

Decision PROPOSED DECISION OF ALJ BUSHEY (Mailed 12/21/2010)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California-American Water Company (U210W) for an Order Authorizing the Collection and Remittance of the Monterey Peninsula Water Management District User Fee.

Application 10-01-012
(Filed January 5, 2010)

DECISION DENYING APPROVAL OF SETTLEMENT AGREEMENT AND AUTHORIZING AMENDMENT TO APPLICATION

Summary

This decision finds that the settlement agreement fails to meet the Commission's standards for approving settlement agreements and denies approval of the settlement agreement. It also authorizes the applicant to amend the application consistent with this decision.

Background

In Decision (D.) 09-07-021, the Commission authorized California-American Water Company (Cal-Am) to increase water rates in its Monterey district by over 40% for the three-year rate case cycle. In that Decision, the Commission also considered the user fee that Cal-Am had been collecting on behalf of the Monterey Peninsula Water Management District (Management

District). The user fee was set at 8.325% of all meter and water charges billed by Cal-Am in the Monterey district.¹

The Commission began its analysis by noting that the substantial rate increase in Cal-Am's Monterey District imposed "significant financial burdens on residential and business customers" and required that all "proposed expenditures be demonstrably necessary for reliable service and provide value to customers." With this context of closely scrutinizing increased customer charges, the Commission expressed concern that "Cal-Am's customers may be paying user fees to the Management District for projects that may not be necessary or cost effectively performed by the Management District." The Commission noted that the "Management District has a variety of funding mechanisms at its disposal over which this Commission has no jurisdiction," specifically:

The Management District is authorized to issue bonds, assess charges for groundwater enhancement facilities, levy assessments on real property and improvements, and fix, revise, and collect rates and charges for the services, facilities, or water furnished by it. For general administrative costs and expenses, as well programs of general benefit, the Management District is authorized to levy a second property tax of up to \$0.10 per \$100 in assessed value.²

Turning its attention to the Management District's user fee, the Commission observed that the "Management District's choice of a percentage assessment, rather than a fixed amount, has the effect of substantially increasing the total amount collected by the Management District for the identified projects

¹ The Commission's discussion of the Management District's fee proposal is found at 116 through 123 of mimeo version of D.09-07-021. All quotations in this section are to those pages.

² D.09-07-021, *mimeo* at 117, quotations and citations omitted.

as Cal-Am's rates increase." The Commission noted that the user fee generated \$1,860,000 in revenue during fiscal year 2006. With approximately \$42 million in operating revenues adopted in D.09-07-021 for test year 2009, at the level of 8.325%, the fee would generate about \$3,500,000 for the Management District, an 88% increase from 2006.

The Commission next expressed concern with the incomplete explanation offered by the Management District for all components of the user fee. The Commission stated that of the current 8.325% fee, 7.125% is attributed to Carmel River mitigation measures, which was explained, but the Management District offered no explanation for the remaining 1.2% which is for the Aquifer Storage and Recovery project costs.

In light of these concerns with Management District's user fee, the Commission pointed to an alternative approach that Cal-Am and the Management District have previously used to ensure cost-effective coordination on a joint project for water conservation programs. This joint project approach, which included recovery of the Management District's costs from Cal-Am's customers by a surcharge placed on the customers' bills, was approved by the Commission in D.06-11-050.

The Commission concluded its discussion of the Management District's user fee by emphasizing that to the extent Cal-Am and its ratepayers are legally responsible for Carmel River Mitigation or Aquifer Storage Projects, the Commission expected Cal-Am to meet that "responsibility in an efficient and effective manner either by its own actions or as a joint project with the Management District." To achieve this objective, the Commission directed Cal-Am to (1) meet and confer with the Management District regarding "cost effective and efficient methods for Cal-Am to fully meet any responsibility it may

have for the Mitigation Program and the Aquifer Storage and Recovery project” and to particularly discuss the possibility of implementing them as joint projects, and to then (2) file an application setting forth any new method of collecting funds to support Management District program costs properly assignable to Cal-Am, whether performed by Cal-Am or the Management District.

The Commission also authorized Cal-Am to file an Advice Letter for a Memorandum Account to record costs that are Cal-Am’s responsibility on an interim basis.

