 2 Witkin, Cal.Proc., p. 1096). See also, *Cache La Poudre Irrigating Ditch Co. et al. v. Hawley*, 43 Colo. 32, 39-40, 95 P. 317, 319 (1908), in which the court held that the petition in intervention did not change the basic question before the court: the right to withdraw a volume of water form a river.

Moreover, the public trust and related Endangered Species Act provisions that protect the corpus of the trust have always been part of this hearing. *See, e.g., In re Water Use Permit Applications*, 94 Haw. 97, 108-10 (2000):

> Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state. See *Robinson*, 65 Haw. at 674, 658 P.2d at 310; see also *State v. Central Vt. Ry.*, 153 Vt. 337, 571 A.2d 1128, 1132 (Vt. 1989) ("The state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power."), cert.

denied, 495 U.S. 931, 109 L. Ed. 2d 501, 110 S. Ct. 2171 (1990). The continuing authority of the state over its water resources precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes. See *Robinson*, 65 Haw. at 677, 658 P.2d at 312; see also *National Audubon*, 658 P.2d at 727; *Kootenai*, 671 P.2d at 1094 ("The public trust doctrine takes precedent even over vested water rights."); cf. *Karam v. Department of Envtl. Protection*, 308 N.J. Super. 225, 705 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998) ("The sovereign never waives its right to regulate the use of public trust property."), aff'd, 157 N.J. 187, 723 A.2d 943, cert. denied, 145 L. Ed. 2d 45, 528 U.S. 814, 120 S. Ct. 51 (1999). [38] This authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust. See *National Audubon*, 658 P.2d at 728.

D. Public Trust Considerations Should Embrace Indian Trust Resources

The beneficiaries of the public trust doctrine are frequently viewed as simply the citizens of the state. This large, undifferentiated "state" beneficiary class tends to disadvantage indigenous peoples, who have been forced off of their ancestral lands and then relegated to the status of mere stakeholders in the decisionmaking regarding the "public" lands. Nevertheless, some decisions have redefined the beneficiary class so as to protect the interests of indigenous peoples. The Hawaiian Supreme Court made the distinctive cultural characteristics of indigenous Hawaiians a central part of the equation in resolving a water rights dispute. One commentator suggests that this decision "reconceptualized the public trust doctrine in order to preserve the customs of the indigenous plaintiffs."[2] *In re Water Use Permit Applications*, 94 Haw. 97, 127-138, 9 P.3d 409, 439-50 (2000), *aff'd in part, vacated in part, remanded by*, 105 Haw. 1, 93 P.3d 643 (2004). Some commentators suggest that the beneficiary class of the public trust doctrine is inherently flexible: the beneficiaries of the public trust are members of a public "community," which may be defined variously as all citizens of a specific country, a

[2] Kyle W. La Londe, *Who Wants to be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander V. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27 (2004).

smaller subgroup within the country, or as "all members of the global community."[3]

III. Conclusion

The Board, with its obligation to protect trust values whenever feasible, cannot legally issue another "free pass" to Cal-Am. Circumstances have qualitatively worsened since the Board issued its prior orders (as reflected in the threatened and endangered species designations). The Board should view the impending collapse of the Carmel River ecosystem in the context of the whole picture and should craft the most effective solution, preferably within a scientific framework of ecosystem management and watershed management, and a legal framework of the public trust doctrine. A well-crafted Cease and Desist Order could be a valuable support for the construction of appropriately scaled facilities if it were thoughtfully combined with Board support for the visions being explored by the Division of Ratepayers' Advocates of the C. P.U.C. and academic departments at U.C. Santa Cruz.

The authorities cited above demonstrate that the courts do not look favorably on attempts to truncate public participation in protecting public trust resources. Cal-Am's arguments for narrowing the scope of the hearing tend to exclude fundamental public interests, and the bias toward bifurcation and exclusion would preclude integrated decision making by the Board.

The need to provide a truly public space for decision making rather than an analysis based primarily on private rights was presciently anticipated by Justice Holmes a century ago. In his famous opinion in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), the highest court in the land stated

> Few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of the opinion that the private property of riparian proprietors cannot be supposed to have deeper roots...The private right to appropriate is

[3] *See, e.g.*, Sharon Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENVTL. L. & LITIG. 317, 366 (2006).

> subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health."

209 U.S. at 356

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.

Id. at 357

Respectfully submitted,

Dated this April 23, 2008

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