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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF MONTEREY**
10

11 CALIFORNIA AMERICAN WATER,

12 Plaintiff,

13 v.

14 CITY OF SEASIDE, et al.,

15 Defendants.

16
17 MONTEREY PENINSULA WATER
MANAGEMENT DISTRICT,

18 Intervenor.

19
20 MONTEREY COUNTY WATER
RESOURCES AGENCY,

21 Intervenor.

22
23 AND RELATED CROSS ACTIONS.
24
25
26
27
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Case No. M66343

**DEFENDANT CITY OF SEASIDE'S
NOTICE OF MOTION AND MOTION
FOR APPROVAL OF IN LIEU
GROUNDWATER STORAGE
PROGRAM**

Assigned for All Purposes to the Honorable
Robert O'Farrell, Ret.

Action Filed: August 14, 2003

Hearing: October 25, 2019, 1:30 p.m.

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that Defendant City of Seaside hereby moves for an order of
3 the Court approving an in lieu groundwater storage program ("Motion"). This Motion is based
4 upon this notice, the attached memorandum of points and authorities, the attached request for
5 judicial notice, the attached proposed order, all other papers submitted in this action, and upon
6 any other argument or evidence that may be presented at or before the hearing on this Motion.

7 PLEASE TAKE FURTHER NOTICE that the Motion will be heard on October 25, 2019 at
8 1:30 p.m. before The Honorable Robert O'Farrell, Ret. at the Monterey Superior Court,
9 Department 13, located at 1200 Aguajito Road, Monterey, CA 93940.

10
11 Dated: September 4, 2019

RUSSELL MCGLOTHLIN
KATHERINE TAKAKJIAN
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14
15 By: 

Russell McGlothlin
Attorneys for Defendant

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant, City of Seaside (“City”) applied to the Watermaster of the Seaside
4 Groundwater Basin for an in lieu storage program that will promote the maximum beneficial use
5 of recycled water. The proposed program would substitute recycled water in lieu of the current
6 use of approximately 450 acre feet per year (“AFY”) of groundwater produced from the Seaside
7 Groundwater Basin, for irrigation of the City’s Bayonet and Blackhorse Golf Courses. After
8 review of the application, the Watermaster determined that the Decision was unclear as to
9 whether the Watermaster possesses the authority to approve the proposed in lieu storage program
10 and instructed the City to file this Motion for the Court’s consideration of this matter. By this
11 Motion, the City seeks the Court’s direction to the Watermaster respecting approval of the
12 proposed in lieu storage program.

13 **II. BACKGROUND**

14 Seaside Groundwater Basin (“Basin”) is located in northern coastal Monterey County. It
15 underlies the Cities of Seaside, Sand City, Del Rey Oaks, Monterey, and portions of
16 unincorporated county areas, including the southern portions of the former Fort Ord and the
17 Laguna Seca Area. The Basin contains 52,030 acre-feet of usable storage, and is one of
18 approximately two dozen groundwater basins in California that have been adjudicated by the
19 courts and are now subject to judicial management. On February 9, 2007, Judge Randall entered
20 the amended decision (“Decision”) governing water rights in the Basin. The Decision:

- 21 • calculates the “safe yield” of the Basin;
- 22 • implements a series of 10% triennial rampdowns in allowed annual production
23 until the total Basin production is no more than the natural safe yield;
- 24 • allocates the allowed annual production between the parties;
- 25 • establishes two “classes” of adjudicated production rights:
 - 26 ○ Standard Production Allocation (“SPA”), which generally reflects the
27 characteristics of an *appropriative* groundwater right under the common
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law; and

- Alternative Production Allocation (“APA”), which generally reflects the characteristics of an *overlying* groundwater right under the common law;
- allows for groundwater replenishment and storage;
- permits “carryover” of unused SPA from year to year;
- allows for transfers of SPA;
- establishes the Seaside Groundwater Basin Watermaster to assist in the implementation of the Decision and the management of the Basin;
- requires the Watermaster to assess administrative budget and replenishment assessments to finance its administrative activities and Basin replenishment; and
- reserves continuing jurisdiction to the Court to modify the Decision as appropriate and to resolve any disputes.

The Decision continues to control today.