Cal-Am filed Advice Letter No. 785-A that established the Monterey Peninsula Water Management District User Fee Memorandum Account. The Memorandum Account tracks costs for projects which Cal-Am has proper responsibility for and has funded, and that are performed by the Management District. The Memorandum Account was made effective July 20, 2009.

Description of the Application

On January 5, 2010, Cal-Am filed this application seeking Commission approval of “a program to fund projects currently performed by the District that are properly the Company’s responsibility” by authorizing Cal-Am to “collect funds required by the [District] to carry out projects on behalf of the Company and which the Company would otherwise have to carry out.”³ The application specified that stated Cal-Am would “collect from the Company’s Monterey District customers and remit to the Monterey Peninsula Water Management District the Monterey Peninsula Water Management District User Fee at the rate set by the Monterey Peninsula Water Management District’s Board of

³ Application at 2 - 3.

Directors.”⁴ The application also sought Commission authorization to collect from its Monterey District customers all amounts recorded in its Monterey Peninsula Water Management District Memorandum Account, which it estimates will total over \$5 million if the application is pending for 18 months. In support of its application, Cal-Am provided testimony from its Director of Rates and Regulation and its Vice President of Engineering.

In the application, Cal-Am contended that the proposed “percent of revenue” basis for calculating the user fee will not impose “a significant financial burden” on its customers because the Management District adopts its budget in a “transparent public process” and that the California Constitution prohibits the Management District from collecting more than it spends on a project.⁵ Cal-Am also argued that the Commission should abstain from reviewing the Management District’s user fee, as it does with other local government fees and taxes, or should only review it to ensure “that utility customers are not paying for duplicative work” or activities that “run counter to the Commission’s comprehensive scheme for regulating utilities.”⁶

In its application, Cal-Am stated that the State Water Resources Control Board has imposed a “contingent obligation” on Cal-Am to implement the Management District’s Carmel River Mitigation Program, should the Management District ever cease doing so.⁷ Cal-Am stated that in its 1995 decision, the Board expressed “accolades” for the Management District’s

⁴ Application at 19.

⁵ Application at 6.

⁶ Application at 12.

⁷ Application at 10.

Fisheries Mitigation Program, and the Riparian Vegetation and Associated Wildlife Mitigation Program.

The Management District also supplied supporting testimony for Cal-Am's application. The testimony of the Management District's General Manager explained the legislative creation of the Management District and its various powers.

The General Manager's testimony also described the 1990 process that produced the Carmel River Mitigation Program. The testimony included the 2007-2008 Annual Report for the Mitigation Program, dated September 2009. This report included the only cost data presented for the Mitigation Program. In the Executive Summary section, the report states that:

"a trend analysis shows that the overall costs remained fairly constant (about \$1.3 - \$1.7 million) for many years, except for FY 2000, when an additional \$981,786 was added to the capital expense program to fund one half of the acquisition cost of the District's new office building, bringing the expenditure total over \$2.6 million for that year. More recently, expenditures continue to trend upward: FY 2005-06 expenditures were \$3.17 million; and FY 2006-07 were \$3.29 million. . . . The Mitigation Program Fund Balance as of June 30, 2008, was \$999,898."⁸

Section XIII of the annual report is entitled "Summary of Costs for the Mitigation Program - July 2007 through June 2008" and consists of one page of text followed by one table showing the "cost breakdown." The table states that: "This report does not include the Rebate Program, salaries for the Conservation

⁸ Darby testimony at Exhibit 3, at I - 14.

Office Staff or the project expenditures for 'Ordinance Enforcement' even though they were booked as part of the Mitigation Program."

The table shows seven cost components, broken down into "personnel costs," "operating expenses," "project expenses" and "fixed asset acquisitions." The total expenditure amount shown is \$3,671,996, with personnel comprising the largest amount, \$1,660,034. The second largest amount shown is just under \$1 million for unspecified "project expenses" for "water supply." Setting aside that \$1 million expenditure, the most expensive cost component is "administrative" at \$689,235. Chapter VI discusses the specific program elements for "water supply" and adopts two specific goals: (1) determine and participate in long-term water supply solutions, which focuses on participation in the various forums for the Coastal Water Project and Community Outreach; and (2) the Aquifer Storage and Reclamation Project, specifically to complete Phase I and continue work on the next Phase.

