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## Valencia Water Company's Status Becomes a Newhall Ranch Football

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By Martha Bridegam on 1 June 2015 - 8:31pm

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The longtime battle over Newhall Ranch has spilled into unusual legal territory with a fight over the status of the private water company that would likely serve the development project.

Uniquely, the Valencia Water Company (VWC) may be California's only active large-scale water provider that is neither public, nor mutual, nor regulated as a private entity by the California Public Utilities Commission (CPUC).

VWC still supplies water day by day to some 31,000 existing hookups serving about 120,000 people in the Santa Clarita Valley of Los Angeles County. But legally VWC has been in an odd state of existence for a little over a year. Opinions differ whether VWC is public or private, what rules apply to its continued operation, and even by what right it operates at all.

A former subsidiary of the Newhall Land and Farming Company, VWC was purchased in 2012 by the Castaic Lake Water Agency (CLWA) in a settlement of an eminent domain action. Local environmental groups promptly challenged the purchase. In February 2014, the CPUC [ruled](#) that the cordial \$73 million settlement -- which it termed a "consensual condemnation" -- meant VWC was no longer a "private corporation" eligible for CPUC regulation. The ruling canceled VWC's certificate of public convenience and necessity. This March, however, a county judge rejected a parallel challenge to VWC's current status, contradicting the CPUC's position. That ruling is on appeal.

Many of the challengers have spent decades opposing the Newhall Ranch project -- the proposed development by the Newhall Land and Farming Company that, per current plans, would build nearly 20,000 new residential units in the Santa Clarita Valley of Los Angeles County. VWC is envisioned as the water provider for the Newhall Ranch project. CLWA's general manager, Dan Masnada, formerly served as general manager of VWC for the development company.

Santa Clarita Organization for Planning and the Environment (SCOPE), a longtime leading environmental group in the area, first challenged the VWC purchase with a [CPUC complaint](#) in

2012. It alleged the whole purchase was improper and that the deal included an "apparent prejudicial preference to [the] former parent company promised by a regulated utility" through terms in a purchase contract prior to the transfer of ownership. It said the CPUC previously required VWC to file a new Water Management Plan before supplying water to the Newhall Ranch and to serve old and new customers fairly -- but that Article VI of the [agreement](#) nevertheless promised actions that would help protect water supplies for the development.

Masnada, with exasperation, described SCOPE and its ally Friends of the Santa Clara River as "trying to dictate land use planning in northern L.A. County" by "trying to keep us from augmenting our water supplies." But from the environmental groups' perspective the Valley's resources are already stretched thin, and the Newhall Ranch proposal is the biggest demand placed on them. SCOPE president Lynne Plambeck wrote that she was "frankly tired of being accused of trying to stop growth every time we demand good planning that is common practice in many other parts of the state or any time we demand that laws be followed as is required of most people and most developers."

Parties on all sides said they would like to see Valencia Water become public -- but they have different ideas of what "public" should mean, and for the present the company's unusual private status is jammed in place by the dispute itself.

## **Valley of Litigation**

The legal fronts in the war over Santa Clarita Valley real estate development seem endless.

As recounted in *CP&DR's* [January coverage](#), one case in the multipart Newhall Ranch litigation is [awaiting an oral argument date](#) before the California Supreme Court, on issues that significantly include greenhouse gas reduction rules under AB 32. As also [reported in January](#), SCOPE and other groups are separately challenging the plan's Landmark Village and Mission Village phases, and have sued over federal agencies' environmental resource reviews.

On April 21, 2015, the Second District Court of Appeal, Fifth Division, [issued an unpublished ruling](#) that upheld the Landmark Village environmental impact report (EIR) -- a decision welcomed by Newhall Land and Farming. Plambeck said this newer ruling raised emissions issues similar to those before the state Supreme Court. In late May, SCOPE asked the Supreme Court to review this new decision as well.

Yet another front may be about to open. In early June, Los Angeles County Regional Planning was about to hold an introductory public hearing on a third Newhall Ranch development phase, 1,574-unit Entrada South, which is queued in the planning process behind Landmark and Mission Villages.

A separate dispute over a landfill expansion is further testing whether the valley can or should

accommodate more new residents and businesses.

## **Focus on the Water Fight**

This spring, however, the VWC dispute seems the most active front, or at least the most innovative one, in the Santa Clarita Valley land-use war.

Last year after the CPUC decision, a statement from the Newhall County Water District (NCWD), where Plambeck is one of five board members, called the resulting lack of either CPUC regulation or a public board of directors "taxation without representation."

On March 10, 2015, however, Judge Robert H. O'Brien of the Los Angeles Superior Court disagreed with a complaint by SCOPE, [ruling that the purchase was legal](#) and that VWC continued to exist as a private entity distinct from CLWA.

Although last year's CPUC ruling is currently in effect, the [CPUC case](#) is awaiting a Commission decision whether to grant Newhall Land's request for rehearing. SCOPE [appealed the March Superior Court decision](#) in May. A parallel court challenge by NCWD to the VWC purchase is still pending.

Plambeck argued there was no legal provision available for a private entity to sell water without being regulated by the CPUC. She said water sellers can be municipal agencies, mutual water districts, county waterworks, state-established agencies like CLWA, or CPUC-regulated private entities -- yet VWC is now none of those. She wrote, "Their action is illegal. They are operating illegally. There is no structure in California law to permit them to operate as they are operating. They are cowboy outlaws."

