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STATE WATER RESOURCES  
CONTROL BOARD

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DIV. OF WATER RIGHTS  
SACRAMENTO

Attorneys for the Water Rights Prosecution Team

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

13 In the matter of,

14 **California American Water Company**  
15 **Cease and Desist Order Hearing**

)  
) **DIVISION OF WATER RIGHTS**  
) **PROSECUTION TEAM'S REPLY TO**  
) **CLOSING BRIEFS**  
)

28

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1 **I. INTRODUCTION**

2 The Prosecution Team submits the following brief in response to the closing brief  
3 of California American Water Company (Cal-Am) and other interested parties. It is the  
4 intent of the Prosecution Team, for the sake of efficiency and economy, to rebut  
5 arguments not otherwise address in the Division of Water Rights Prosecution Team's  
6 Closing Brief submitted on October 9, 2008 (Prosecution Team's Closing Brief).  
7 Accordingly, this brief expands upon and is to be considered in conjunction with the  
8 Prosecution Team's Closing Brief.

9 **II. REPLY TO CAL-AM'S CLOSING BRIEF**

10 On July 6, 1995, the State Water Resources Control Board (State Water Board or  
11 Board) issued Order WR 95-10 (Order 95-10) in response to four complaints filed against  
12 Cal-Am. Order 95-10 found: (1) that Cal-Am's legal rights to water from the Carmel River  
13 are limited to 3,376 acre feet annually (afa); and (2) that Cal-Am's diversion were having  
14 an adverse effect on the public trust resources of the Carmel River. (Order 95-10, pp. 25-  
15 29.) The State Water Board's declared intent in adopting Order 95-10 was:

16 to adopt an order which, until a legal supply of water can be developed or  
17 obtained, will require that Cal-Am: (1) minimize its diversions from the  
18 Carmel River, (2) mitigate the environmental effect of its diversions, and  
19 (3) prepare a plan setting forth: (a) specific actions to develop or obtain a  
20 legal supply of water and (b) the dates specific actions will have occurred so  
21 that progress on the plan can be objectively monitored.

22 Order 95-10 cites Cal-Am's support of the New Los Pardres Dam Project and the  
23 availability of a reliable and legal water supply for Cal-Am's customers from the dam  
24 project as one of the considerations "mitigating against the use of punitive enforcement  
25 options." (Order 95-10, pp. 37-38.) On January 15, 2008, the Prosecution Team noticed  
26 draft cease and desist order WR 2008-00XX-DWR (Draft Order) containing a reduction  
27 schedule that would require Cal-Am to reduce its continuing unauthorized diversions from  
28 the Carmel River.

1 Over 13 years after the adoption of Order 95-10, the New Los Padres Dam Project  
2 is no longer considered a viable alternative water project and Cal-Am continues to divert  
3 water above and beyond its water rights from the Carmel River. Regardless, Cal-Am's  
4 Closing Brief argues that because Order 95-10 defers enforcement against Cal-Am's  
5 unauthorized water use and imposing certain conservation and mitigation conditions upon  
6 that use, that Cal-Am now has a perpetual right to continue those unauthorized diversions  
7 as long as it "maintains a consistent effort to acquire alternative supplies." (Cal-Am's  
8 Closing Brief, pp. 4-12.) Cal-Am goes so far as to assert that the State Water Board  
9 lacks authority to address the continuing impacts of Cal-Am's unauthorized diversion  
10 based on a limited reservation of jurisdiction contained in the Superior Court order settling  
11 writ of mandate challenges to Order 95-10. (Cal-Am's Closing Brief, p. 9, fn. 12 citing  
12 CAW-017, p. 8, ¶ 8.)

13 Cal-Am's arguments are based on misinterpretations of the applicable law, the  
14 plain language and intent of Order 95-10, and general principles of California water law.  
15 If given effect, Cal-Am's interpretations would have the absurd result of insulating Cal-Am  
16 from any future accountability for: (1) the use of water over and above its legal rights; and  
17 (2) the effectiveness of its efforts to acquire alternative water supplies. Cal-Am's  
18 inventive legal arguments take the water rights determination in Order 95-10 (finding that  
19 Cal-Am lacks water rights for a significant portion of its diversions from the Carmel River)  
20 and interpret that order as not only granting Cal-Am the right to use water in excess of its  
21 water rights, but also precluding any additional enforcement of the State Water Board of  
22 those diversion so long as the limited conditions imposed by 95-10 are met. In essence,  
23 Cal-Am contends that Order 95-10 grants a right to water in excess of any right that could  
24 have been granted by a permit or license to appropriate.

25 Cal-Am's contentions are untenable because they are: (1) not supported by the  
26 legal doctrine cited; (2) prohibited by public policy; and (3) in direct conflict with well  
27 established principles of California water law. Furthermore, Cal-Am's contentions would  
28 have the practical effect of requiring the State Water Board to take steps to immediately

1 cease all unauthorized diversions at the time that a water right determination is made in  
2 any water right proceeding or risk being precluded from taking future progressive  
3 enforcement. Cal-Am's tenuous and self-serving interpretations of the law and Order 95-  
4 10 demonstrate why it is necessary to adopt the Draft CDO to clarify Cal-Am's obligation  
5 to take more urgent measures to cease its illegal diversions.

6 **a. Cal-Am's Assertion That the State Water Board Can Only Issue the Draft**  
7 **CDO if the Board Finds That Cal-Am Is Threatening to Violate or Has Violated Order**  
8 **95-10 Is Legally Untenable.**

9 **1. *The Physical Solution Doctrine Does Not Authorize the Use of Water in***  
10 ***Excess of Vested Water Rights.***

11 Cal-Am maintains that Order 95-10 is a "unique interim physical solution which  
12 provides Cal-Am with a nontraditional authorization to extract water in excess of its water  
13 rights." (Cal-Am's Closing Brief, p. 5, line 1.) Furthermore, Cal-Am argues that a physical  
14 solution involves the "application of general equitable principles to achieve practical  
15 allocation of water to competing interests so that a reasonable accommodation of  
16 demands upon a water source can be achieved." (*Imperial Irrigation Dist v. State Wat.*  
17 *Res. Control Bd.* (1990) 225 Cal.App.3d 548, 572.) While the Prosecution Team agrees  
18 that physical solutions involve the application of equitable principles, the present situation  
19 on the Carmel River is not one in which an adjudicatory entity could impose a physical  
20 solution. Cal-Am's contention that Order 95-10 is a nontraditional authorization to divert  
21 more water than it is legally entitled to divert mischaracterizes the doctrine of physical  
22 solutions.