The City is a general law city situated in the County of Monterey. The City produces groundwater from the Basin for two primary purposes: (1) the provision of municipal water service to its residents, and (2) use on two City-owned golf courses—the Bayonet and Blackhorse Golf Courses (“the Courses”)—that overlie the Basin. (*See* Cal. Const., Art. XI, § 9; Gov. Code, § 38730.) As one of the parties to the Decision, the City has both APA and SPA. The City’s SPA applies to its municipal system, while its APA is appurtenant to the Courses. In 2010, a Declaration by the Watermaster allotted the City a maximum storage amount of 2,361 acre-feet in the Basin, roughly 7.4% of the Basin’s total usable storage allocation. (*See* Exhibit A to the Declaration of Russell McGlothlin accompanying the City’s concurrently filed Request for Judicial Notice.)

Pursuant to the terms of the Decision, on June 5, 2019, the City submitted to the Watermaster an application for execution of a Storage and Recovery Agreement for the proposed in lieu storage program (“Program”) pursuant to Section III.3.L.3.j.xix of the Decision. The application was subsequently reviewed by the Watermaster at its regular board meeting on

1 August 7, 2019. The proposed Program will substitute recycled water, purchased from Marina
2 Coast Water District (“MCWD”), for irrigation of the Courses in lieu of the current use of
3 approximately 450 AFY of groundwater produced from the Basin. This substitution will achieve
4 replenishment and storage of water in the Basin. Under the terms of the Program, delivery of
5 recycled water to the Courses will be metered and reported to the Watermaster on a schedule and
6 pursuant to appropriate terms to be set forth in the storage and recovery agreement. The quantity
7 of recycled water applied annually at the Courses will establish the amount of water “stored”
8 annually in the Basin via in lieu storage.

9 Stored water will be recaptured by the City at its Well Number 4 (or a future planned
10 replacement for this well), and subsequently be used to serve anticipated projects, such as the
11 Campus Town and Main Gate projects, for which there is presently insufficient allocation.¹ The
12 Program will also allow the City to recover some of the stored water to serve the City’s municipal
13 water system. This will offset demand exceedances in excess of the City’s SPA for its municipal
14 system resulting from the rampdown in SPA pursuant to the Decision’s provisions.

15 The Watermaster’s board considered the City’s application for the Program at its August
16 7, 2019 board meeting. The board was generally supportive of the Program, but concluded that
17 the Decision is unclear as to whether it authorizes the Watermaster to approve the Program. It
18 thus instructed the City to bring this Motion for consideration of the application by the Court. At
19 the board’s direction, Watermaster staff also prepared a letter addressed to the Court discussing
20 the matter. Watermaster staff instructed the City to include the letter with this Motion. A true and
21 correct copy of that letter is attached as Exhibit B to the Declaration of Russell McGlothlin
22 accompanying the City’s concurrently filed Request for Judicial Notice.

23 **III. ARGUMENT**

24 If approved, the Program will positively affect the City, its residents, the Basin, and the
25 environment. As discussed in more detail below, approval of the Motion is supported by sound
26 legal precedent and policy. The proposed Program is in accord with the terms of the Decision and
27

28 ¹ Pursuant to the Fort Ord Reuse Authority’s water allocation program.

1 conforms to the Golden Rule of California water law and policy: “that the water resources of the
2 State be put to beneficial use to the fullest extent of which they are capable, and that the waste or
3 unreasonable use or unreasonable method of use of water be prevented.” (Cal. Const. Art. X, § 2.)

4 **A. The Program Is Consistent with the Terms of the Decision.**

5 *a. The City Has a Right to Store Water in the Basin.*

6 In the Watermaster’s Declaration of Total Usable Storage Space (February 3, 2010), the
7 City was granted 2,361 acre-feet of storage in the Basin. This storage space is a derivative of the
8 City’s SPA. But as a public agency, the City need not rely on that allocation alone to make use of
9 storage space in the Basin for public purposes. Section III.H.1 of the Decision provides that
10 “Underground Storage within the Seaside Basin is and shall remain a public resource.”² Public
11 agencies—like the City—have the right to store water by “Direct Injection, Spreading, or other
12 artificial means.” (Decision, Section III.H.6.) The City therefore has a right to make use of
13 unused storage space within the Basin for public purposes. It seeks to assert this right through in
14 lieu substitution of recycled water for an existing non-potable use of potable groundwater. While
15 this substitution happens to be on City-owned golf courses, the City could do a similar
16 substitution of *any* non-potable demand as a means of establishing in lieu storage.

17 California courts have long recognized the public nature of subterranean storage space and
18 the right of public agencies to make use of such storage space for the public welfare. (*See e.g.*,
19 *Niles Sand & Gravel Co. v. Alameda County Water Dist.* (1974) 37 Cal.App.3d 924, 933-934
20 [discussing a public servitude applicable to storage space]; *see also Central and West Basin*
21 *Water Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, 904-905
22 [explaining that underground storage space is a public resource and that California Constitutional
23 policy requires it be put to use for the public welfare]; *accord Hillside Memorial Park &*
24 *Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th 534, 539-540.)

