

**EXHIBIT 12-C**

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates	Application 12-04-019 (Filed April 23, 2012)
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**OPENING BRIEF ON SELECTED LEGAL ISSUES OF  
SALINAS VALLEY WATER COALITION**

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of statutes and a comprehensive water rights system, Tehama County's ordinance was found not to have been preempted.

If the wells serving the Desal Facility are publically owned and operated, then in the event there are issues surrounding the manner in which the wells are operated, the level of groundwater pumped, the manner in which the groundwater is used and/or the need to construct new and/or additional wells in the future, there will be a clear process for notice, participation, over-sight and accountability to the public. The public will be assured of an opportunity to have their concerns expressed and considered. Without public ownership of the Desal Facility, and/or at a minimal, the wells, the public will be shut out of the entire decision-making process, and there would be no accountability of Cal-Am decisions or subsequent actions except to its shareholders.

The CPUC should find that the Monterey County Ordinance has not been preempted, and should allow its implementation to require public ownership of the Desal Facility and/or the slant wells to be utilized for the Desal Facility.

### **III. Does or Will Cal-Am, or another Entity Participating Possess Adequate Rights to the Slant Well intake Water?**

Cal-Am's application does not include any discussion or information as to whether Cal-Am has, or intends to secure, water rights for groundwater associated with the slant wells. It is because of the lack of discussion and information, in part, that the issue of water rights for the proposed project has been raised, and ALJ Weatherford has requested briefs in an effort to resolve these issues early in the process. Without having any information in the present record regarding the water rights, it is difficult to adequately address all of what may be the appropriate basis in law. The following comments are based on information that has been presented in other forums, presented to the some segment(s) of the public, and/or are assumptions that could be raised as to the need and adequacy of water rights for the

slant well component of the proposed project; that are based on the following are facts pertaining to this issue:

1. The CPUC has no authority over water rights and cannot grant or approve such rights.
2. Cal-Am proposes to use a series of slant wells to draw ocean water and potentially a small amount of groundwater.
3. Cal-Am has not identified any water rights associated with the slant wells' intake water.
4. Cal-Am proposes to operate the Desal Facility so that, on an annual average basis, the plant will return desalinated water to the Basin in an amount equal to the freshwater amount in the water extracted from the slant wells.
5. Although the Project Description assumes that the average annual amount of water to be returned to the Salinas Valley is eight percent, it is our understanding that the modeling used by Cal-Am to make this assumption also showed that over time, there will be an increasing proportion of freshwater in the water extracted from the slant wells.
6. Cal-Am's application admits that its groundwater modeling results indicate that, even at the outset, feedwater pumped from the slant wells would include a small amount of intruded groundwater from the Basin.
7. Monterey County Water Resources Agency Legislative Act, Sec. 21 states:

“.... For the purpose of preserving that balance, no groundwater from that basin may be exported for any use outside the basin, except that use of water from the basin on any part of Fort Ord shall not be deemed such an export. If any export of water from the basin is attempted, the Agency may obtain from the superior court, and the court shall grant, injunctive relief prohibiting that exportation of groundwater.” (Emphasis added.)

Based on these facts, Cal-Am does not hold valid water rights to take any portion of groundwater via the proposed slant wells and use that groundwater in any manner other than, perhaps, as an overlying landowner on the same site as the well(s). Use of the groundwater in any other manner would be an illegal appropriation of groundwater from the overdrafted Basin, and would result in an illegal taking of groundwater from overlying landowners.

California groundwater law was summarized by the California Supreme Court in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4<sup>th</sup> 1224, 1241-42:

Courts typically classify water rights in an underground basin as overlying, appropriative, or prescriptive. (*California Water Service Co., supra*, 224 Cal. App. 2d at p. 725.) fn. 10 An overlying right, "analogous to that of the riparian owner in a surface stream, is 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 the ownership of the land and is appurtenant thereto." (*California Water Service Co., supra*, 224 Cal. App. 2d at p. 725.) One with overlying rights has rights superior to that of other persons who lack legal priority, but is nonetheless restricted to a reasonable beneficial use. Thus, after first considering this priority, courts may limit it to present and prospective reasonable beneficial uses, consonant with article X, section 2 of the California Constitution. (*Jordan v. City of Santa Barbara* (1996) 46 Cal. App. 4th 1245, 1268.) . . . Any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed. . . . As between overlying owners, the rights, like those of riparians, are correlative; [i.e.,] each may use only his reasonable share when water is insufficient to meet the needs of all [ ]. As between appropriators, however, the one first in time is the first in right, and a prior

appropriator is entitled to all the water he needs, up to the amount he has taken in the past, before a subsequent appropriator may take any [ ].