The testimony of the Management District's Chief Financial Officer explains the history and derivation of the user fee. The Chief Financial Officer stated that the Management District and Cal-Am agreed that the "device of a water user fee was the most equitable" means to fund the District's Mitigation Program, and Cal-Am required that any such revenue collection means "would not put the utility at risk."⁹ The testimony states that the Management District Board set the current user fee amount of 7.125% for the Mitigation Program in a 1992 Ordinance, and that the Board set the Aquifer Storage Project user fee at an additional 1.2% in 2005 based on the Board's determination that the Aquifer

⁹ Dickhaut Testimony at 3.

Storage Project would be "funded on a pay-as-you go basis rather than via debt financing."

Although not included in the testimony, the Management District's Ordinance No. 67, adopted December 8, 1992, with a purpose to "increase user fee revenue available for the Five Year Mitigation Program" retains the total 7.125% fee but also includes within that amount 1.11% that was reallocated from conservation programs. The ordinance states that the total 7.125% user fee "shall not be exclusively dedicated to a single activity or program, but instead may be allocated at the discretion of the Board provided that all such expenses shall confer benefit and/or service to existing water users."¹⁰

Similarly, the Management District's Ordinance No. 123, adopted September 13, 2005, sets an additional user fee component of 1.2% to fund Aquifer Storage and Recovery Project and related water supply expenses. That ordinance, like the Mitigation Program ordinance, retains the Board's discretion to "allocate" the proceeds from this user fee to any endeavor that "confers benefit and/or service" to Cal-Am customers.¹¹

Cal-Am provided testimony from its engineer and the Management District's engineer showing that the Aquifer Storage and Recovery Project is a joint project between the two entities to store excess winter Carmel River water in the Santa Margarita aquifer for use during the summer. Generally, Cal-Am is providing improvements to its water main distribution system to enable the conveyance of water through its system to wells owned by the Management

¹⁰ Management District Ordinance 67, Section 3.C. (December 8, 1992.)

¹¹ Management District Ordinance 123, Section 2.

District for injection into the aquifer and then for the extraction and conveyance of the water back into Cal-Am's system.¹²

The Management District submitted testimony showing that it owns certain water rights that are essential to the Aquifer Storage and Recovery Project and that it has constructed two wells and related facilities that comprise Phase I of the Aquifer Storage and Recovery Project.¹³ The testimony also explained that the entire project is operated and managed pursuant to an agreement between Cal-Am and the Management District dated March 28, 2006. The testimony included cost data showing that Phase I testing and construction costs were \$4,176,931, exclusive of staff time and permitting costs, with \$1,620,300 in costs remaining, and that the projected costs for Phase II are \$5,042,400.¹⁴ The projected firm yield of Phase I is 920 acre-feet/year, with Phase II estimated to yield an additional 1,000 acre-feet/year.¹⁵

With approximately \$42 million in operating revenues adopted in D.09-07-021 for test year 2009, at the requested level of 1.2%, the Aquifer Storage and Recovery Project component of the user fee would generate about \$504,000 per year for the Management District.

Description of the Settlement Agreement

On May 18, 2010, Cal-Am, the Management District and the Division of Ratepayer Advocates filed their joint motion to approve settlement agreement. The settlement agreement stated that the parties agreed that:

¹² Testimony of Schubert at 4 - 8.

¹³ Testimony of Oliver at 4 - 11.

¹⁴ *Id.* at Oliver Exhibits 6, 7, and 11.

¹⁵ *Id.* at 7 and 13.

1. The Management District's Carmel River Mitigation Program is non-duplicative, and reasonable and prudent.
2. The Management District's Aquifer Storage and Recovery Program is non-duplicative, and reasonable and prudent.
3. The Commission should authorize Cal-Am to collect and remit the user fee to the Management District at the rate set by the Management District.

The settlement agreement also stated that the interest rate to be assessed on the Memorandum Account balance should be 5%. The parties also agreed that the Commission should receive into evidence all testimony that has been served in this matter.

Discussion

Standard of Review – Settlement Agreement

In this application, Cal-Am bears the burden of proof to show its requests are just and reasonable and the related ratemaking mechanisms are fair. In order for the Commission to approve any proposed settlement, the Commission must be convinced that the parties have a sound and thorough understanding of the application, the underlying assumptions, and the data included in the record. This level of understanding of the application and development of an adequate record is necessary to meet our requirements for considering any settlement.¹⁶ These requirements are set forth in Rule 12.1 of the Commission's Rules of Practice and Procedure, which states, in pertinent part:

¹⁶ In the Matter of the Application of Park Water Company for Authority to Increase Rates Charged for Water Service by \$1,479,580 or 5.99% in 2010, \$503,371 or 1.91% in 2011, and \$643,923 or 2.40% in 2012, D.09-12-001, mimeo at 19 -20.