25
26 ² The Decision’s statement that “subsurface storage space is a public resource is amply
27 supported by the Constitution and Water Code.” (*See Central and West Basin Water*
Replenishment Dist. v. Southern Cal. Water Co. (2003) 109 Cal.App.4th 891, 905.)

1 The City is *not* requesting to use its APA as a basis for its proposed storage program.³ Nor
2 is the City seeking to transfer the APA associated with the Courses for use on another property.
3 Such endeavors would be barred by Sections III.A.35 and III.B.3.a of the Decision, respectively.
4 Rather, the City *is* entitled to store water in the Basin both in relation to its express storage
5 allocation of 2,361 acre-feet, and generally as a public agency, making use of public groundwater
6 storage resources. The Courses will only serve as a means of introducing recycled water into the
7 Basin through in lieu storage methods. Under the Program, the City’s APA will remain
8 appurtenant to the Courses.

9 *b. The Decision Does Not Require the City to Convert Its APA to SPA to*
10 *Undertake In Lieu Storage.*

11 Some may read the Decision and conclude that the City should be required to convert its
12 APA (currently appurtenant to the Courses) into SPA to facilitate the Program. Section III.B.3.e
13 of the Decision allows a pumper to convert APA to SPA and thereafter transfer the new SPA
14 away from the property to which the APA was initially allocated. Once converted, the new SPA
15 is subject to all rampdowns, which will amount to a greater than a 50% reduction when the final
16 triennial rampdown goes into effect in 2021. The City, though, is not proposing to convert its
17 APA to SPA and transfer the SPA. It intends to leave the APA appurtenant to the property and
18 substitute recycled water for the exercise of the APA. Consequently, the City will store water, the
19 Basin will benefit from the higher water levels for so long as the stored water remains in the
20 Basin, and a non-potable demand will switch from potable groundwater to recycled supplies, all
21 consistent with water management policy. The stored water credited to the City would also be
22 consistent with the developed water doctrine; that is, a party responsible for introducing new
23 water to a groundwater basin has an exclusive right to recover the augmented and recoverable
24 yield attributable to their actions—i.e., a fruits-of-one’s-labor standard. (*See City of Los Angeles*
25 *v. City of San Fernando* (1975) 14 Cal.3d 199, 256-262; *City of Santa Maria v. Adam* (2012) 211
26 Cal.App.4th 266, 301; 304-307.)

27 _____
28 ³ The Decision allocates storage rights only to SPA producers.

1 The City acknowledges that Section III.B.3.d of the Decision creates some ambiguity in
2 relation to the City’s proposed Program. That section provides:

3 In the event a Party electing the Alternative Production Allocation is required to utilize
4 reclaimed Water for irrigation purposes, pursuant to the terms of sections 13550 and
5 13551 of the California Water Code, that Party shall have the first opportunity to
6 obtain and substitute reclaimed Water for its irrigation demands. Should that Party not
7 pursue such substitution with due diligence, any other Party may provide reclaimed
8 Water for the irrigation purpose pursuant to the terms of sections 13550 and 13551 of
9 the California Water Code. Under either circumstance, the Party providing the
10 reclaimed Water for substitution shall obtain a credit to Produce an amount of
11 Groundwater equal to the amount of substituted reclaimed Water in that particular
12 Water Year, *provided that such credit shall be reduced proportionately to all*
13 *reductions in the Operating Yield in accordance with Section III.L.3.j.ii.* The
14 Alternative Production Allocation of the Party utilizing the reclaimed Water shall be
15 debited in an amount equal to the reclaimed Water being substituted. (emphasis
16 added.)

17 This section provides that the party substituting recycled water for a non-potable demand,
18 consistent with statutory requirements, will be credited with a production amount equivalent to
19 the amount of the substitution. The section also provides, however, that the credit will be reduced
20 proportionately to all rampdown then in effect. The reduction requirement mirrors the APA-to-
21 SPA conversion provisions in Section III.B.3.e., which immediately follows in the Decision. That
22 is, if APA is stripped from the appurtenant parcel for use elsewhere, the use becomes akin to an
23 appropriative groundwater right, which is junior in priority to overlying rights,⁴ and thus is
24 properly burdened by necessary rampdowns in basin yield. The “credit” afforded to a party
25 substituting recycled water, however, is not like an APA-to-SPA conversion (i.e., a conversion of
26 an overlying right to an appropriative right). Instead, the credit is akin to a *developed* water right
27 credited to a party introducing new water to the basin that would not exist but for the party’s
28 actions. As noted above, a developed water right is properly quantified by the amount of
augmented and recoverable yield attributable to such efforts. (See *San Fernando*, 14 Cal.3d at
256-262; *Santa Maria*, 211 Cal.App.4th at 301; 304-307.)

