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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 Closing Briefs

I. Introduction

A revealing aspect of this case is the divergent ways in which the Board and the various parties have attempted to define (or define away) the purpose of these proceedings. The Board has ruled that the key issue in the case is whether it should adopt the proposed CDO, with or without modifications. May 13, 2008 Ruling on Procedural Issues 1.0. The proceedings, as defined by the Board, encompass Cal Am violations of Water Code section 1052 and Condition 2 of Order 95-10. *Id.* at 1.1. In common with other public interest participants, the Public Trust Alliance suggests that the hearings recently conducted did not revolve around the "entitlements" of Cal Am and other parties, but were an effort to spur more diligent efforts to serve the public interests referenced in 95-10, including the protection of public trust assets.[1] We oppose attempts to redefine these proceedings as a forum to acquire official recognition and new water rights outside of the normal, legal process. That's not what an enforcement hearing is about.

[1] This interpretation appears to us to be consistent with the Board's ruling on the scope of the case—far more consistent than the subsequent attempts of other parties to use Order 95-10 as a springboard to "entitlement." Such attempts reflect a very self-interested definition of the order and an equally self-interested approach to public service. Although Cal Am has repeatedly minimized or characterized public trust impacts as irrelevant, the Board indicated that public trust impacts would be relevant to its choice of remedies (*Id.* 4.0).

Entities should not come to these types of proceedings to establish new rights with respect to other claims, in part because the public has not been adequately noticed that its rights might be at risk and in part because this approach simply fails to answer the basic questions that the Board has posed.

The Public Trust Alliance would also like to address the specific contentions in the briefs of Cal Am and the Monterey Peninsula Water Management District that Cal Am has met the standard for "diligence" in Order 95-10. We will also address the arguments that this proceeding is barred by the doctrines of collateral estoppel and res judicata.

II. The Meaning of Diligence

Cal Am has pronounced its actions "diligent" by formulating a rather limited "plain meaning" definition based on Webster's dictionary and a 1938 Board decision defining diligence in the context of perfecting a water right. Cal Am Closing Brief 11-12. In view of the important public interests at stake, a more searching look is essential.

If a particular word is not defined by a governing statute, courts "normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). To determine ordinary or natural meanings of words, courts look to sources such as dictionaries and treatises for common usage. In *Smith*, the U.S. Supreme Court looked to Webster's New International Dictionary and Black's Law Dictionary, as well as past judicial interpretations. See also, *Carlson v. Hyundai Motor Co.*, 222 F.3d 1044, 1045 (8th Cir. 2000) (citing Black's Law Dictionary 1154 (7th ed. 1999)). Black's Law Dictionary (8th ed. 2004) offers the following definition of "diligence":

> **diligence. 1.** A continual effort to accomplish something. **2.** Care; caution; the attention and care required from a person in a given situation. • The Roman-law equivalent is *diligentia*. See DILIGENTIA.
> "Care, or the absence of *negligentia*, is *diligentia*. The use of the word diligence in this sense is obsolete in modern English, though it is still retained as an archaism of legal diction. In ordinary usage, diligence is opposed to idleness, not to carelessness." John Salmond, *Jurisprudence* 393 n. (i) (Glanville L. Williams ed., 10th ed. 1947).
> ***common diligence.* 1.** See *due diligence* (1). **2.** See *ordinary diligence*.
> ***due diligence.* 1.** The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. -- Also termed *reasonable diligence*; *common diligence*. **2.** *Corporations & securities.* A prospective buyer's or broker's

investigation and analysis of a target company, a piece of property, or a newly issued security. • A failure to exercise due diligence may sometimes result in liability, as when a broker recommends a security without first investigating it adequately.
extraordinary diligence. Extreme care that a person of unusual prudence exercises to secure rights or property.
great diligence. The diligence that a very prudent person exercises in handling his or her own property like that at issue. -- Also termed *high diligence.*
low diligence. See *slight diligence.*
necessary diligence. The diligence that a person is required to exercise to be legally protected.
ordinary diligence. The diligence that a person of average prudence would exercise in handling his or her own property like that at issue. -- Also termed *common diligence.*
reasonable diligence. **1.** A fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue. **2.** See *due diligence* (1).
slight diligence. The diligence that a person of less than common prudence takes with his or her own concerns. -- Also termed *low diligence.*
special diligence. The diligence expected from a person practicing in a particular field of specialty under circumstances like those at issue.

Two main factors stand out in applying this definition to Cal Am actions under Order 95-10: (1) the surrounding circumstances illuminate any duty of diligence, and (2) Cal Am's acts affect more than its own property—they are linked to the health and public safety of the Monterey Peninsula community and have profound effects on property that the state holds in trust for the benefit of the people of California. In some respects, as a public utility that provides infrastructure for a public purpose, Cal Am's duties are analogous to those of a government agency charged with safeguarding the environment and the public.