The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

For the reasons stated below, we are unable to find that the provisions of the settlement agreement are consistent with Rule 12.1.

Reasonable in Light of the Record as a Whole

The record consists of Cal-Am's application with supporting testimony.

In its application, Cal-Am seeks Commission authorization for "the device of a user fee" that will be "collected at rates set by the District's Board of Directors" for the Management District to fund any endeavor that the Management District determines will confer "benefit and/or service" to Cal-Am's customers. Cal-Am justifies this request as "an appropriate means to fund projects, (i.e., the Aquifer Storage and Recovery Program and Mitigation Program) currently performed by the District but properly or ultimately the responsibility of the Company."¹⁷

As described above, however, Cal-Am's user fee proposal is not based on the costs of these two programs and includes no ratemaking or programmatic limitations. Consequently, the record in this proceeding is not sufficient for settling parties to meet their burden of justifying the Commission's ratemaking approval of the settlement agreement.

Specifically, the record shows that the Management District's presentation on the Aquifer Storage and Recovery Project includes this Project in both the Mitigation Program for which it seeks an assessment of 7.125%, and as a separate component for another 1.2%. The Management District's Chief Financial Officer

¹⁷ Application at 5.

stated that the Management District Board has decided to fund this project on a "pay-as-you-go" basis rather than incurring debt. While the Management District's decision has the advantage of avoiding debt costs, such a decision results in current customers paying the full costs of a project that is expected to provide service for many years. This is not consistent with the Commission's ratemaking standards.

Turning to the Carmel River Mitigation Program, Cal-Am's presentation does little to respond to the issues identified by the Commission in D.09-07-021. Cal-Am continues to seek a percentage assessment but offers no cost-justification for the proposed 88% increase in annual collections since 2006. The Management District's own report shows that annual costs were stable at \$1.3 to \$1.7 million for "many years" but in recent years have more than doubled that, without explanation. The exception to the stable cost levels was in 2000 when the Management District used nearly a million dollars of Mitigation Program revenues to fund half its new office building.

Cal-Am's application raises several issues, most notably several instances where duplication in effort and accounting may occur. In addition to the apparent double-counting of the Aquifer Storage and Recovery Project as both a part of the user fee Mitigation Program costs and also to substantiate a stand-alone additional component of the user fee, "water supply augmentation" is a major cost component of the Management District's Mitigation Program which largely focuses on the Coastal Water Project. Cal-Am, however, is actively involved in the Coastal Water Project, such that the Management District need not act on Cal-Am's behalf. The Management District's Mitigation Program report also indicates that it does not include the "rebate program, salaries for the Conservation Office Staff or project expenditures for 'ordinance enforcement'"

even though such costs are "booked as part of the Mitigation Program." The Commission, however, has approved and separately funded a joint conservation program with the Management District which would appear to include at least some conservation costs. Finally, Cal-Am asserts that National Oceanic and Atmospheric Administration (NOAA) steelhead mitigation activities¹⁸ focus on impacts to steelhead, and that these activities have no "overlap" with the Management District's activities which also focus on the steelhead fishery but the record shows no analytical explanation for how endangered species costs for steelhead are divided between the two agencies or any evidence that Cal-Am is in any way managing these costs for ratepayers. With the total costs for the two programs approaching \$5 million a year, Cal-Am must demonstrate necessity and cost-effectiveness of both components before the Commission can approve a joint program of the kind we requested Cal-Am to propose to use in D.09-07-021. Our goals are to ensure cost control by these two agencies.

To find a settlement agreement reasonable in light of the record, the Commission must conclude that the parties used their collective experience to produce appropriate, well-founded recommendations. As set forth above, the record contains insufficient cost justification, several instances of apparent double-counting, and ratemaking treatment at odds with our standards. Accordingly, we are unable to conclude that the settlement agreement is reasonable in light of the record.

¹⁸ In Resolution W-4836, Cal-Am obtained Commission authorization to recover from customers \$3.5 million paid to the NOAA for "Endangered Species Act mitigation activities on the Carmel River."