Again, the City is not proposing to convert its APA to SPA; the APA will remain
appurtenant to the golf course parcels. It just substituting existing potable groundwater

⁴ See *City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1241.

1 production to create stored water. Consistent with the policies inherent in the developed water
2 doctrine, the City should receive the full fruits of its labor; the stored water credit should equal
3 the amount of the augmented and recoverable yield.

4 **B. The Program Is Consistent with California Policy.**

5 a. *California Encourages the “Conjunctive Use” of Surface Water and*
6 *Groundwater Resources.*

7 Conjunctive use is the coordinated use of surface water (including recycled water) and
8 groundwater resources to optimize water supply management and benefits. Conjunctive use
9 allows entities to maximize the utility from a portfolio of water resources. The California Water
10 Code proclaims that it is state policy to “encourage conjunctive use of surface water and
11 groundwater supplies . . .” (Wat. Code § 1011.5.) The Program is a prime example of conjunctive
12 use; it utilizes recycled water and in lieu storage to allow the City to accumulate stored water in
13 the Basin, which will in turn benefit the Basin and the water supplies of the City.

14 b. *California Encourages the Use of Recycled Water for Non-Potable Uses.*

15 California policy encourages the use of recycled water because it maximizes the beneficial
16 use of the state’s water resources. (*See* Cal. Const. Art. X, § 2; Wat. Code § 100; *see also* Wat.
17 Code § 275.) Indeed, the California Legislature has declared that, when recycled water is
18 available, using *potable* water for *non-potable* uses “is a waste and unreasonable use of water
19 within the meaning of Section 2 of Article X of the California Constitution.” (*See* Wat. Code §
20 13550.) To further its policy of promoting the maximum beneficial use of recycled water for non-
21 potable uses, the Legislature enacted the Water Recycling Law (Wat. Code §§ 13500-13557) and
22 the Water Recycling Act of 1991 (Wat. Code §§ 13575-13583). The former includes policies
23 promoting the use of recycled water to supplement water supplies, while the latter encourages the
24 formation of recycled water delivery agreements and mandates the use of recycled water when
25 available.⁵ Given the unprecedented water crisis facing the state, California has adopted policies

26 ⁵ S. Hastings and D. Johnson, *Municipal Water Reuse In An Increasing Complex Regulatory*
27 *Environment* (May 4, 2018) p. 6, at <https://www.cacities.org/Resources-Documents/Member->
28

1 to promote and increase the use of recycled water; this includes a goal to substitute “as much
2 recycled water for potable water as possible by 2030.”⁶ The Program promotes these policies.

3 c. *In Lieu Storage Is a Preferred Method of Groundwater Replenishment.*

4 In lieu storage is a common means of recharging groundwater with surface supplies for
5 conjunctive use. In lieu storage occurs when a non-native water supply is substituted for the use
6 of native groundwater production. In lieu storage accomplishes two key objectives: (1) it avoids
7 the necessity of creating or using infrastructure to inject or spread water for replenishment, and
8 (2) it avoids any necessary treatment prior to said injection or spreading.⁷ The California
9 Department of Water Resources recognizes the benefits achieved from groundwater
10 replenishment “through in-lieu recharge when recycled water replaces source water supplied by
11 groundwater.”⁸

12 **C. Alternative Storage Options Do Not Achieve Maximum Beneficial Use and**
13 **Would Cause Adverse Results.**

14 If the Program is not approved, the City will be forced to pursue other storage options.
15 One option would be *direct* injection and recovery of water through an aquifer storage and
16 recovery well (“ASR Well”). A direct injection project would make use of the City’s dedicated
17 storage space in the same manner as previously authorized by the Watermaster on behalf of
18 Plaintiff, California American Water Company. (See Exhibit C to the Declaration of Russell

19 _____
20 [Engagement/Professional-Departments/City-Attorneys/Library/2018/Spring-Conference-2018/5-2018-Spring;-Hastings-Johnson-Municipal-Water-Re.aspx](#) [as of Aug. 14, 2019].