A. Context Is Important

Cal Am cites Board Decision No. A 1149 D 430 (1938) for the proposition that diligence entails only "ordinary" efforts to finish a task. Cal Am Closing brief, p. 12, lines 8-14. This undemanding definition, applied in Decision A 1149 D 430, concerned a permittee's delay in applying water to a beneficial use. It was expressly limited to "cases of this kind." Decision A 1149 D 430 at p. 6. The concerns underlying a lack of diligence in this context is that water rights will acquired and held for speculative purpose, and such stale claims will make it difficult to determine how much water is available for appropriation. See, e.g., *State ex rel. Martinez v. McDermett*, 901 P.2d 745 (N.M. Ct. App. 1995). See also, Samantha K. Olson & Erin K.L. Mahaney, *Searching for Certainty in a State of Flux: How Administrative Procedures Help Provide Stability in Water Rights Law*, 36 MCGEORGE L. REV. 73, 77 (2005) (citing State Conservation Comm'n, Report of the Conservation Commission of the State of California 21 (Transmitted

to the Gov. and Leg., Jan. 1913)). Those are far less urgent concerns than a collapsing ecosystem and potentially irreversible impacts on a public resource, with looming Endangered Species Act requirements. Therefore, they require a less demanding definition of diligence. See *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998) (In refusing to apply doctrine of laches in the context of public interest environmental litigation, court noted that one factor to be considered in defining diligence is whether the harm at issue affects many people in addition to plaintiff) .

B. Cal Am Should Be Held to a High Level of Diligence

Cal Am should be held to a standard of "special diligence" as set forth in Black's Law dictionary due to its substantial corporate resources and its claims of expertise in the field of water management.[2] Cal Am's website cites its "teams of experts" who are widely acknowledged for their expertise in "water quality, research and environmental stewardship" and "proudly uphold the highest standards in everything we do."[3]

Cal Am should also be held to a heightened level of diligence on the basis of the public trust damage caused by delay. Hawaii's Supreme Court has discussed diligence in the context of the public trust obligations of state agencies. *In re Water Use Permit Applications,* 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000). The Court tied diligence to a participatory process focused on public rights. It also indicated that a high level of diligence is required: "[T]he state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." Moreover, actions affecting the public trust assets must be based on a long-term perspective, "considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Id.* The effort that comes

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[2] In addition to the Black's Law Dictionary definition, cited, *supra* at p. 3, the law dictionary at answers.com gives the following definition: "*Special diligence* is the skill that a good businessperson exercises in his or her specialty. It is more highly regarded than ordinary diligence or the diligence of a nonspecialist in a given set of circumstances."

[3] See Cal Am website at http://www.amwater.com/caaw/about-us/accolades.html.

closest to meeting this diligence standard in resolving the Carmel River crisis is the REPOG effort. This effort is far along in the environmental review process.[4]

C. "Diligence" Is Conceptually Related to "Unreasonable Delay"

The concept of diligence is meaningful primarily in the context of a timeline. For example, *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683, 704 et seq., 169 P.3d 14, 26 et seq. (2007) disapproved a "rolling deadline" for ending a moratorium that kept property owners in limbo regarding their rights to develop public trust property. "[A] reasonable moratorium must be in place no longer than necessary to accomplish the necessary planning by a body exercising diligence to accomplish that planning." A similar approach is adopted in the extensive jurisprudence analyzing "unreasonable delay" under the Federal Administrative Procedure Act ("APA"), which addresses public agencies' duties to protect the environment and public health and safety without unreasonable delay. Given Cal Am's similar duties (and its own claims of expertise and commitment) to protect the environment and public health and safety, there is meaningful guidance in APA case law.

The APA commands each federal agency "to conclude a matter presented to it ... within a reasonable time ...." 5 U.S.C. § 555(b). Where an agency fails to take some action required by statute within a reasonable time, the APA authorizes judicial review of that "failure to act." *Id.* § 551(13). The APA's judicial review provisions explicitly authorize a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The most widely followed authority on the nature of "unreasonable delay" is *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-81 (D.C. Cir. 1984) ("TRAC"). In that case the court summarized earlier decisions regarding "unreasonable delay," establishing a guiding standard for assessing claims by members of the affected public. The factors indicating unreasonable delay ("TRAC factors") are:

[4] Shortly after the Board's Phase 2 hearing on the CDO, the City of Monterey adopted a resolution supporting REPOG. See Minutes, Special Meeting of the City Council of the City of Monterey, Sept. 24, 2008, http://www.monterey.org/ccncl/minutes/2008/080924spm.pdf. This development underscores George Riley's position that pressure from the Board generates results. See Public Trust Alliance closing brief, pp. 12-14.