Consistent With Law and Prior Commission Decisions

The parties assert that the Mitigation Program component of the User Fee is consistent with applicable law because "the Mitigation Program . . . is required by the California Environmental Quality Act."¹⁹ The parties offered no justification for the other components of the proposed user fee.

The Commission is charged with the responsibility of ensuring settlement agreements are consistent with other applicable law and prior Commission decisions. The Public Utilities Code requires that all rates received by a public utility be just and reasonable: "no public utility shall change any rate . . . except upon a showing before the Commission, and a finding by the Commission that the new rate is justified."²⁰

In D.09-07-021, the Commission indicated its willingness to include in the Monterey District revenue requirement all costs of the Carmel River Mitigation Program and Aquifer Storage and Recovery Project that are properly Cal-Am's responsibility. The Commission required, however, that such costs must be shown to be necessary and cost-effectively performed by the Management District. As presented in the application and carried forward in the settlement agreement, Cal-Am's justification for assessing these costs to its ratepayers does not demonstrate that the Management District's user fee meets the Commission's standards.

As set forth above, the Commission explained its concerns regarding the Management District's proposed "percent of revenue" basis for its user fee. Nevertheless, Cal-Am has presented an application which persists with such a

¹⁹ Joint Motion to Approve Settlement Agreement at 6.

²⁰ Pub. Util. Code §§ 451 and 454.

proposal and offers no compelling justification. Cal-Am's contention that the Management District's "transparent" budgetary process somehow obviates the Commission's concerns with a non-cost-based user fee is not persuasive.

Therefore, we conclude that the settling parties have failed to demonstrate that the settlement agreement is consistent with D.09-07-021.

The Public Interest

For the reasons set forth above, we find that the user fee proposal as described in the application and settlement agreement is not in the public interest. The settling parties' motion for approval of the settlement agreement should, therefore, be denied.

Cal-Am's Responsibilities under Order No. WR 95

The State Water Resources Control Board imposed the responsibility on Cal-Am to implement all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the Management District.²¹ The 1990 Environmental Impact Report (EIR) document referenced in the Board's decision is attached to the Management District's General Manager's testimony in this proceeding, and was adopted by the Management District's Board in November 1990. The adopted mitigation measures are summarized at Exhibit 1 to that EIR and the following page, Exhibit 2 Table, contains cost estimates for each measure. The Mitigation Program summary in Exhibit 1 is substantially similar to the list set forth in the Board's Decision 95-10 in Section 6.2 "Water Allocation Mitigation Program," so

²¹ State Water Resources Control Board Decision 95-10 at Ordering Paragraph 11.

we conclude that this is the Mitigation Program which the State Water Resources Control Board has made a contingent obligation of Cal-Am.

The three headings for the mitigation measures are: fisheries, riparian vegetation and wildlife, and lagoon vegetation and wildlife. Exhibit 2 Table contains cost estimates for each measure, broken down into capital, \$442,700, and annual expenses, \$323,100.²²

The EIR Exhibit 2 Table provides an ideal beginning point to prepare a budget for the Mitigation Program that is Cal-Am's responsibility, and is attached to today's decision for ease of reference. One way for Cal-Am to justify the amount of funding required to perform these three mitigation program elements is for Cal-Am to obtain up-to-date cost and budget data from the Management District specific to these three mitigation measures which are Cal-Am's contingent responsibility. Those data can then be used to update the Exhibit 2 Table as the basis for justifying a forward-looking rate mechanism to fund the three mitigation measures, should the Management District cease to implement these mitigation measures.

In D.09-07-021, the Commission emphasized that to the extent Cal-Am and its ratepayers are legally responsible for Carmel River Mitigation, the Commission expected Cal-Am to meet that "responsibility in an efficient and effective manner either by its own actions or as a joint project with the Management District." If the Management District ceases to perform these mitigation measures, then Cal-Am must prepare and implement a plan to meet this responsibility.

²² The table also includes \$6,000 for "aesthetics" which is not referenced in Order 95-10 as a Cal-Am obligation.

Next Steps

The findings and conclusions in today's decision address many of the substantive issues raised by Cal-Am's application.

