

BEFORE THE

STATE WATER RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

In re Petition of Southern California Water )  
Company to Revise the Declaration of Fully ) Closing Brief for the Bureau of  
Appropriated Stream Systems Regarding the ) Reclamation  
American River, Sacramento County )  
\_\_\_\_\_ )

INTRODUCTION

By letter dated April 26, 2002, Hearing Officer Peter Silva advised the parties to this proceeding:

“For purposes of this proceeding, a finding that water is available simply refers to whether there is new water, different from the water understood to be available when the orders that are the basis for the listing of the stream on the Declaration were issued. Put another way, it means only that water is available that was not taken into consideration when it was originally determined that the river was fully appropriated. It does not rule out the possibility that the river could be

determined to be fully appropriated for other reasons or as a result of other developments that occurred since the orders were issued. A conclusion in this proceeding that water is available does not amount to a determination that water is “available for appropriation” consistent with Water Code sections 1243 and 1375, subdivision (d), for water proposed to be diverted under a water right application processed by the SWRCB. This proceeding does not reach the merits of an application, including whether any “new” water identified in this proceeding is required to go to senior water users, or for environmental purposes.”

However, the Bureau of Reclamation was permitted to present testimony and evidence, during the May 31, 2002 hearing, to support its contention that this Board should not revise SWRCB Orders 89-25 and 98-08 declaring the American River system to be fully appropriated (Declaration) so it can accept and process the water right application filed by Southern California Water Company (SCWC) for a permit allowing it to divert from the American River the groundwater Aerojet-General Corporation (Aerojet) extracts, treats and discharges into the American River through Buffalo Creek (treated groundwater) because the treated groundwater is not unappropriated water in the American River system during the season of diversion specified in SCWC’s water right application. See Key Issues identified on page 4 of the *Notice of Pre-Hearing Conference, Public Hearing and Petition to Revise Declaration of Fully Appropriated Stream Systems Regarding the American River, Sacramento County*, dated March 6, 2002 (Notice). Likewise, Sacramento County/Sacramento County Water Agency (Sacramento County) was permitted to present testimony and evidence, during the June 13, 2002 hearing, to support its contention that the SWRCB should not revise the Declaration because the treated

groundwater Aerojet discharges into Buffalo Creek retains its character as groundwater even after it is discharged into the American River. To assure that we are not deprived of the opportunity to present legal arguments to support Reclamation's above-described contention and to refute Sacramento County's above described contention, we are presenting those legal arguments in this brief.

#### TESTIMONY AND EXHIBITS

During the May 31, 2002 hearing, to support its allegation that the treated groundwater should be considered "new water" that it should be permitted appropriate for diversion from the American River, SCWC presented testimony and exhibits to support its allegation that 98% of the groundwater extracted is "nontributary" to Buffalo Creek and/or the American River. The Bureau of Reclamation then presented testimony and exhibits to support its allegation that even if the treated groundwater is deemed to be "new water", the SWRCB should not revise the Declaration, thereby allowing it to accept and process SCWC's water right application, because the "new water" is needed to enable the existing water right holders on the American River to fully exercise their respective water rights. During the June 23, 2002 hearing, Aerojet presented testimony and exhibits to further support its and SCWC's allegation that the treated groundwater is "new water". The Department of Fish and Game then presented testimony and exhibits to support its allegation that the treated water is not "new water" because the groundwater basin from which it is extracted and the water flowing in the American River are hydrologically connected. Sacramento County/Sacramento County Water Agency then presented testimony and

exhibits to support its allegation that the Declaration should not be revised because the treated groundwater retains its character as groundwater, even after it is discharged into the American River, thereby depriving the SWRCB of authority to regulate its diversion from the creek the river or any other natural channel into which it flows. Finally, the City of Sacramento presented testimony and exhibits to support its request that the City's water rights on the American River not be adversely affected by whatever determination the SWRCB makes in this proceeding.

## LEGAL ARGUMENTS

Arguments in support of Reclamation's contention that the Board should not revise the Declaration for the purpose of allowing it to accept and process SCWC's water right application because it cannot be shown that the treated groundwater is unappropriated water in the American River

Revising the Declaration for the purpose of allowing the Board to accept and process SCWC's application for a permit to divert the treated groundwater from the American River is pointless unless the Board determines that the treated groundwater is "new water" and that such "new water" is unappropriated during the season in which SCWC wants to divert that water.