(1) the time agencies take to make decisions must be governed by a "rule of reason;"
(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
(5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
(6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is "unreasonably delayed." Id. at 80.[5]

The TRAC "rule of reason" was initially articulated in *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980). *MCI* stated that although occasional administrative delays may be justifiable and even unavoidable, extensive or repeated delays are unacceptable. If a controlling authority provides a time frame for action, this scheme illuminates the rule of reason. See also, *TRAC*, 750 F.2d at 79 (addressing statutory timetable). An agency's own proposed timetable is also extremely relevant. *Oil, Chemical, and Atomic Workers International Union v. Zegeer*, 768 F.2d 1480 (D.C. Cir. 1985). Repeated failure to meet a timeline diminishes credibility regarding diligence.[6]

A further factor relevant to Cal Am's claim of "diligence" is the potential impact on the public and the environment. Under the TRAC balancing test, delays that might be reasonable in the sphere of economic regulation have been found less tolerable when human health and welfare are at stake. See *TRAC*, 750 F.2d at 79-81. See *Pub. Citizen Health Research v. Com'r, Food & Drug*, 740 F.2d 21, 34-35 (1984) (When agency administers statutory scheme whose paramount concern is protection of public health, pace of decisionmaking must account for this concern). Similarly, *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) found that "public health concerns must enter into the calculus under [the] rule of reason." The court ordered the agency to proceed on a priority,

[5] The Ninth Circuit has adopted TRAC. *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997); *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 626 (9th Cir.1985).
[6] See *National Wildlife Federation v. Cosgriffe*, 21 F. Supp.2d 1211 (D. Or. 1998) (commenting that BLM's actions thus far did not inspire confidence in its projected completion date.

expedited basis to issue a final rule as promptly as possible and well in advance of the agency's current estimated date. *In re International Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) found OSHA's six-year delay in updating exposure limits for cadmium extraordinarily long and unreasonable in view of the seriousness of health risks posed by delay. Factors contributing to the court's decision included persistent failure to meet timetables set by the court. *Id.* 1150. This factor is important to this proceeding. Cal Am delays prolong the public's uncertainty and health risks of water shortages.

The courts apply similar reasoning to ongoing ecological harm. They consider both the seriousness of ecological harm and whether delay undermines the purpose of a protective statute. Imminent hazards limit an agency's discretion. *Sierra Club v. Gorsuch*, 715 F.2d 653, 658-59 (D.C. Cir. 1987). Even in the absence of a statutory timetable, a four-year delay in issuing land use regulations was unreasonable in view of continued ecological damage. *Hells Canyon Preservation Council v. Richmond*, 841 F.Supp. 1039 (D. Or. 1993). Similarly, EPA's 19-month delay in preparing a federal water quality standard after disapproving a state standard was unreasonable because of the ongoing harm to water quality and aquatic life. *Raymond Profitt Foundation v. U.S. EPA*, 930 F.Supp. 1088, 1103-04 (E.D. Pa. 1996). In *Friends of the Wild Swan v. U.S. Forest Service*, 910 F.Supp. 1500 (D. Or. 1995), the court found unreasonable delay where the Forest Service had known for two years that the bull trout was significantly threatened by activities on federal land but had not responded definitively to information received, even though status of an entire species was at stake. In *U.S. v. General Motors Corp.*, 876 F.2d 1060, 165-68 (1st Cir. 1984), *aff'd* 496 U.S. 530 (1990), the court found it unreasonable to delay a decision on a proposed revision of a state's Clean Air Act SIP for three years. The court found that EPA had improperly given itself a "pocket veto" over SIP revisions, allowing it to frustrate the states' developing policy choices "for no reason or any reason." The court concluded that it is "dangerous to defer" to an entity that has a substantial institutional interest in not imposing constraints on itself.

Complexity of an issue is not a blank check for continuing delay. See *Brower v. Evans,* 257 F.3d 1058, 1068 (9th Cir. 2001) (rejecting claims that other necessary parties were not cooperating in complex

task). See also, *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987)(Complexity of issue is not always sufficient to justify lengthy delays; if delay will result in harm or substantial nullification of a right conferred by statute, court must act to make certain that what can be done is done). *Sierra Club v. Gorsuch*, 715 F.2d 653, 658-59 (D.C. Cir. 1987) disapproved "blind acceptance" of an agency's claim that a complex matter is under continuing study. *Natural Resources Defense Council v. U.S. E.P.A.*, 595 F.Supp. 1255, 1268-70 (S.D. N.Y. 1984) addressed a prolonged delay between proposed rulemaking and issuance of a final rule under the Toxic Substances Control Act, in which EPA intended to withdraw the proposed rules and wait for more data. While it was sympathetic to the agency's limited resources and heavy workload, the court refused to condone "what amounts to administrative or executive repeal of an Act of Congress" [*citing Sun Enterprises v. Train*, 532 F.2d 280, 290 (2d Cir. 1976)]. The court found that the decision to delay the finalization of the rule subverted the very essence of the statutory scheme.