As discussed above, Cal-Am's application sought Commission approval of "a program to fund projects currently performed by the District that are properly the Company's responsibility" by authorizing Cal-Am to "collect funds required by the [District] to carry out projects on behalf of the Company and which the Company would otherwise have to carry out."²³ As also set forth above, the parties to the settlement agreement represented that the application met the Commission's ratemaking standards by being "non-duplicative, and reasonable and prudent." For reasons set forth in D.09-07-021 and reiterated above, we decline to approve the ratemaking proposal in the application as filed. Similarly, we repeat our support for the joint project approach to funding the Carmel River Mitigation program and the Aquifer Storage and Recovery Project.

Therefore, to ensure that Cal-Am fully discharges its responsibilities for the Carmel River Mitigation Program, we will authorize Cal-Am to amend its application within 60 days of the effective date of today's decision by filing and serving one of the following;

1. a joint program proposal for the District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the District's portion of the Aquifer Storage and Recovery Project, or
2. implementation plan for Cal-Am to assume direct responsibility for the Carmel River Mitigation measures, should the District cease to implement these measures.

²³ Application at 2 - 3.

As noted above, Cal-Am has been recording payments to the District in a memorandum account, and the District has been performing all Carmel River mitigation measures since July 2009. Under the unique circumstances and history of the District's user fee and mitigation program, including particularly that the funds have been remitted to a government agency, we find that it is reasonable to allow Cal-Am to recover the amount recorded in the memorandum account. We will also require that the account be closed in 60 days to bring the unique circumstances to an end.

The Monterey Peninsula Water Management District User Fee Memorandum shall close 60 days after the effective date of this order. Cal-Am is authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Cal-Am, DRA, and the District filed comments in opposition to the proposed decision on January 10, 2011.

In its comments on the proposed decision, Cal-Am disavowed all responsibility for the District's Carmel River mitigation and Aquifer Storage programs and contended that these were "local government programs funded by a utility users' tax."²⁴ Specifically, Cal-Am stated that the proposed decision is

²⁴ Cal-Am Comments at 12.

premised on a "factual error" in accepting that the District's mitigation and aquifer storage programs are Cal-Am obligations with no evidence to support that conclusion.²⁵ Instead, Cal-Am explained that as a result of the meet and confer process ordered in D.09-07-021, the parties reached "agreement between the Company and [the District] (and ultimately DRA) that neither the Mitigation Program nor [the District's] [aquifer storage project] activities were California American Water's responsibility."²⁶

The District, however, took the opposite position and, citing to Cal-Am's application, explained that "[b]y its Application, [Cal-Am] seeks authorization to collect funds required by the Water Management District to carry out projects on behalf of [Cal-Am], and which [Cal-Am] is mandated to carry out."²⁷

DRA agreed with Cal-Am.²⁸

The parties showed a similar divergence of opinion on the exact nature of the fee. Cal-Am declared that the District's user fee "is a utility user tax" within the meaning of D.89-05-063 and that the Commission has no jurisdiction to determine the validity of such taxes.²⁹

²⁵ Id.

²⁶ Id. at 11, *but see*, Application at 5, "In this application, California American Water - with the support of MPWMD - describes the user fee as the appropriate means to fund projects (i.e., the Aquifer Storage and Recovery Program and Mitigation Program) currently performed by the District but properly or ultimately the responsibility of the Company."

²⁷ District Comments at 7.

²⁸ DRA Comments at 2.

²⁹ Cal-Am Comments at 12 -13.

DRA and the District were more circumspect and contended that the "Commission has limited authority to question a local government agency's collection of a fee or tax," without specifying the precise legal nature of the District's user fee.³⁰ The District carefully stated that (1) it was "a government agency," (2) it has the authority to "impose taxes, fees, and other assessments," and (3) "the Commission lacks authority to contest the District's lawful exercise of its authority."³¹ In contrast to Cal-Am, the District did not argue specifically that the user fee was a utility user tax or that the District was authorized by the Legislature to levy such a tax.

All parties agreed that the proposed decision was premature in dismissing the application without further proceedings after rejecting the settlement. As set forth above, the proposed decision has been modified to authorize Cal-Am to amend its application.

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. Cal-Am must implement all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the Management District.

³⁰ District Comments at 5; DRA Comments at 2.

³¹ District Comments at 6.

2. The Mitigation Program for the District's Water Allocation Program Environmental Impact Report is comprised of mitigation measures for fisheries, riparian vegetation and wildlife, and lagoon vegetation and wildlife.

3. The Management District's 2007-2008 Annual Report for the Mitigation Program shows that the Management District allocated nearly \$1 million of costs of its new office building to the Mitigation Program.