As previously stated, to date, Cal-Am has not presented any documentation of a claim to valid water rights for this purpose. In order to claim valid water rights for the Desal Facility, it would need to initiate an appropriative right – which in itself, would most likely trigger a basin-wide water rights adjudication. Such an adjudication could take years and be very costly to Cal-Am, its rate-payers and the Salinas Valley water right holders, and have significant impacts. Given the overdrafted nature of the Basin, there is no surplus water available for appropriation.

The Coalition believes the lack of valid water rights for the proposed use is a fatal flaw of the project. The previously considered project, the Regional Water Supply Project (RWSP), included public partners that held certain water rights – that is what made that project feasible. The Marina Coast Water District (MCWD) was annexed into the Salinas Valley Groundwater Zones. As part of its annexation, conditions and limits were placed on the amount of water it could pump from the Basin and use within the Basin. However, in return for accepting these limitations, it was assured the right to pump a certain amount of groundwater for use within the Basin. The Coalition was informed that MCWD was willing to use a portion of its own limited water rights for the RWSP, and to provide assurances and guarantees that any groundwater component would not be exported out of the Basin, since export of water is contrary to MCWRA's legislative act. Without a similar partner and/or scenario pertaining to water rights for the proposed slant wells, the proposed project is fatally flawed.

Cal-Am recently made a public presentation to the MCWRA and was asked why it just didn't move the location of the proposed Desal Facility so it was outside the Basin and it wouldn't have to deal with the water rights issue in the

overdrafted Basin. Its response was the 'availability of land'. The Coalition was very surprised at this response, but if relocation of the Desal Facility and its wells truly is a matter of availability of land, then the Coalition suggests Cal-Am start looking outside of the Basin for other lands where it can acquire water rights to support its proposed Desal Facility. Without such a move, the proposed project is without water rights to support pumping from the slant wells.

Cal-Am has failed to identify valid appropriative water rights that can be utilized in the manner it proposes. Identification of such rights would need to include a discussion of future impacts when the project wells start pumping greater percentages of freshwater than the 3% assumed within the current project description. Even if Cal-Am could identify valid appropriative water rights to 3% of the pumped water, it would still need to show a valid basis for the greater amount of Basin water when the proportion of seawater being pumped and processed, suddenly decreased and the Basin's freshwater increased. How would the increased freshwater pumped at that point in time then be returned to the Basin, and what would be the impacts of the resulting reduction in water supply to the Monterey Peninsula?

Without providing adequate evidence of valid appropriative water rights to an increasing amount of Basin groundwater, Cal-Am's proposed project is fatally flawed and it should consider alternative projects and/or locations. Cal-Am has come into the Basin and the Salinas Valley residents, businesses and agricultural landowners are being asked to trust that it will not take actions contrary to its promises -- actions that could adversely impact the Salinas Valley. This is one of the reasons that the public participation is critical in decisions concerning the Desal Facility and its operation -- public participation that can only be assured by the sunshine laws governing public entities.

Cal-Am has said it needs to move forward with the test well as it will provide the data needed to determine what water rights are needed for the slant wells. The Coalition cannot accept Cal-Am's assurances on this. No pumping test will alter the overdrafted nature of the Basin in which new appropriative water rights are unavailable. Cal-Am needs to substantiate existing valid appropriative water rights upfront, prior to the test well; otherwise its money will have been wasted, and the Basin needlessly subjected to further degradation. The water rights demonstrated must be shown to meet Cal-Am's short-term needs and its potential long-term needs, and an explanation should be provided concerning how these rights will be utilized. Cal-Am should not be allowed to proceed forward unless and until such valid appropriative water rights are identified.

**IV. Does or Will Cal-Am, or another Entity Participating, Possess Adequate Rights to the Groundwater Replenishment Water?**

As part of their application, Cal-Am includes a component that relies on groundwater replenishment from the Monterey Regional Pollution Control Agency's (Pollution Control Agency) reclaimed water plant. However, their application does not include any discussion or information whether Cal-Am or another participating entity (the Pollution Control Agency) has or will secure rights to the wastewater associated with the groundwater replenishment component.

To date, neither Cal-Am nor the Pollution Control Agency has shown that it possesses "adequate" rights to the groundwater replenishment water. There are many different, and often over-lapping, water rights agreements that control the wastewater flows into, and out of the reclamation plant, that it makes it difficult to determine exactly which entity has what rights and under what conditions.

We do know that the Pollution Control Agency's tertiary treatment plant was built with monies it and the MCWRA borrowed. The growers of the Salinas Valley pay the entire debt for the capital cost and pay the annual operation and