23 The physical solution doctrine is founded on the 1928 constitutional amendment  
24 that became the current Article X, Section 2 of the California Constitution. (WR Order  
25 2004-0004, p. 15.) The sine qua non of a physical solution is the existence of specific  
26 conflicting demands which can be arbitrated. (*Imperial Irrigation District*, 225 Cal.App.3d  
27 at 572.) Specifically, the use of physical solutions occurs most commonly where the  
28 arbitration or adjudication of competing water right holders places riparian water right

1 holders at odds with appropriative or prescriptive right holders or those with prior  
2 appropriative rights against those with subsequent appropriative rights. (See *Peabody v.*  
3 *Vallejo* (1935) 2 Cal.2d 351; *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*  
4 (1935) 3 Cal.2d 489; *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal.2d  
5 316.) The purpose of imposing a physical solution as an equitable remedy is to resolve  
6 competing claims to water by cooperatively satisfying the reasonable needs of each user.  
7 (Littleworth and Garner, *California Water* (1995) p. 176.) Physical solutions resolve  
8 competing claims through “the manipulation of the water supply” to satisfy demands of  
9 competing interests holding existing vested water rights. (*Ibid.*; see also *City of Barstow v.*  
10 *Mojave Water Agency* (2000) 5 P.3d 853, 869.)

11 Presently, Cal-Am attempts to use the physical solution doctrine as the mechanism  
12 authorizing it to divert more water than it is legally entitled to. This interpretation is -  
13 untenable. There is no legal authority to support the contention that physical solutions  
14 somehow authorize or grant an appropriator additional water rights. Quite the contrary,  
15 as previously mentioned above, overwhelming legal authority suggests that physical  
16 solutions merely manipulate the water supply among existing water right holders.  
17 Therefore, Order 95-10 cannot be viewed as an interim physical solution that provides  
18 Cal-Am with a nontraditional authorization to extract water in excess of its water rights.

19 Moreover, as discussed below and in the Prosecution Team's Closing Brief, Order  
20 95-10 cannot be viewed as an appropriative permit authorizing the continued diversion of  
21 water above 3,376 afa because the statutory provisions of Division 2 of the Water Code  
22 establishes the exclusive means of acquiring an appropriative water right. (Water Code,  
23 § 1225.) In addition the statutory provision of section 1375 of Division 2 of the Water  
24 Code have not been satisfied.

25 **2. Order 95-10 Does Not “Authorize” Cal-Am to Divert Water in Excess of its**  
26 **Water Rights as Defined by Order 95-10.**

27 Cal-Am reasserts its contention that Order 95-10 authorizes Cal-Am to extract  
28 Carmel River water in excess of its water rights. (Cal-Am's Closing Brief, p. 4.) For the

1 reasons discussed in greater detail in Section III.a of the Prosecution Team's Closing  
2 Brief, Order 95-10 does not "authorize" Cal-Am to use water above and beyond its Water  
3 Rights.

4 The State Water Board's authority to decide the matters at issue in Order 95-10  
5 was limited to determining the extent Cal-Am's water rights, not granting Cal-Am addition  
6 rights if they did not exist. (See, State Water Board Order WRO 2004-0004 (*Phelps*) p.  
7 8.) Furthermore, the State Water Board has no authority to issue an order that would  
8 permit Cal-Am to continue to divert water in violation of Water Code section 1052 with  
9 impunity and deprive future Board's of their discretion to bring enforcement under Water  
10 Code section 1381(d)(1).

11 The fact remains that Cal-Am's water use above and beyond its water rights as  
12 defined by Order 95-10 are a trespass in violation of Water Code section 1052 and the  
13 likelihood that Cal-Am will continue this practice in the future is a threatened violation of  
14 Order 95-10.

15 **3. *The State Water Board's Enforcement Authority Is Not Limited by***  
16 ***Collateral Estoppel or Res Judicata.***

17 Cal-Am erroneously argues that the doctrines of collateral estoppel and res  
18 judicata prohibit the State Water Board from issuing the Draft Order. Cal-Am misstates  
19 the doctrine of collateral estoppel as it is applied to public agencies and is incorrect in it  
20 analysis of the application of both doctrines to these proceedings.

21 Cal-Am cites State Water Board Order WR 2006-008-EXEC (CAW-015) as  
22 establishing that the doctrine of collateral estoppel is recognized by the State Water  
23 Board. (Cal-Am's Closing Brief p. 7:3 – 7:8, 7:15 – 7:16. [Cal-Am's Closing Brief provides  
24 the incorrect page cites to CAW-015, those cites should be p. 6 and p. 7, respectively].)  
25 CAW-015 is a decision by the Executive Officer finding that a petition for reconsideration  
26 of a water rights fee determination is collaterally estopped based on the fact that a  
27 substantially identical petition had been previously denied for the same petitioner. (CAW-  
28 015, p.1.) In the alternative, the Executive Officer went on to find that the decision to

1 impose the fees was appropriate and proper. (CAW-015, pp.1, 2.)

2 The issue here is distinguishable because Cal-Am is claiming that Order 95-10, a  
3 determination of Water Rights in response to multiple complaints, precludes enforcement  
4 against future violations of Water Code section 1052's prohibitions against the  
5 unauthorized use of water. In order for an action to be precluded by collateral estoppel  
6 the following prerequisites must be satisfied:

7 (1) the issue decided in a prior proceeding is identical to the current issue,

8 (2) the issue was actually litigated in the prior proceeding,

9 (3) the issue was necessarily decided in the prior proceeding,

10 (4) the prior proceeding resulted in a final judgment on the merits, and

11 (5) the party against whom collateral estoppel is asserted is the same as, or  
12 in privity with, a party to the prior proceeding.

