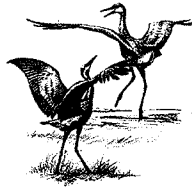


CALIFORNIA ENVIRONMENTAL LAW PROJECT
A Non-Profit Legal Corporation



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RECEIVED

JAN 30 2009

MPWMD

January 26, 2009

Darby Fuerst, General Mgr.
Henrietta Stern
Monterey Peninsula Water Management District.
5 Harris Court Building,
GPO Box 85
Monterey CA. 93942 0085

Re: Application of Cal-Am for Water Distribution Permit To Serve Monterey
Bay Shores Ecoresort

Dear Mr. Fuerst and Ms. Stern:

Sierra Club wishes to respond to SNG's counsel's letter dated January 21, 2009, and to the District's Staff Report.

I.

Sierra Club Response to SNG Counsel's Letter of January 21, 2009

In her letter, counsel for SNG states: "There is no question that expansion [sic] of Cal-Am's water system permit based upon pumping an additional 90 AFY, so [sic] Condition 4 [of Order 95-10] could conceivably apply." (p.3). Then, despite this statement, counsel cites a number of reasons why she believes Condition 4 is inapplicable. None of these reasons are persuasive or even responsive to Sierra Club's arguments.

The first reason given is that "development of water and purveying of water within the Seaside Basin is governed by the Seaside Adjudication Order, so Cal-Am can't maximize production from the Seaside Basin in a way inconsistent with the Order." *Id.* Counsel, however, fails to inform the Board how requiring Cal-Am to comply with Conditions 2 and 4 of WR Order 95-10 would result in maximizing production from the Seaside Basin in a manner inconsistent with the adjudication. In fact, so conditioning the permit would not be inconsistent with the adjudication in any manner, but would fulfill the intent of Order 95-10.

Under the contemplated scenario, described in SNG's counsel's letter, "Cal-Am is simply purveying or supplying a portion of SNG's water right from an area inland of the SNG

Pumps Water Off-site for Use by SNG on Site, Is Contrary to the Common Law of Overlying Water Rights, In that it Severs the Appurtenant Ground-Water Pumping Right from the Overlying Land

In approving a water distribution permit to Cal-Am sanctioning its augmented pumping from the Seaside aquifer the District is allowing and approving an unlawful use of SNG's overlying right in violation of California law. The overlying right, as noted below, constitutes a appurtenant right to take water from the ground and use it on the overlying property. It is unlawful to sever the appurtenant pumping right from the right of use. The overlying land-owner cannot lawfully "convey" its groundwater pumping right to a third party, who is to pump water not appurtenant to the overlying land.

District Staff states in the Staff Report:

CAW extractions from the Seaside Basin could increase by up to 90 AFY based on water rights held by SNG, as specified in the Seaside Basin adjudication (Staff Report at 1).

For the reasons explained below it is contrary to the California law of overlying groundwater rights for staff to conclude that augmented pumping in the Seaside Basin by Cal-Am for the purpose of supplying SNG's on site uses, can be derived from or "based on [overlying] water rights held by SNG."

In City of Barstow v Mohave Water Agency, 23 Cal.4th, 1224 (2000), the Supreme Court characterized an overlying right as "the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on ownership of the land and is appurtenant. 23 Cal 4th at 1231. (emphasis added) The Court cited "California Water Service Co. v. Edw. Sidebotham and Sons, 224 Cal.App. 2d, 715-725. (1964) in support of its statement.

In Hutchins, Water Rights Laws In Nineteen Western States, it is stated:

"The right to use percolated water, as well as the corpus of the water itself, is real property." In Pasadena v. Alhambra, 33 Cal.2d 908, 925 (1949) the California Supreme Court stated that the overlying "right," or right of the owner of the land, "to take water from the ground underneath for use of his underlying land "is based on ownership of the land and is appurtenant thereto." (Huchins, Vol.II, 67). (emphasis added)

Allowing or sanctioning such severance is bad public policy. If the Board allows this precedent to occur, any owner of an Alternative Production Allocation under the Seaside Decree could similarly sever its appurtenant pumping right from its property and conceivably allow for its use offsite. Whatever the consequences, sanctioning such a severance, and compounding the lack of proper regulatory oversight by not conditioning the approval on reduction of the Cal-Am production allowance, should be avoided by this Board.²

² The Board should note that (including SNG), there are approximately 1400 acre-feet in Alternative Production Allocations under the Seaside Decree.

Darby Fuerst, General Mgr.

January 26, 2009

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III.

This Board Has the Authority to Condition a Permit to Cal-Am on A One-For-One Reduction in Cal-Am's Production Allowance

In the Staff Report, comment is made on Sierra Club's January 15, 2009 letter. Staff comments:

"Another question is whether the District has the authority to reduce the 11,285 AFY diversion limit set by the SWRCB."

Mr. Fuerst's testimony at the recent hearings relating to the State Board's proposed Cease and Desist Order makes it clear that the District has plenary authority to take into account one-for-one reductions in the Cal-Am diversions limit in setting its annual production limits, in a manner consistent with Order 95-10. Mr. Fuerst's testimony, dated June 5, 2008, in Phase I of the State Board hearings, states:

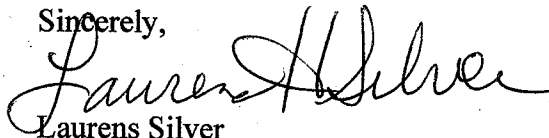
"With respect to water system management, the MPWMD controls formation of new water systems and additions of new sources of supply, connections, or service territory to existing systems. The MPWMD manages water demand by setting a maximum number of connections and quantity of annual production for each water distribution system..."(Paragraph 8)

IV.

Board Action Requested by Sierra Club

Sierra Club requests that the Board defer consideration of the Cal-Am-SNG applications for extension of its service area and for a water distribution permit to serve SNG's resort until such time as the Water Rights Divisions of the State Board rules on Sierra Club's request for an opinion. If, however, this Board decides to approve Cal-Am's applications, they should be conditioned on a reduction in Cal-Am's production allowance (for the Carmel River) on an acre foot per acre-foot basis. If the Board decides that Cal-Am's applications are consistent with Conditions 2 and 4 of Order 95-10 then it should condition the permit on the results of any exercise by a court of competent jurisdiction relating to compliance with Order 95-10 (at the request of a beneficially interested entity).

Sincerely,



Laurens Silver

California Environmental Law Project