

State of California

Before the State Water Resources Control Board

In the Matter of Administrative Hearings Before the Board - Unauthorized Use and Theft of the People Water and Damage to the People's Property by the California American Water Company - Carmel River - Monterey County, California

Policy Statement by Bob Baiocchi of the California Salmon and Steelhead Association

Bob Baiocchi of the California Salmon and Steelhead Association was denied the opportunity and his due process rights to testify at the hearings before the State Water Resources Control Board in June and July 2008. Bob Baiocchi is the executive director of the California Salmon and Steelhead Association and a qualified expertise witness in water right matters. I reference the pre-hearing records in that matter and the denial of the Art Baggett and Gary Wolff, the hearing officers, against Bob Baiocchi testifying as a witness to a crime against the people of the State of California.

Because of the denial of the hearing officers to allow Bob Baiocchi to testify by telephone because of his disability and health, the following is the policy statement of the California Salmon and Steelhead Association.

The Hearing Staff of the Board has divided the hearing into two phases. The hearings concern the illegally diversions of the people's water by the California American Water Company, and the related adverse harm and damage to the public trust steelhead fishery and their habitat of the Carmel River resulting from the unauthorized diversions and use of the people's waters of the Carmel River by the California American Water Company.

I have witnessed a crime by the California American Water Company against the people of the State of California. The property of the people has been and continues to be stolen by the California American Water Company and the property of the people has been and continues to be damaged by the California American Water Company.

By no means is the California American Water Company "Robin Hood". California American Water Company does not steal water from the rich and give the water to the poor. The California American Water Company steals the water from the people of California and then sells water unlawfully diverted from the Carmel River for profit to its customers regardless of the effects to the public trust steelhead fishery assets of the Carmel River.

According to the records, the California American Water Company (Cal-Am) is responsible for approximately 85% of the total water diversions from the Carmel River system and its associated subterranean flow (Monterey Peninsula Water Management District Water Production Summaries: July 1, 1998 to June 30, 2000). The remaining diversions are due to a diverse group of water users including 14 non Cal-Am entities that are responsible for an additional 12 to 13% of the total water withdrawn from the Carmel River. Of the approximately 14,000 acre-feet (AF) of water annually diverted from the Carmel River by Cal-Am in recent years, 3,376 AF are appropriated through legal pre-1914, riparian and appropriate rights; the remainder is diverted without a basis of water right (SWRCB Order 95-10) - July 6, 1995). The above information is not current and must be updated by the California American Water Company and checked by the Board and its staff.

According to the Hearing Ruling of May 13, 2008 by the Hearing Officers, the California American Water Company has the legal rights of 3,376 acre-feet of water per annum. Also according to the Ruling, the California American Water Company has diverted up to 11,285 acre-feet per annum of the people's water. Consequently the California American Water Company has unlawfully diverted up to about 7, 809 acre-feet of water per annum.

However, according to the Synopsis in Board Order 95-10, the California American Water Company does not have the legal right to divert 10,730 acre-feet of water annually.

My purpose of showing the above unlawfully amounts of diversions is to give a meaning to the value of the people's water that is being unlawfully diverted by the California American Water Company as follows:

The value of 10,730 acre-feet of the people's water @ \$1,000 per acre-foot is \$10,730, 000 annually. Also 10,730 acre-feet of water equal about 3 billion plus gallons of water (325,851 gallons equal one acre-foot of water) annually. In order for the Hearing Team to estimate the value of the unlawful water being diverted and sold by the California American Water Company to its customers it needs to examine the specific rates the customers are charged for the people's water sold by the California American Water Company. The next step is for the Hearing Team to examine the value of the water that has been unlawfully diverted from the very beginning of the unlawfully diversions by the California American Water Company.

We need to know the Board's legal authority and the discretion to allow the California American Water Company to divert the people's water unlawfully in contravention of the California Constitution (Article X, Section 2) and the provisions of the California Water Code. We believe the Hearing Team and the Board must make that conclusion in its final decision in this matter.

We also need to know the legal authority and discretion of the Board to give away ten of millions of dollars of the people's water annually to the California American Water Company without a valid water right.

The SWRCB Order of July 6, 1995 ordered Cal-Am as follows:

1.. "Cal-Am shall forthwith cease and desist from diverting any water in excess of 14,106 acre-feet annually from the Carmel River, until unlawful diversions from the Carmel River ended." (Emphasis Added)

Comment: Only 3,376 acre-feet of water annually is legally diverted from the Carmel River by Cal-Am, with Cal-Am diverting about 10,730 acre-feet of water annually without a valid basis of right. (Summary and Conclusions at page 38 at no. 2 on page 39 of Board Order 95-10).