13 (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

14 These five prerequisites are not satisfied. The first prerequisite is not met because  
15 the Draft CDO does not seek to re-litigate issues decided in Order 95-10. Instead, the  
16 Draft CDO is an exercise of the State Water Board's authority to enforce against  
17 continuing water use above and beyond Cal-Am's water rights as determined in Order 95-  
18 10. The second prerequisite is not satisfied because Order 95-10 was not noticed as an  
19 enforcement order and did not actually litigate whether the State Water Board should take  
20 enforcement against Cal-Am's unauthorized water use. (Order 95-10, p. 37.) Order 95-  
21 10 did defer referral of Cal-Am's violation of section 1052 to the Attorney General's Office.  
22 (*Id.*) This deferral, however, this does not preclude the State Water Board from taking  
23 enforcement now to prevent future violations.

24 It is impossible for the State Water Board in adopting Order 95-10 to have waived  
25 its right to issue a cease and desist order under the statutory authority granted by Water  
26 Code section 1831 (d)(1) because the State Water Board was not granted the authority to  
27 issue cease and desist orders for the violation of Water Code section 1052 until 2002  
28 when section 1831 (d)(1) was added to the Water Code. (See Historical and Statutory

1 Notes, 68 West's Ann. Codes, Wat. Code (1971 ed.) foll. § 1831, pp. 226-227.) Finally,  
2 the third prerequisite is not met because, the issue of whether to issue a cease and desist  
3 order against Cal-Am or take other State Water Board enforcement for future violations  
4 was not an issue that was necessarily before the Board in Order 95-10. (Order 95-10, p.  
5 37.)

6 Furthermore, Cal-Am fails to complete the entire collateral estoppel analysis. In  
7 addition to the five prerequisites discussed above, the statutory scheme governing a  
8 particular proceeding must be considered in determining whether collateral estoppel  
9 should be applied. (CAW-015, p.6 citing *Lucido v. Superior Court*, supra, 51 Cal.3d at  
10 pp. 342-343 and *Pacific Lumber v. State Water Resources Control Board* (2006) 37  
11 Cal.4<sup>th</sup> 921, 945 [statutory scheme governing timber harvest plan review process did not  
12 favor application of collateral estoppel.] The statutory scheme governing Water Rights  
13 disfavors the application of collateral estoppel.

14 Water Code section 1225 establishes that Division 2 of the Water Code is the  
15 exclusive means of acquiring appropriative rights. (Wat. Code, § 1225; *People v.*  
16 *Shirokow*, supra, 26 Cal3d 301, 309.) The California Supreme Court has recognized that  
17 Water Code section 1052 is intended to ensure that water rights could not become  
18 vested, by prescription or otherwise, "in an excessive use of water or in a use for an  
19 unauthorized purpose." (Hutchins, *The California Law of Water Rights* (1956) p, 98, citing  
20 *Meridian v. San Francisco* (1939) 13 Cal.2d 424, 450.) In 2002, the Legislature granted  
21 the State Water Board the authority to adopt cease and desist orders to stop violations of  
22 section 1052. (See Historical and Statutory Notes, 68 West's Ann. Codes, Wat. Code  
23 (1971 ed.) foll. § 1831, pp. 226-227.) Accordingly, the statutory scheme governing water  
24 right petitions and enforcement counsel against the application of collateral estoppel  
25 because it would permit Cal-Am to circumvent the statutory provision of the Water Code  
26 and obtain de facto water right.

27 Cal-Am also argues that the Draft CDO is barred by res judicata. Res judicata  
28 bars bringing a second suit between the same parties if; (1) a claim or issue raised in the

1 present action is identical to a claim or issue raised in a prior proceeding, (2) the prior  
2 proceeding resulted in a final judgment on the merits, and (3) the party against whom the  
3 doctrine is being asserted was a party to the prior proceeding. (*People v. Barragan*  
4 (2004) 32 Cal.4<sup>th</sup> 236, 253.) The prerequisites for res judicata are not meet here because  
5 the claim or issue that is the subject of these proceedings, whether or not to issue a  
6 cease in desist order under the authority granted by Water Code section 1831(d)(1), was  
7 not decided in Order 95-10. The facts at issue in Order 95-10 are by no means identical  
8 to the situation at hand now. The duration and impacts of Cal-Am's unauthorized  
9 diversions, as well as the availability of alternative water supplies and the needs of the  
10 community that make use of the unauthorized diversions are all different than at the time  
11 that Order 95-10 was adopted.

12 Furthermore, the final decision on the issues that are decided by Order 95-10 do  
13 not preclude the Water Board from exercising its authority under Water Code section  
14 1831(d)(1). Order 95-10 identifies that Cal-Am has a right to 3,376 afa from the Carmel  
15 River and recognizes that the diversion of water above and beyond the amount is a  
16 trespass under Water Code section 1052. (Order 95-10, pp. 25, 36.) Order 95-10 defers  
17 referral of Cal-Am's past violations of section 1052 based on Cal-Am's compliance with  
18 certain conditions. This deferral, however, does not preclude the State Water Board from  
19 taking enforcement to curtail continuing and future violations of Order 95-10.

20 The Draft CDO does not seek to re-litigate issues decided in Order 95-10. Instead,  
21 the Draft is simply an exercise of the State Water Board's authority to enforce against  
22 water use above and beyond Cal-Am's water rights as determined in Order 95-10 and is  
23 not barred by collateral estoppel or res judicata. Moreover, the facts at issue here are  
24 different than those that were at issue in Order 95-10 and public policy favors the State  
25 Water Board having continuing jurisdiction to revisit decisions concerning water use and  
26 appropriation when there is a changed circumstance. (*National Audubon Society v.*  
27 *Superior Court* (1983) 33 Cal.3d 419, pp. 447-448 (Audubon).)

1           **b. The Doctrine of Equitable Estoppel Is Inapplicable.**

2           Estoppel can be applied against a public entity only when “justice and right require  
3 it.” (*City of Long Beach v. Mansel* (1970) 3 Cal.3d 462, 493.) The Draft CDO does not  
4 perpetrate any injustice against Cal-Am because Cal-Am could not reasonably rely on  
5 Order 95-10 as providing a right to use water in excess of its water rights in perpetuity.  
6 Furthermore, courts will not apply estoppel to a public agency if the result would impede a  
7 strong public policy. (*Phelps v. State Water Resources Control Board*, 157 Cal.App. 4th  
8 89, 114.)