Cal Am's failure to exercise maximum diligence to push forward a solution to its illegal diversions from the Carmel River amount to a similar "pocket veto" and unofficial "repeal" of the Endangered Species Act provisions that protect public trust resources. Such delays benefit Cal Am rather than the public of the Monterey Peninsula.

III. Res Judicata and Collateral Estoppel

A. Collateral Estoppel

The doctrine of collateral estoppel clearly does not preclude organizations that were not party to Order 95-10 from raising public trust and other issues addressed in the Order. The U.S. Supreme Court recently rejected the "virtual representation" doctrine applied in the Ninth and other Circuits. *Taylor v. Sturgell*, 128 S.Ct. 2161, 2173 et seq., 76 USLW 4453, 08 Cal. Daily Op. Serv. 7114 (2008). The Court found that "identity of interests" and "adequate representation" tests do not protect the non party's due process rights, except in certain narrowly defined circumstances.[7]

Parties to the 95-10 proceedings also are not subject to the collateral estoppel doctrine. There are at

[7] The Court recognized exceptions for parties acting as a representative in a properly conducted class action, and situations in which the party had a fiduciary relationship with the nonparty. *Id.* 2172-73.

least three rationales that allow them to revisit issues addressed in 95-10: the exception for important public interests, a general "interests of justice" exception, and a changed circumstances doctrine. In a landmark decision, the California Supreme Court found that the doctrine of collateral estoppel does not apply in a public trust dispute of great public importance. *Berkeley v. Superior Court*, 26 Cal. 3d 515, 520, fn 5 (1980). The Supreme Court has also declined to apply collateral estoppel to issues of law if the public interest requires relitigation. *Consumers Lobby Against Monopolies v. PUC*, 25 Cal. 3d 891, 901, 603 P.2d 41; 160 Cal. Rptr. 124 (1979). See also, *Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control*, 57 Cal.2d 749, 757-58, 22 Cal.Rptr. 14 (1962), in which the Court stated 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.

Both *Consumers Lobby* and *Louis Stores* also noted a general "interests of justice" exception. *Louis Stores* stated that a prior determination of questions of law *is not conclusive if injustice would result.* 57 Cal.2d at 757 (citing Restatement of Judgments section 70, italics added by Court).

A change in circumstances since the entry of a prior judgment may also make it inappropriate to apply the doctrine of collateral estoppels. See *United States Golf Assn. v. Arroyo Software Corp.*, 69 Cal.App.4th 607, 616, 81 Cal. Rptr.2d 708, 713 (1999); *People v. Carmony*, 99 Cal.App.4th 317, 322-23;120 Cal. Rptr.2d 896, 899-900 (2002) (Estoppel effect of judgment extends only to facts in issue as they existed when prior judgment was rendered).

Representatives of the state, in particular, may—indeed they must—revisit public trust issues for sound public policy reasons. The state, in its continuing role of guardian 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 (1980). This is particularly true of resources under dire threat: "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 (1981).

B. Res judicata

Changed-circumstances and interests-of-justice principles also apply in the context of res judicata. The *Louis Stores* decision concluded 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 and that it should be qualified or relaxed to whatever extent is desirable for making it a proper and useful tool for administrative justice."

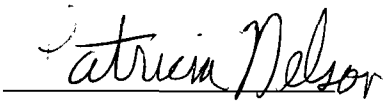
As to changed circumstances, see *Starr v. City and County of San Francisco*, 72 Cal.App.3d 164, 178; 140 Cal.Rptr. 73, 81-82 (1977) (Res judicata does not apply if there are changed conditions and new facts); *In re Fain*, 188 Cal. Rptr. 653 (1983) (Res judicata never intended to prevent reexamination of same question between same parties if facts have materially changed or new facts may have altered litigants' legal rights or relations. Listing of species under the ESA clearly changes and heightens the legal obligations of Cal Am and other water users. Regarding post-judgment conduct as a basis for new claims, see *Lawlor v. Nat'l Screen Service*, 349 U.S. 322, 328 (1955); *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1177, 197 Cal. Rptr. 612, 615 (1983); *Int'l Techs. Consultants, Inc. v. Pilington PLC*, 137 F.3d 1382, 1387 (9th Cir. 1988).

IV. Conclusion

The Board should make maximum efforts to spur diligent compliance with its orders, in order to protect threatened public trust resources. APA and other precedents suggest that Cal Am has not applied adequate diligence in view of the interests involved and will not do so in the future absent a strong CDO.

Respectfully submitted,

Dated this Nov. 9, 2008



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