However the SWRCB and its staff allowed for the unlawful diversion of 10,730 acre-feet of water annually from the Carmel River. Consequently, CA-Am was given an unlawful waiver by the SWRCB in Board Order 95-10 to continue to unlawfully divert the people's water for profit at the expense of the public trust steelhead fishery of the Carmel River.

2.. "Cal-Am shall diligently implement one or more of the following actions to terminate its unlawful diversions from the Carmel River: (1) obtain appropriate permits for water being unlawfully diverted from the Carmel River, (2) obtain water from other sources of supply and make one-for-one reductions in unlawful diversions from the Carmel River, provided that water pumped from the Seaside aquifer shall be governed by Condition 4 of this Order not this condition, and/or (3) contract with another agency having appropriate rights to divert and use water from the Carmel River. " (Emphasis Added)

Comment: Cal-Am has not obtained appropriate water right permits for water unlawfully being diverted from the Carmel River. Secondly; the Change Petition for the ARS Project is in the name of the Monterey Peninsula Water Management District and not Cal-Am.

3.. "(a) Cal-Am shall develop and implement an urban water conservation plan. In addition, Cal-Am shall develop and implement a water conservation based upon best irrigation practices for all parcels with turf and crops of more than one-half acre receiving Carmel River water deliveries from Cal-Am. Documentation that best irrigation practices and urban water conservation have already been implemented may be substituted for plans where applicable." (Emphasis Added)

Comment: The Board and its staff must acquire evidence that Cal-Am did develop and implement an urban conservation plan and also did develop and implement an irrigation conservation plan, which includes golf courses and crops elements. The Board is the enforcement agency that is required to enforce the provisions of Board Order 95-10. The California American Water Company has a duty and obligation to comply with all of the provisions of Board Order 95-10.

"(b) Urban and irrigation conservation measures shall remain in effect until Cal-Am ceases unlawful diversions from the Carmel River. Conservation measures required by this Order in combination with conservation measures required by the District shall have the goal of achieving 15% conservation in 1996 water year and 20% conservation in each subsequent year (each water year from October 1 to September 30 of the following year). To the extent that this requirement conflicts with prior commitments (allocations) by the District, the Chief, Division of Water Rights shall have the authority to modify the conservation requirement. The base for measuring conservation measures (14,106 afa represents Cal-Am's total diversions from the Carmel River) required by this order shall not supercede any more stringent water conservation requirements imposed by other agencies." (Emphasis Added)

Comment: Said urban and irrigation conservation plans must still be in effect because unlawful diversions by Cal-Am continue. The Board and its staff must acquire evidence that Cal-Am did develop and implement an urban conservation plan and also a irrigation conservation plan, which includes golf course and crops elements.

4.. "Cal-Am shall maximize production from the Seaside aquifer for the purpose of serving existing connections, honoring existing commitments (allocations), and to reduce diversions from the Carmel River to the greatest practicable extent. The long-term yield of the basin shall be maintained by using the practical rate of withdrawal method. " (Emphasis Added)

Comment: The SWRCB has no authority over groundwater and has approved the increased diversions from the Carmel River into the groundwater aquifer when the Board approved the ASR Project neglecting to provide year round protection measures for the public trust steelhead fishery of the Carmel River. The question is how will the Board control groundwater uses in the Seaside aquifer without any legal authority to do so?

5. "Cal-Am shall satisfy the water demands of its customers by extracting water from its most downstream wells to the maximum practicable extent, without degrading water quality or significantly affecting the operation of the wells. " (Emphasis Added)

Comment: This provision does not require daily flow requirement for the protection of Carmel River Steelhead and their habitat (all life stages) below the most downstream wells as required by this provision to protect water quality. In addition, the Order does not contain any water quality provisions that protect water quality at all times in the Carmel River below the downstream wells.

5.. "Cal-Am shall conduct a reconnaissance level study of the feasibility, benefits, and costs of supplying water to the Carmel Valley Village Filter Plant from its more nearby wells downstream of the plant. The objectives of supplying water from the wells is to maintain surface flow in the stream as far downstream as possible by releasing water from San Clemente Dam for maintenance of fish habitat. The results of the study and recommendations shall be provided to the District and DFG for comments. " (Emphasis Added)

Comment: Mandatory daily surface flows for steelhead and their habitat was not required during the study period. Also, because Carmel River Steelhead species were listed as threatened under the federal ESA, the NMFS (aka NOAA Fisheries)

must be a party to this provision following the listing of Carmel River Steelhead species. Discovery work must be conducted by the Board and its staff to acquire evidence concerning consultation between Cal-Am and the NMFS and also the study as proposed.