9           The California Supreme Court has clearly identified two strong public policies that  
10 preclude the application of equitable estoppel. First, the Supreme Court has established  
11 that water users cannot prescriptively acquire a water right against the state. (*People v.*  
12 *Shirokow* (1980) 26 Cal.3d 301, 311.) The State Water Board found in Order WRO  
13 2004-0004 that based on the ruling in *Shirokow*, “a water user cannot obtain equitable  
14 relief such as estoppel against the State Water Board’s enforcing the requirement that  
15 water users must obtain appropriative water rights under the Water Code if they do not  
16 have other water rights.” (State Water Board Order WRO 2004-0004, (*Phelps*) p.9.)

17           Second, the California Supreme Court in *Audubon* recognized a strong public  
18 policy of continuing State Water Board jurisdiction to supervise and reconsider water  
19 allocation decisions:

20           It is clear that some responsible body ought to reconsider the allocation of  
21 the waters of the Mono Basin. No vested rights bar such reconsideration.

22           We recognize the substantial concerns voiced by Los Angeles - the city's  
23 need for water, its reliance upon the 1940 board decision, the cost both in  
24 terms of money and environmental impact of obtaining water elsewhere.

25           Such concerns must enter into any allocation decision. We hold only that  
26 they do not preclude a reconsideration and reallocation which also takes  
27 into account the impact of water diversion on the Mono Lake environment.

28 (*Audubon*, supra, 37 Cal.3d at pp. 447-448.)

1           Additionally, the traditional elements necessary for assertion of estoppel are not  
2 present. The necessary elements include:

3           (1) the party to be estopped must be apprised of the facts;

4           (2) he must intend that his conduct shall be acted upon, or must so act that  
5 the party asserting the estoppel had a right to believe it was so intended;

6           (3) the other party must be ignorant of the true state of facts; and

7           (4) he must rely upon the conduct to his injury.

8           (*City of Long Beach v. Mansel*, supra, 3 Cal.3d p. 489.)

9           The necessary elements of equitable estoppel are not met. Order 95-10 provided  
10 notice to Cal-Am that its use of water from the Carmel River in excess of 3,376 afa  
11 annually is an illegal use of water subject to enforcement under Water Code section  
12 1052. (Order 95-10, pp. 25, 36.) Accordingly, Cal-Am could not reasonably rely on the  
13 availability of water over and above its rights as defined in Order 95-10 in perpetuity. The  
14 Draft CDO is not unjust because it does not punish Cal-Am for its past actions or its  
15 professed compliance with Order 95-10. Instead, the Draft CDO puts Cal-Am on notice  
16 that it will have to terminate its use of water from the Carmel River in excess of its water  
17 rights in the future. The curtailment of water use to which Cal-Am has no legal right is not  
18 an injustice. Furthermore, the Draft CDO proposes a schedule for the reduction of  
19 Carmel River extractions in a reasonable manner that allows for the supplementation of  
20 other alternative water sources and reduction in use through additional conservation.

21           Cal-Am claims that reliance on the continued availability of water in excess of its  
22 water rights is based on the fact that the State Water Board was aware that Cal-Am  
23 extracted more water than allowed under its water rights and Cal-Am received regular  
24 correspondence from Division of Water Rights' staff indicating that the conditions of Order  
25 95-10 were being met. (Cal-Am's Closing Brief, p. 16.) Case law clearly establishes that  
26 Cal-Am can not rely on the unauthorized legal representations by agency staff as a basis  
27 for estoppel. (*Phelps*, supra, 157 Cal. App. 4th p.115.) Furthermore, for the reasons  
28 discussed below in Section 3(c), Cal-Am's belief that "a consistent effort to acquire

1 alternative water supplies" would allow it to continue to use water for which it does not  
2 have a right indefinitely is unreasonable.

3 **c. Cal-Am's Interpretation of Condition 2 of Order 95-10 is Fundamentally**  
4 **Flawed.**

5 Cal-Am misinterprets the plain language of Condition 2 of Order 95-10 as imposing  
6 only a duty to "maintain a consistent effort to acquire alternative water supplies." (Cal-  
7 Am's Closing Brief, pp. 10-12.) Condition 2 of Order 95-10 states:

8 Cal-Am shall diligently implement one or more of the following actions  
9 to terminate its unlawful diversions from the Carmel River: (1) obtain  
10 appropriative permits for water being unlawfully diverted from the  
11 Carmel River; (2) obtain water from other sources of supply and  
12 make one-for-one reductions in unlawful diversion from the Carmel  
13 River, provided that water pumped from the Seaside aquifer shall be  
14 governed by condition 4 of this Order not this condition; and/or (3)  
15 contract with another agency having appropriative rights to divert and  
16 use water from the Carmel River.

17 (Order 95-10, p. 40 (emphasis added).)

18 The language of Condition 2 specifies both implementation of a project and  
19 termination of unlawful diversions as the requirements, not merely diligent pursuit of  
20 alternate water supplies or diligent pursuit of a plan to obtain alternate water supplies.  
21 Cal-Am's Closing Brief acknowledges that the definition of "implement" is to "put into  
22 effect according to or by means of a definite plan or procedure." (Cal-Am's Closing Brief,  
23 p. 11 [citing Webster's Encyclopedia Unabridged Dictionary of the English Language  
24 (1996)].) Cal-Am is unable to demonstrate that it has implemented any of the three  
25 actions enumerated in Condition 2 of Order 95-10.

26 Cal-Am's interpretation of Condition 2 ignores the context in which Order 95-10  
27 was adopted. Order 95-10 clearly cites Cal-Am's support of the New Los Padres Dam  
28 Project and the availability of that project as a reliable and legal water supply for Cal-Am's

1 customers as one of the considerations for deferring punitive enforcement. (Order 95-10,  
2 pp. 37-38) The contemplated duration of Cal-Am's excess diversions was finite. This is  
3 demonstrated by the limited scope of the conservation and mitigation measures imposed  
4 by Order 95-10. (Order 95-10, pp. 40-44.)