4. The Management District's 2007-2008 Annual Report for the Mitigation Program shows the Aquifer Storage and Recovery Project as a component of the user fee Mitigation Program costs and also as a stand-alone additional user fee.

5. Cal-Am is actively pursuing water supply augmentation through its Coastal Water Project and the Management District need not act on Cal-Am's behalf.

6. The rebate program, salaries for the Conservation Office Staff and project expenditures for ordinance enforcement are booked as part of the Mitigation Program, even though such costs are not included in the Management District's 2007-2008 Annual Report for the Mitigation Program. The Management District did not explain whether these booked costs are included in the user fee even though the Commission has approved and separately funded a joint conservation program with the Management District which may include some of the same costs.

7. The testimony supporting the application shows accounting treatment inconsistent with Commission ratemaking standards.

8. The user fee and Carmel River mitigation program have a unique history, including particularly that the funds have been remitted to a government agency, that render reasonable Cal-Am's request to recover the amounts recorded in the account.

Conclusions of Law

1. The testimony supporting the application should be received into evidence.
2. The settlement agreement is not reasonable in light of the record, consistent with the law, or in the public interest.
3. The settlement agreement should not be approved.
4. California American Water Company should be authorized to amend this application within 60 days of the effective date of today's decision by filing and serving one of the following;
 - A. Joint program proposal for the District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the District's portion of the Aquifer Storage and Recovery Project, or
 - B. Implementation plan for Cal-Am to assume direct responsibility for the Carmel River Mitigation measures, should the District cease to fund the measures.

The Monterey Peninsula Water Management District User Fee Memorandum should close 60 days after the effective date of this order. Cal-Am should be authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

5. Pub. Util. Code § 451 requires all charges or rules pertaining to charges demanded or received by a public utility to be just and reasonable.

O R D E R

IT IS ORDERED that:

1. The motion to approve the settlement agreement among California-American Water Company, the Monterey Peninsula Water Management District and the Division of Ratepayer Advocates is denied.

2. California American Water Company is authorized to amend Application 10-01-012 within 60 days of the effective date of this order by filing and serving one of the following:

- A. Joint program proposal for the Monterey Peninsula Water Management District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the Monterey Peninsula Water Management District's portion of the Aquifer Storage and Recovery Project, or
- B. Implementation plan for California-American Water Company to assume direct responsibility for the Carmel River Mitigation measures, should the Monterey Peninsula Water Management District cease to fund the measures.

Absent such an amendment, the Executive Director is authorized to dismiss this application without prejudice to refile.

3. The Monterey Peninsula Water Management District User Fee Memorandum Account shall close 60 days after the effective date of this order. California-American Water Company is authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

4. The testimony submitted in support of the application is received into evidence.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT

Exhibit 2

**COST ESTIMATES FOR FINAL MITIGATION PROGRAM FOR OPTION V
November 1990**

(Values shown are fully funded by MPWMD for five years.)

<u>MITIGATION PROGRAM</u>	<u>CAPITAL COST</u>			<u>ANNUAL COST</u>		
	<u>Existing</u>	<u>New</u>	<u>Total</u>	<u>Existing</u>	<u>New</u>	<u>Total</u>
Fisheries	\$ 9,000	407,700	416,700	\$ 12,800	200,100	212,900 ⁽¹⁾
Riparian Vegetation and Wildlife	\$ 0	10,000	10,000	\$295,000	121,000	416,000
Lagoon Vegetation and Wildlife	\$ 26,000	25,000	51,000	\$ 1,200	2,000	3,200
Aesthetics	\$ 0	0	0	\$ 6,000	0	6,000
GRAND TOTAL	\$ 35,000	\$442,700	\$477,700	\$315,000	\$323,100	\$638,100
ESTIMATED TOTAL COST OF BOARD APPROVED NEW PROGRAMS		\$442,700				\$323,100
ANNUAL FUNDS NEEDED TO CONTINUE EXISTING ENVIRONMENTAL PROGRAMS		N/A				\$315,000
TOTAL MITIGATION PROGRAM COST		\$442,700				\$638,100

NOTE 1: Annual cost estimates for fishery resources are averages; the annual costs could be as high as \$382,000 in individual critically dry years and as low as \$78,700 in wet years.

u/henri/wp/allocir.mitprog2