6.. "Cal-Am shall evaluate the feasibility of bypassing early storm runoff at Los Padres and San Clemente Dams to recharge the subterranean stream below San Clemente Dam in order to restore surface flows in the river at an earlier date. The results of the study and recommendations shall be provided to the District and DFG for comment. " (Emphasis Added)

Comment: Mandatory daily surface flows requirements for steelhead and their habitat from Los Padres and San Clemente Dams to the Carmel River Lagoon not required in Board Order 95-10 during the evaluation period. Also, because Carmel River Steelhead species were listed as threatened under the federal ESA, the NMFS (aka NOAA Fisheries) must be a party to this provision. Also, only the MPWMD and DFG are given the opportunity and right to comment, when said feasibility study should be available to all parties that were involved in Board Order 95-10 and the public. The Carmel River Steelhead Association was a party to Board Order 95-10.

7.. "Cal-Am shall conduct a study of the feasibility, benefits, and costs of modifying critical stream reaches to facilitate the passage of fish. The study shall be designed and carried out in consultation with DFG and the District. The results of the study and recommendations shall be provided to the district and DFG for comment. "

Comment: The Board and its staff must determine whether Cal-Am did conduct said fishery passage study. Because Carmel River steelhead species were listed as threatened under the federal ESA, the NMFS (aka NOAA Fisheries) must be a party to this provision. Also, only the MPWMD and DFG are given the opportunity and right to comment, when said feasibility fish passage study should be available all parties that were involved in Board Order 95-10 and the public. The Carmel River Steelhead Association was a party to Board Order 95-10.

8.. "The studies required by conditions 6, 7, and 8 shall be carried out by persons with appropriate professional qualifications. The studies required by condition 7 shall be completed and submitted to the Chief, Division of Water Rights within 5 months from the date of this order. The Chief, Division of Waters may extend the time for performing the study required by condition 8 upon making a finding that adequate flows were not available to perform the study. The studies required by condition 6 and 8 shall be completed and submitted to the Chief, Division of Water Rights, within 12 months from the date of this order. The Chief, Division of Water Rights may extend the time for performing the study required by condition 8 upon making a finding that adequate flows were not available to perform the study. The report (or reports) transmitting the results of the study (or studies) shall describe the action (or actions) which Cal-Am will undertake to correct the problems addressed by the studies. Cal-Am shall provide a written response to any comments received on the study. If no action (or actions) will be taken to correct the underlying problem (or problems), Cal-Am's report shall provide written justification why corrective action is not appropriate. Based upon the results of the studies, recommendations, comments by the District and DFG, and Cal-Am responses, the Chief, Division of Water Rights, shall determine what actions shall be taken by Cal-Am consistent with this Order and establish reasonable time for implementation." (Emphasis Added)

Comment: The Board and its staff must obtain copies of the studies to determine compliance with this provision. Also, only the MPWMD and DFG are given the opportunity and right to comment, when said feasibility study should be available all parties that were involved in Board Order 95-10 and the public. The Carmel River Steelhead Association was a party to Board Order 95-10.

9.. "Cal-Am shall remove the large rock immediately below the spillway of the Los Padres Dam which results in substantial loss of juvenile steelhead or implement some other reliable measure (or measures) to assure safe passage for fish over or around the rock. Prior to removing the rock Cal-Am shall consult with DFG and obtain any streambed alteration permit required by Fish and Game Code 1601. If Cal-Am leaves the rock in place, it shall consult with DFG when evaluating what other measures can be used to assure safe fish passage. Cal-Am shall comply with this measure within 4 months." (Emphasis Added)

Comment: The Board and its staff must investigate whether the work was conducted by Cal-Am to prevent the substantial losses of juvenile steelhead at the Los Padres Dam and whether substantial losses of juvenile steelhead are

still occurring at the Los Padres Dam from all passage problems. The Board must question Dr. Roy Thomas when he testifies at these hearings regarding Los Padres Dam et al.