5 Since the adoption of Order 95-10, the New Los Padres Dam Project was defeated  
6 by voters. (Cal-Am's Closing Brief, p. 13.) Accordingly, the conditions that the State  
7 Water Board relied upon in finding that defer of enforcement was appropriate have  
8 changed. As discussed in greater detail above Section 3(b), the California Supreme  
9 Court has found that public policy requires that the State Water Board maintain continuing  
10 jurisdiction to reevaluate past allocation decisions in appropriative permits and licenses.  
11 (*Audubon*, supra, 37 Cal.3d at pp. 447-448.) Logic dictates that a State Water Board  
12 determination that water use exceeds legitimate water rights would be subject to  
13 continuing jurisdiction to prevent an illegal diverter from gaining more rights than a party  
14 that has complied with the statutory provisions for obtaining an appropriative right.

15 Cal-Am has violated and threatens to continue violating Condition 2 of Order 95-10  
16 for the reasons above and in Section III.B of the Prosecution Team's Closing Brief.  
17 Additionally, Cal-Am's misinterpretation of Condition 2 has led to the absurd result of Cal-  
18 Am continuing to pursue infeasible alternative water supply projects to the detriment of its  
19 rate payers. (*California-American Water Company* (2006) Cal. P.U.C. Dec. No. 06-11-  
20 05, pp.25, 26 [in an action to recover costs from rate payer for the abandoned Carmel  
21 River Dam project; "On the issue of why it [Cal-Am] continued to pursue the Carmel River  
22 Dam until August 2003, even after MPWMD requested it withdraw the project in January  
23 2002 and Cal-Am itself in February 2003 had applied to the Commission to replace the  
24 Carmel River Dam with the Costal Water Project, Cal-Am testified that it need to always  
25 have an active project before the SWRCB or it would face substantial fines."])  
26 Accordingly, it is imperative that the State Water Board correct Cal-Am's interpretation to  
27 prevent further unnecessary spending under the guise of compliance with Order 95-10.  
28

1           **d. Benefit to the Public Trust Is Not Required to Issue the Draft CDO,**  
2           **Regardless, the Draft CDO Will Benefit Public Trust Resources.**

3           In order for the State Water Board to issue the Draft CDO, it is not necessary to  
4           find that Cal-Am's diversion are having an adverse impact on the public trust, nor is the  
5           Prosecution Team required to show that the Draft CDO will benefit public trust resources.  
6           Water Code section 1831 provides in part:

7           (a) When the board determines that any person is violating,  
8           or threatening to violate, any requirement described in subdivision  
9           (d), the board may issue an order to that person to cease and desist from  
10          that violation. . .

11          (d) The board may issue a cease and desist order in response to a violation  
12          or threatened violation of any of the following:

13          (1) The prohibition set forth in Section 1052 against the  
14          unauthorized diversion or use of water subject to this division.

15          (2) Any term or condition of a permit, license, certification, or  
16          registration issued under this division.

17          (3) Any decision or order of the board issued under this part,  
18          Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of  
19          Division 7, in which decision or order the person to whom the cease and  
20          desist order will be issued, or a predecessor in interest to that person, was  
21          named as a party directly affected by the decision or order. . . .

22          Accordingly, as the Hearing Team has recognized, the Draft CDO can be issued  
23          based on a violation of Order 95-10 or Water Code section 1052's prohibition against the  
24          unauthorized diversion or use of water. (May 13, 2008, Ruling on Procedural Issues.)  
25          Contrary to Cal-Am's assertions, it is not necessary for the Draft Order to benefit public  
26          trust resources in order for the State Water Board to issue the cease and desist order.  
27          Nevertheless, as discussed in Section IV.c of the Prosecution Team's Closing Brief, the  
28          Draft CDO will benefit public trust resources.

1           **e. The Revised Diversion Schedule Proposed in the Prosecution Team's**  
2 **Closing Brief Is Reasonable.**

3           As discussed in the Prosecution Team's Closing Brief Section VI, the Prosecution  
4 Team recommends that the reduction schedule proposed in the Draft CDO be adopted  
5 with the minor modification that reductions not be required to begin until water years  
6 2009-2010. In response to the denial of the Prosecution Team's Request for Official  
7 Notice of a Report prepared by the California Public Utilities Commission's (CPUC),  
8 Division of Ratepayer Advocated, a Revised Exhibit A is attached hereto to replace the  
9 Exhibit A of the Prosecution Team's Closing Brief. Revised Exhibit A is a comparison of  
10 reduction in diversions from Carmel River required by the Draft Order and the Seaside  
11 Basin Adjudication to potential new yield.

12           As discussed in greater detail in Section VI of the Prosecution Team's Closing  
13 Brief, the total reduction required by the revised Draft CDO schedule combined with the  
14 potential reductions required by the Seaside Basin Adjudication can be substantially  
15 compensated for by estimated new yield and improved efficiency of the Cal-Am  
16 distribution system until 2014 when the reductions from the Carmel River imposed by the  
17 Draft Order increase to 35 percent.

18           Revised Exhibit A (and original Exhibit A to the Prosecution Team's Closing Brief),  
19 substantially derives its estimates for quantity and timing of the alternative sources of water  
20 from evidence submitted by MPWMD. (MPWMD-HS-14B.) Revised Exhibit A takes into  
21 consideration the maximum amount of reductions that Cal-Am could be subject to under  
22 the Seaside Basin Adjudication and adopts reasonable estimates of quantity and timing  
23 for other water projects being currently contemplated to supply water to the community on  
24 the Monterey Peninsula. In addition to new yield from alternative water project, Revised  
25 Exhibit A assumes that Cal-Am can reduce its current unaccounted for water losses of  
26 12 percent (approx. 1716 afa) and takes into account the fact that actual diversion from  
27 the Carmel River in the past 10 years were below 11,285 afa. (Hearing Transcript, Phase  
28 1 Friday June 20, 2008, p. 443, lines 1-5, MPWMD DF-3.)