Reclamation witness John Renning presented testimony and exhibits revealing that the American River will remain fully appropriated between July 1 and October 1 of each year even after the treated groundwater is added to the natural flow of that River. Hence, if SCWC is granted a permit to divert any of the treated groundwater from the American River, it will be decreasing

the amount of water left available to the existing senior water right holders on the American River. That is precisely the fact situation addressed by the California Supreme Court in Eddy v. Simpson, 3 C. 249 (1853). In that case, the defendant had the exclusive right to divert water from certain creeks, which it allowed to flow into another creek from which the plaintiff was entitled to divert. The Court held that the defendants could not construct a dam on the plaintiff's creek upstream of the plaintiff's dam; thereby obstructing, reducing or otherwise interfering with the plaintiff's exercise of his right to divert from his creek because:

“When the water of Grizzly Cannon and Bloody Run left the possession of the defendants at Cherokee Corral, all right to, and interest in that water was lost by the defendants. I might be made the property of whomever chose to possess it. . . . As defendants had lost all rights in the water, they could have no right to withdraw it from the possession of the plaintiff.”

See also Kelly v. Natomas Water Co., 6 C. 105 (1856) Likewise, in The Butte Canal and Ditch Company v. Vaughn, 11 C., 143 (1858) the California Supreme Court made it very clear that a new appropriator of water cannot interfere with a senior appropriator's exercise of his senior right by stating:

“The first appropriator of the water of a stream . . . has the right to insist that the water be subject to his use and enjoyment to the extent of his original appropriation, and that its quality not be impaired so as to defeat the purpose of the appropriation. In subordination to those rights, subsequent appropriators may make such use of the stream as they think proper . . .”

We respectfully submit that the cases referred to clearly support Reclamation's contention that since SCWC cannot be allowed to divert any of the treated groundwater from the American River, it is pointless to revise the Declaration to allow the Board to process SCWC's application for a water right permit allowing it to make such diversions.

Arguments refuting Sacramento County's contention that the treated groundwater retains its character as groundwater even after it is discharged into the American River through Buffalo Creek.

California Water Code section 1201 provides:

"All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code."

In Chase v. Stevinson, 54 P.2d. 1100 (1936) the California Supreme Court defined the term

"foreign water" to mean

". . . water, not from the natural sources of supply of [a natural channel], but is water which after diversion from another watershed . . . has been recovered and turned into the [natural channel]

at points above the plaintiff's lands".

and went on to hold:

"... there should remain no present doubt that the so-called foreign waters are now subject to appropriation under the laws of this state."

See also Bloss v. Rahilly, 104 P.2d 1049 (1940); Stevens v. Oakdale Irrigation District, 90 P. 2d 58 (1939); Stevinson Water District v. Roduner, 223 P. 2d 209 (1950).

Since we were unable to find any statutes or judicial decisions providing that groundwater pumped or discharged into a river, creek or other natural channel is to be treated differently from surface water that is diverted in one watershed and pumped or discharged into another watershed, we are of the opinion once the treated groundwater is discharged into the American River, it must be considered "foreign water" subject to appropriation in accordance with the applicable provisions of the California Water Code.. That means that the treated groundwater must be diverted from the American River pursuant to a water right permit issued by the Board and such a permit can be issued only if the water is found to be unappropriated during the requested season of diversion.. If the Board accepts Sacramento County's assertion that the treated groundwater retains its character as groundwater even after it is discharged into Buffalo Creek and ultimately the American River, the only individuals and entities who could divert, or allow others to divert, the treated groundwater are the owners of the lands overlying the basin from which the treated groundwater is extracted. Furthermore, those individuals and entities could divert, or allow

others to divert, the treated groundwater from any natural channel into which it ultimately flows absent any regulation by the Board.

Finally, we got the impression from Sacramento County's cross-examination of Reclamation's witness and its attorney's opening statement that Sacramento County is of the further opinion that the treated groundwater cannot be considered "foreign water" because it has not been "abandoned". Abandoned by whom? Aerojet, not Sacramento County, is the entity that is extracting, treating and discharging the groundwater into the American River and Aerojet has not expressed any intent to use the treated groundwater after it discharged into Buffalo Creek. and then the American River. Consequently, we are of the opinion that the treated groundwater is properly deemed abandoned by Aerojet when it is discharged into Buffalo Creek.

////

////

////

////

////

////

////

////



CONCLUSION

For the reasons presented above, we respectfully request that the Board: (1) accept Reclamation's contention that the Board not revise the Declaration because the treated groundwater is not unappropriated water in the American River; and (2) reject Sacramento County's contention that the treated groundwater retains its character as groundwater even after it is discharged into Buffalo Creek

DATE: *August 2, 2002*

*James E. Turner*  
\_\_\_\_\_  
James E., Turner

Assistant Regional Solicitor