21 ⁶ Cal. State Water Resources Control Board, Recycled Water Policy (May 21, 2009), at
22 [https://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/docs/finalapprov
edpolicy_020309.pdf](https://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/docs/finalapprov
edpolicy_020309.pdf) [as of August 21, 2019].

23 ⁷ The method of replenishment directly impacts the requirements for water quality for storage
24 of surface water underground. “[A]n in-lieu project may only need to consider the willingness of
25 users to accept the quality of water from a surface water project, while a project that proposes to
26 inject surface water directly into an aquifer may be required to meet stricter water quality
27 standards.” (Cal. Dept. of Water Resources, Water Available for Replenishment - Final Report,
28 Appendix C (April 2018) p. 7, at [https://water.ca.gov/-/media/DWR-Website/Web-
Pages/Programs/Groundwater-Management/Data-and-Tools/Files/Statewide-
Reports/WAFR/Final/Appendix-C-for-Water-Available-for-Replenishment---Final-Report.pdf](https://water.ca.gov/-/media/DWR-Website/Web-
Pages/Programs/Groundwater-Management/Data-and-Tools/Files/Statewide-
Reports/WAFR/Final/Appendix-C-for-Water-Available-for-Replenishment---Final-Report.pdf) [as
of Aug. 14, 2019] (hereafter Water Available For Replenishment).)

⁸ Water Available for Replenishment, *supra* n.7 at p. 35.

1 McGlothlin accompanying the City’s concurrently filed Request for Judicial Notice.) Such a
2 program, however, would require the City to spend several million dollars to construct an ASR
3 Well. Such use of public funds would be strikingly wasteful given the readily available alternative
4 means to undertake storage of the recycled water through in lieu means. The physical
5 construction of an ASR Well could also have a negative environmental impact in relation to the
6 drilling, land use, power, and other consumptive behaviors required to artificially inject water into
7 the Basin.

8 Further, if the City were precluded from engaging in in lieu storage as proposed, the City
9 would continue to use potable groundwater to irrigate the Courses. This result would contravene
10 state policy that encourages maximum use of recycled water and the California Constitutional
11 policy of achieving optimal utility from available water resources. (*See supra* pp. 7-8; Cal. Const.
12 Art. X, § 2.) The same would likely be the result if the Program were approved, but the City were
13 required to incur the reductions resulting from an APA-to-SPA conversion. Such outcome would
14 effectively more than double the cost of recycled water to create an acre-foot of stored water and
15 the City would obtain less than half of the benefits. Under such circumstances, the financial and
16 water supply consequences would force the City to pursue direct injection instead of in lieu
17 replenishment as proposed. Given that the Basin is not harmed in any way from an in lieu
18 approach in comparison to a direct injection approach, it would be unjust and counter to sound
19 policy to require an APA-to-SPA conversion and the resulting reduction.

20 The Court should avoid an interpretation of the Decision that yields such
21 counterproductive results. In the alternative, if the Court were to interpret the Decision to
22 preclude approval of the Program, in the interest of advancing the public policies discussed
23 herein, the Court should exercise its continuing jurisdiction to amend the Decision so that the
24 Program may be approved as proposed. (Decision, Section III.O.1.A [authorizing the Court to
25 “modify, amend or amplify any of the provisions of this Decision”].)

26 **IV. CONCLUSION**

27 By its application, the City has proposed an in lieu storage program that is consistent with
28

1 the Decision and responsible water management. In simplest terms, the Program:

- 2 • is permitted under the terms of the Decision as a use of public groundwater storage
- 3 resources by a public agency for public benefit;
- 4 • leaves the City's APA appurtenant to the Courses (i.e., does not seek to transfer
- 5 the APA);
- 6 • does not require the City to convert its APA to SPA;
- 7 • does not rely on APA as a basis for storage inconsistent with the Decision;
- 8 • promotes conjunctive use and the use of recycled water for a non-potable use in
- 9 accordance with California policy;
- 10 • avoids the continued use of potable water for the irrigation of non-potable
- 11 demands on the Courses;
- 12 • weighs favorably considered against all alternative options;
- 13 • avoids unnecessary expenditures of scarce public funds;
- 14 • preserves environmental resources;
- 15 • allows the City to accumulate stored water in the Basin; and
- 16 • facilitates the City's land use and water planning goals.

17 For these reasons, the City urges the Court to approve this Motion.

18
19 Dated: September 4, 2019

RUSSELL MCGLOTHLIN
KATHERINE TAKAKJIAN
O'MELVENY & MYERS LLP

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By: 

Russell McGlothlin
Attorneys for Defendant