1 Revised Exhibit A shows a yield deficit for water years 2012 through 2014. The  
2 yield deficit for water years 2012 and 2013 are just over 100 afa. As discussed in greater  
3 detail in Section VI of the Prosecution Team's Closing Brief, this level of deficit should be  
4 reasonably attainable through water conservation measures. At 35 percent reduction of  
5 diversion in water year 2014 the yield deficit is under 2,000 afa until the Coastal Water  
6 Project is scheduled to be completed. The Coastal Water Project is currently scheduled  
7 to supply additional water beginning in 2015. (CAW-044.) Accordingly, 2014 may be the  
8 only water year with a significant yield deficit and that deficit is less than a 15 percent  
9 reduction. Accordingly for these reasons and the reasons discussed in Section VI of the  
10 Prosecution Team's Closing Brief, the revised diversion schedule is reasonable.

11 **f. Compliance With the Draft CDO Is Attainable Without Adversely Impacting**  
12 **Public Health and Safety.**

13 Section V of the Prosecution Team's Closing Brief discusses in detail how health  
14 and safety needs were considered in establishing the Draft CDO reduction schedule.  
15 (See also Hearing Transcript, Phase II Wednesday, July 23, 2008, pp. 56:2 – 57: 1-11  
16 [Mark Stretars testifies that proposed reduction schedule would not jeopardize public  
17 health and safety].) The Division of Water Rights staff took into account past and current  
18 water use on the Monterey Peninsula and relied on guidance provided in California Code  
19 of Regulations, title 23, section 687 to establish an average consumptive use rate for  
20 reasonable potable water use. Neither Cal-Am nor any designated party was able to  
21 articulate a specific standard for the requisite amount of water needed to protect public  
22 health and safety.

23 The Prosecution Team's use of 75 gallons per person per day (ppd) as a minimum  
24 necessary to protect health and safety is reasonable. The reasonableness of this  
25 estimate is supported by testimony that the daily residential use in the Monterey  
26 Peninsula area averages approximately 68 gallons ppd. (MPWMD-DF9A, p. 6.)  
27 Accordingly, the Prosecution Team's minimum necessary calculation leaves and addition  
28 10 gallons ppd (prior to any savings gained from additional conservation measures)

1 beyond what is needed to meeting current residential use for health and safety needs.

2 One of Cal-Am's numerous mischaracterizations of Order 95-10 is that in adopting  
3 Order 95-10 the State Water Board found that maintaining Cal-Am's diversions from the  
4 Carmel River at 11, 285 afa is necessary "to protect public health and safety." (Cal-Am's  
5 Closing Brief, p. 17 [quoting Order 95-10, p. 37].) The complete sentence from Order 95-  
6 10, page 37 is as follows:

7 The people and businesses on the Monterey Peninsula must continue  
8 to be served water from the Carmel River in order to protect public  
9 health and safety.

10 Order 95-10 does not make any specific findings as to the exact quantity of  
11 water that was necessary at that time in order for public health and safety needs to  
12 be met.

13 Cal-Am also claims that the cities of Seaside, Sand City, Monterey, and  
14 Carmel presented testimony which explains why the Draft CDO would jeopardize  
15 public health and safety. (Cal-Am's Closing Brief, p. 24.) This statement by Cal-  
16 Am is another mischaracterization. The testimony from the cities cited by Cal-Am  
17 to support its proposition is substantially, if not entirely, related to economic  
18 impacts not health and safety. Only one statement of the testimony from the cities  
19 cited by Cal-Am is tangentially related to health and safety in that it speculates that  
20 economic impacts could result in an inability to fund public health and safety  
21 positions. (Hearing Transcript, Phase II July 24, 2008, 466:14-25.)

22 Cal-Am's argument that the Draft CDO will harm public health and safety is  
23 speculative. Furthermore, as discussed above in Section 3(e), the total reduction  
24 required by the revised Draft CDO schedule combined with the potential reductions  
25 required by the Seaside Basin Adjudication can be substantially compensated for  
26 by estimated new yield and improved efficiency of the Cal-Am distribution system.  
27 Any potential for health and safety impacts will be avoided if the alternative water  
28 supplies are secured.

1 If circumstances beyond Cal-Am's control change and compliance with the  
2 reduction schedule proposed herein become unattainable without endangering the health  
3 and safety of Cal-Am's customers, then Cal-Am can seek relief from the Division of Water  
4 Rights. Section VI.a of the Prosecution Team's Closing Brief discusses in detail the  
5 circumstances under which the revised Draft CDO would permit the Deputy Director of  
6 the Division to alter the reduction schedule

7 **1. Cal-Am has Legal Tools to Comply With the Draft CDO Without Violating**  
8 **the Law.**

9 Cal-Am argues that compliance with the Draft CDO would require Cal-Am to violate  
10 the law because Cal-Am cannot discontinue service, implement a moratorium or  
11 otherwise ban new water service without being ordered by the CPUC. (Cal-Am's Closing  
12 Brief, p. 23.) The Draft CDO does not require Cal-Am to take any specific action to meet  
13 the proposed reduction schedule. Cal-Am can choose to obtain compliance by the most  
14 economic and readily achievable means available. Regardless, as discussed in greater  
15 detail in Section VIII of the Prosecution Team's Closing Brief, if it is necessary to impose  
16 some type of moratorium or to discontinue service, then Cal-Am has a process available  
17 to it to obtain CPUC approval.

18 **2. Cal-Am's Claim That This Proceeding Violated its Due Process Rights Is**  
19 **Not Supported by the Record.**

20 In its closing brief Cal-Am cites a meeting between Kent Turner (Cal-Am's  
21 president), Buck Taylor (Division of Water Right Counsel) and Kathy Morowka (Division of  
22 Water Rights Permitting Staff) as an example of due process violation. (Cal-Am's Closing  
23 Brief, p. 25.) Cal-Am's implication that this meeting was somehow improper is  
24 disingenuous and not supported by the record. The portion of the Hearing Transcripts  
25 cited by Cal-Am demonstrates that the meeting was concerning ASR project and water  
26 right issues going forward with future alternative water supply projects. (Hearing  
27 Transcript, Phase I, Friday, June 20, 2008, pp. 455:19-456:23.)