10.. "Cal-Am shall be responsible for implementing all measures in the "Mitigation Program for the District's Water Allocation Project Environmental Impact Report" not implemented by the District after June 30, 1996. (On November 5, 1990 the District adopted a mitigation program to be carried out for five (5) years. The plan is summarized in Section 6.2, Infra. There is no assurance the District will continue with any or all of the elements of its mitigation program after November of 1995. [MPWMD:289, Vol.III, Appendix 2-D.] ) Not later than August 30, 1996, Cal-Am shall submit a report to the Chief, Division of Water Rights, identifying mitigation measures which the District does not continue to implement after June 30, 1996. At the same time, Cal-Am shall submit a plan for the approval of the Chief, Division of Water Rights, detailing how it will implement mitigation measures not implemented by the District. The Chief, Division of Water Rights, may excuse Cal-Am from implementing specific mitigation measures only upon making a finding that Cal-Am has demonstrated that it does not have adequate legal authority to implement the ability to finance such measures or demonstrates that such measures are demonstrably ineffective. " (Emphasis Added)

Comments: The elements of the District's Mitigation Program are not specifically spelled out under this provision of the order. The Board and its staff must determine what has and what not has been completed in the Mitigation Plan and order additional mitigation elements, if necessary.

11.. "Within 30 days of the date of this order, Cal-Am shall submit for the approval of the Chief, Division of Water Rights: (a) A compliance plan detailing the specific action which will be taken to comply with condition 2 and the dates by which those actions will be accomplished; (b) An urban conservation plan; and (c) An irrigation plan." (Emphasis Added)

Comment: The Board and its staff must acquire copies of said plans for compliance with the order.

12.. "Starting with the first month following adoption of this order, Cal-Am shall file quarterly with the Chief, Division of Water Rights: (a) Reports of the monthly total amounts being: (1) pumped from wells; and (2) diverted from the Carmel River, (b) Reports of the progress being made in complying with the scheduled submitted to comply with condition 11, and (c) Reports of the progress being made in complying with conditions 6, 7, 8, and 9. " (Emphasis Added)

Comment: The Board and its staff must acquire copies of said plans for compliance with the order.

13.. "The Chief, Division of Water Rights, is authorized to refer any violations of these conditions to the Attorney General for action under Section 1052 or to initiate such other enforcement actions as may be appropriate under the Water Code."

Comment: The California Salmon and Steelhead Association submitted a motion to the Board's Hearing Officers that the Draft Cease and Desist Order must be referred to the California Department of Justice for enforcement actions. The public need to understand the specific reasons why the Chief of the Division of Water Rights and the Board members did not refer this major unlawful diversion of the people's water to the California Department of Justice for court actions.

Secondly, the Chief of the Division of Water Rights has willfully allowed the unlawful diversion of the people's water of the Carmel River continue without taking any responsible enforcement actions against the California American Water Company since 1995, and only until recently initiated actions by the Board. Consequently at a salary of \$100,000 per year for the chief and the five (5) board members, the people have paid the Board and one staff member about 6 million dollars for the past decade to enforcement the State Constitution and California Water Code and to prevent the unlawful diversion of the people's water. Unfortunately the chief and the Board members have not enforce state statutes to prevent the California American Water Company from continuing to steal the people's water and damaging the people's trust steelhead assets of the Carmel River.

The Board must investigate the specific reasons why the Chief did not take any responsible actions for over a decade to prevent the unlawful diversion and selling of the people's water from the Carmel River by the California American Water Company. While not taking any responsible enforcement actions against the California American Water Company for over a decade, the Chief was allowing water right applications to be noticed that would divert more water from the Carmel River at the expense of the public trust threatened steelhead species and their habitat and other public trust assets of the Carmel River. I do not know whether or not the Chief was directed by the Board members not to take enforcement actions against the California American Water Company for unlawfully diverting and selling the people's water of the Carmel River. There must be a state investigation of this matter so that the people of the State of California are aware of the specific circumstances regarding millions of dollars of the people's water being stolen and sold for profit annually by the California American Water Company at the expenses of the public trust steelhead assets of the Carmel River.

#### Conclusion

All provisions of Board Order 95-10 that may be violated by the California American Water Company must be dealt with swiftly and severely by the Board with civil penalties.

The Board Order authorized the unlawful diversion of the state's water in Board Order 95-10, which violates state law. Civil and criminal penalties must be levied against the California American Water Company by the State of California for unlawfully diverting and selling the people's water from the Carmel River that damaged the people's public trust steelhead fishery and other trust assets of the Carmel River. I will testify during the second phase of the hearings to show harm and damage to the Camel River threatened steelhead species and their habitat, and the river from the unauthorized diversions by the California American Water Company.

Thank you for the opportunity to submit a policy statement.

Respectfully Submitted

Signed by Bob Baiocchi

Bob Baiocchi, Executive Director

California Salmon and Steelhead Association

P.O. Box 1790

Graeagle, CA 96103

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