28 There is no prohibition against Division of Water Rights permitting staff and their

1 counsel meeting with a water rights holder to discuss future or current water supply  
2 project. Furthermore, Kathy Mrowka is not a member of the Prosecution Team, but a  
3 witness for the prosecution in her capacity as a Senior Water Resources Control  
4 Engineer for the Division of Water Rights. (PT1, PT2.) Mrs. Mrowka testified that she did  
5 not have any discussions with the Prosecution Team concerning the Draft CDO or Cal-  
6 Am until after the draft CDO was issued to Cal-Am. (Hearing Transcript, Phase I,  
7 Thursday, June 19, 2008 pp. 91:24 - 92:4, 95:1- 96:13.) The record does not indicate  
8 that any of the participants in that meeting played a prosecutorial role in these  
9 proceedings; accordingly, there is no appearance or potential for bias.

10 **III. REPLY TO JOINT CLOSING BRIEF OF THE MONTEREY PENINSULA WATER**  
11 **MANAGEMENT DISTRICT AND THE SEASIDE BASIN WATERMASTER BOARD**

12 The MPWMD and the Seaside Basin Watermaster Board (Watermaster) submitted  
13 a joint Closing Brief (MPWMD and Watermaster's Closing Brief) which contains several  
14 arguments that are substantively similar or identical to argument made in the Cal-Am  
15 Closing Brief:

- 16 (1) The Draft CDO is barred by collateral estoppel and res judicata;  
17 (2) The Prosecution Team has not meet its burden of showing that Cal-Am violated  
18 Order 95-10 or Water Code section 1052<sup>1</sup>;  
19 (3) Cal-Am has exercised diligence in meeting Condition 2 of Order 95-10;  
20 (4) No quantitative showing that the Draft CDO will benefit the fishery.

21 These arguments are addressed above in Section I of this Reply Brief.

22 One of MPWMD and Watermaster's unique contentions is that the Prosecution  
23 Team must demonstrate that the Draft CDO will have significant benefits to the  
24 environment to justify threatened detrimental impacts to the health and safety of the  
25

26 \_\_\_\_\_  
27 <sup>1</sup> Although the heading in the MPWMD and Watermaster's Closing Brief state that the prosecution team has  
28 not shown that Cal-Am violated Water Code section 1052, the text of the actual brief does not contain and  
argument to support this assertion.

1 community. (MPWMD and Watermaster's Closing Brief, p. 11-13.) As discussed above  
2 in Section 3(d), there is no legal requirement that the Draft CDO benefit public trust  
3 resources. The reduction schedule in the Draft CDO was developed with intent to provide  
4 sufficient water to continue to meet public health and safety need. (See, Section 3(f)  
5 above; Section V Prosecution Team's Closing Brief.) Furthermore, as discussed above in  
6 Section 3(e), the total reduction required by the revised Draft CDO schedule combined  
7 with the potential reductions required by the Seaside Basin Adjudication can be  
8 substantially compensated for by estimated new yield and improved efficiency of the Cal-  
9 Am distribution system. Accordingly, any potential for health and safety impacts will be  
10 avoided if the alternative water supplies are secured.

11 If compliance with the reduction schedule proposed herein become unattainable  
12 without endangering the health and safety of Cal-Am's customers, then Cal-Am can seek  
13 relief from the Division of Water Rights. (See, Section VI.a of the Prosecution Team's  
14 Closing Brief for detailed discusses of the circumstances under which the revised Draft  
15 CDO would permit the Deputy Director of the Division to alter the reduction schedule)

16 **a. The Prosecution Team's Calculation of 75 Gallons ppd Establishes a**  
17 **Reasonable Amount Necessary to Meet Health and Safety Needs and Is Not**  
18 **Intended to Maintain General Commercial and Industrial Uses.**

19 MPWMD and the Watermaster argue that the Prosecution Team's use of  
20 75 gallons ppd as reasonable quantity of water for domestic residential use is inaccurate  
21 and flawed because it fails to account for commercial or industrial uses. (MPWMD and  
22 Watermaster's Closing Brief, pp. 13-16.) MPWMD presented conflicting testimony on  
23 what the current per captia water use. (MPWMD-DF9A, p. 6 [testimony of Darby Fuerst  
24 that average residential use approx. 68 gallons ppd]; MPWMD-sp12, pp.4, 5 [ Stephanie  
25 Pintar testifying that by 2006-2007, average residential water use had fallen to 90 gallons  
26 ppd.] The intent of the 75 gallons ppd was to establish a reasonable estimate of water  
27 quantity necessary to protect public health and safety. (See Prosecution Team's Closing  
28 Brief, Section V.) MPWMD and the Watermaster do not provide an explanation as to why

1 the failure to provide water sufficient to maintain general commercial and industrial uses  
2 is a threat to public health and safety.

3 Page 15 of MPWMD and the Watermaster's Closing Brief reference testimony  
4 from Mr. Darby Fuerst where he attempts to quantify the gallons ppd available for  
5 residential use at different points in the original reduction schedule in the Draft CDO.  
6 There is insufficient evidence in the record to determine how these numbers are  
7 calculated and what assumptions were made in those calculations. For example, there is  
8 no explanation as to why compliance with the initial reduction to 12783 afa (based on  
9 MPWMD-14B, year 2009) would require a reduction to 58 gallons ppd when that level of  
10 residential use would only consume approximately 7471 afa<sup>2</sup> of the available water. The  
11 lack of information in the record on how these figures were reached makes it difficult to  
12 discern their value for determining Cal-Am's ability to meet health and safety needs at  
13 the respective reduction levels.

14 **b. Revised Exhibit A of the Prosecution Team's Closing Brief Adopts**  
15 **MPWMD's Calculations Regarding the Availability of Alternative Water Sources.**

16 MPWMD and the Watermaster argue that the Prosecution Team's analysis  
17 of the amount of water available from alternative sources is inaccurate because:  
18 (1) they do not take into account the potential reductions imposed by the Seaside  
19 Groundwater Basin adjudication; (2) they neglect to consider timelines within which  
20 alternative water supply projects will be completed, or the reliability and variability  
21 of those sources; and (3) potential real water saving achieved through reduction for  
22 unaccounted for water is too speculative to rely upon to satisfy public health and  
23 safety needs.

24 These arguments are addressed as follows: (1) revised Exhibit A (and  
25 original Exhibit A to the Prosecution Team's Closing Brief), attached hereto,  
26

27 \_\_\_\_\_  
28 <sup>2</sup> Based on population of 115,000.

1 compares the required reduction to potential new yield takes into consideration the  
2 maximum amount of reductions that Cal-Am could be subject to under the Seaside  
3 Basin Adjudication; (2) revised Exhibit A derives its estimates for quantity and timing  
4 of the alternative sources of water from evidence submitted by MPWMD and Cal-  
5 Am (MPWMD-HS-14B); and (3) the potential real water saving from reduction of  
6 unaccounted for water estimates in Exhibit A are not relied on to meet public  
7 health and safety needs, those needs should be satisfied by the allowable  
8 diversions and new yields.

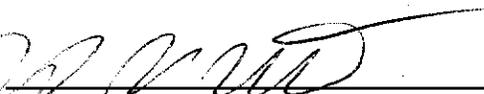
9 **IV. REPLY TO CLOSING BRIEFS OF THE CITY OF CARMEL, SAND CITY, CITY OF**  
10 **SEASIDE, AND MONTEREY COUNTY HOSPITALITY ASSOCIATION**

11 The Closing Briefs of the above parties raised issues that have already been  
12 addressed in response to the Cal-Am's Closing Brief, and the MPWMD and  
13 Watermaster's Closing Brief as well as issues that were addressed in the Prosecution  
14 Team's Closing Brief.

15 **VIII. CONCLUSION**

16 For the reasons provided above and in the Prosecution Team's Closing Brief, the  
17 Prosecution Team request that the Draft CDO be adopted with the revisions  
18 recommended in the Prosecution Team's Closing Brief.

19  
20 Respectfully submitted,

21  
22 

23 Yvonne West  
24 Attorney for the Division of Water Rights Prosecution Team

**Revised Exhibit A**  
**Required Reductions Compared to Potential New Yield**

Water Year	Required Reductions			Estimated New Yield <sup>1</sup>						Yield Deficit from 10 Yr Average of 14298 AFA <sup>6</sup>		
	Carmel River Draft CDO (AFA) <sup>2</sup>	Carmel River Draft CDO (Percent)	Seaside Groundwater Reductions (AFA) <sup>3</sup>	Total Reductions	Sand City Desal	ASR Plant	Pebble Beach & RUWAP Reclaim	Cal Am System Efficiency Savings <sup>4</sup>	Coastal Water Project <sup>5</sup>		Total AFA from New Sources	Yield Deficit from max of 14789 AFA
2009	0	0%	313	313	300	310	150	0		760	0	0
2010	1,693	15%	417	2,110	300	920	450	224		1,894	216	0
2011	1,693	15%	417	2,110	300	920	450	447		2,117	0	0
2012	2,257	20%	835	3,092	300	920	450	805		2,475	617	126
2013	2,257	20%	835	3,092	300	920	450	805		2,475	617	126
2014	3,950	35%	835	4,785	300	920	450	805		2,475	2,310	1,819
2015	3,950	35%	1,253	5,203	300	920	450	805		10,875	0	0
2016	5,643	50%	1,253	6,896	300	920	450	805		10,875	0	0
2017	5,643	50%	1,253	6,896	300	920	450	805		10,875	0	0
2018	5,643	50%	1,684	7,327	300	1,920	450	805		11,875	0	0
2019	5,643	50%	1,684	7,327	94	1,920	450	805		11,6699	0	0

<sup>1</sup> Estimates of new yield are from MPWMD-HS14-B, unless otherwise noted.  
<sup>2</sup> Annual percent reductions and associated acre-foot reductions for Cal Am from Draft CDO delayed by one water year as proposed in Section VI of the Prosecution Team Closing Brief.  
<sup>3</sup> Annual percent reductions and associated acre-foot reductions for Cal Am from California American Water v. City of Seaside et al., Case No. M66343 (CAW-5).  
<sup>4</sup> Assumes a reduction in Cal Am's 12% (approx. 1716 AFA) of unaccounted for water. (Hearing Transcript, Phase I Friday June 20, 2008, p. 443, lines 1-5.) Estimates that Cal-Am can achieve a 7% reduction in unaccounted for water losses is based on the fact that stage 3 of the MPWMD's Expanded Water Conservation and Standby Rationing Plan requires Cal-Am to implement such a reduction. (MPWMD's Rule 163(A), PT-52D.) Assumes that 25% of the 7% reduction of unaccounted for water will result in real water savings in 2010, 50% in 2011 and 90% beginning in 2012.  
<sup>5</sup> CAW-044  
<sup>6</sup> Average use for 10 year period of Water Year 1997 through Water Year 2007 from MPWMD DF-3.

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**PROOF OF SERVICE**

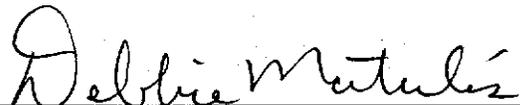
I, Debbie Matulis, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 16<sup>th</sup> Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, I served the within document:

**DIVISION OF WATER RIGHTS PROSECUTION TEAM'S**

**REPLY TO CLOSING BRIEFS**

X	<b>BY PERSONAL DELIVERY:</b> I caused a true and correct copy of the document(s) to be personally served on Paul Murphy, Hearings Unit, Division of Water Rights on Monday, November 10, 2008, before 5 p.m.
X	<b>BY ELECTRONIC MAIL:</b> I caused a true and correct copy of the document(s) to be transmitted by electronic mail compliant with section 1010.6 of the California Code of Civil Procedure to the person(s) as shown on attached Service List, to any party who has consented to email service..
X	<b>BY FIRST CLASS MAIL TO ALL PARTIES LISTED:</b> I am readily familiar with my employer's practice for the collection and processing of mail. Under that practice, envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service by placing a true copy thereof in separate, sealed envelopes. See attached Service List, to any party who has not consented to email service.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on November 10, 2008 at Sacramento, California.

  
\_\_\_\_\_  
Debbie Matulis

**DIVISION OF WATER RIGHTS PROSECUTION TEAM'S**

**SERVICE LIST OF PARTICIPANTS**

**(PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS  
AND OTHER DOCUMENTS.)**

**(Note: The participants whose E-mail addresses are listed below agreed to accept  
electronic service, pursuant to the rules specified in the hearing notice.)**

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