But Ed Casey of Alston & Bird, an attorney for VWC, said, "Every private water company has the authority to sell water in the state of California. Simply because it's not subject to the PUC's regulatory requirements doesn't mean it doesn't have the legal right to sell water and if somebody wants to show me a legal argument to the contrary I would like to hear it."

In the Superior Court lawsuit leading to the March ruling, SCOPE had argued CLWA's purchase of VWC was improper in part because, as a legislatively created wholesaler of water from the State Water Project (SWP), CLWA lacked authority to sell water at retail except within boundaries specified by its authorizing legislation.

The boundaries in question were defined in AB 134 of the 2001-02 session, which was a legislative response to a similar dispute following CLWA's 1999 purchase and absorption of the Santa Clarita Water Company (now CLWA's Santa Clarita Water Division).

AB 134 was approved amid litigation, brought by Plambeck among others, over the propriety of

the 1999 purchase, principally in *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal. App. 4th 987 (*Klajic I*) and *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal. App. 4th 5. (*Klajic II*).

In his recent March decision, Judge O'Brien found CLWA's purchase of VWC was not blocked by Article XVI, § 17 of the California Constitution, which allows public entities to acquire stock of "any mutual water company or corporation" in order to supply water. He found *Klajic I* "did not decide the constitutionality of the Agency's acquisition of a company other than a mutual water company," and hence did not settle whether the words "...or corporation" included VWC. On that issue, he flatly contradicted the Public Utilities Commission's 2014 decision -- which, drawing on legislative history, had found § 17 gave permission only for public entities to purchase not-for-profit mutual water companies. O'Brien wrote that the CPUC reasoning was not binding -- and instead he held as a matter of statutory construction that the VWC purchase was allowed.

Further, O'Brien held there was no barrier to CLWA's ownership of VWC under § 12944.7 of the state Water Code, which provides that if an agency is restricted by its authorizing legislation to wholesale distribution of water -- and CLWA is under that restriction in the VWC service area -- then the only way it can sell water at retail is under a written contract with a CPUC-regulated water corporation providing retail service to the area in question.

O'Brien agreed with CLWA that it was not acting through VWC, only owning it. The five directors on Valencia's board consist of Masnada, CLWA's administrative services manager, the retail manager of the Santa Clarita water division, and VWC's general manager and vice president. But O'Brien found the operations were not sufficiently merged to justify SCOPE's "alter ego" allegations.

Water is, however, conveyed from CLWA to VWC. Masnada wrote that CLWA received 33,875 acre feet (AF) of imported water in 2014, consisting of 451 AF of currently contracted SWP water, "7,746 AF of SWP 'carryover' from prior years and most if not all of the roughly 14,000 AF extracted from our banking programs." (CLWA owns water banking rights in two storage districts in Kern County.) Of that he wrote that 7,668 AF were delivered to VWC. Meanwhile he wrote that VWC pumped 21,428 AF of groundwater and recycled about 500 AF.

Since VWC occupies the "sweet spot of the aquifer," Masnada said Valencia has been trying to pump more than its share of groundwater to spare the other Santa Clarita Valley retailers, since some wells are going dry at the upward east end of the valley. He wrote that VWC expected to withdraw less water from storage in the current year, when SWP customers have been offered a 20% allocation, and likely would not need stored water at SWP allocations above 25%.

### **What's public now?**

Adding to the uncertainty, earlier this year VWC conducted a ratemaking proceeding in the style of a Proposition 218 governmental process, but continued to assert its private status, both in the

board's [approval resolution](#) and in a separate response to a SCOPE member's public records request.

Casey saw no contradiction: "If there is no alter ego relationship, the identity of the entity that owns Valencia Water Company is irrelevant, which means that Valencia Water Co is not a public agency within the meaning of either Prop 218 or the Public Record Act."

Casey said "Valencia Water Company is subject to the same rules any private entity would be subject to," in that a private corporation must turn over records for reasons such as litigation or subpoenas "but there is no other so-called public disclosure requirement." He said, "We comply with the self-same procedures. If some people like to have more, that's their policy position. But at this point in time there is no legal requirement to do so."

But Casey and Masnada each said VWC voluntarily conducted a public meeting on the ratemaking with opportunities for public comments. Masnada wrote that fewer than 40 protests were filed, so "VWC customers appear to be satisfied with the service they are receiving and, more to the point, don't have the so-called concerns that SCOPE has in regards to acquisition of VWC by CLWA."

Plambeck contended the ratemaking process was improper.

But Casey said, "We decided to follow the PUC process because it was a process and we had been under that process for years and we thought it better to continue that process until some entity, whether it's the court or the PUC, told us that it did not have jurisdiction over us." He said "I don't think it's fair ... to criticize Valencia for what it did, when we tried to promote transparency and receive direct customer input to the board."

### **Are Profits OK?**

The ratemaking procedure surprised Danilo Sanchez, program manager of the water branch for the Office of Ratepayer Advocates (ORA) at the CPUC. Making clear he spoke only for ORA, not for the utilities regulator itself, he said, "They can't be for-profit and not under the Commission's jurisdiction." He said that would be an "unregulated monopoly."

In reading through VWC's posted [rate-setting document](#), he said the water rates were comparatively cheap at lower billing tiers but he was surprised to see projected "returns on equity". He asked, "If they are part of a public agency, should they be for-profit?" Reading through the document, he said, "I've never seen anything like this before."

Regarding the concern Sanchez raised about profits, Casey offered "the same exact response" regarding the irrelevance of the identity of VWC's owner in the absence of an alter ego relationship.

Sanchez further said that in his view the VWC tariff sheets listing water prices would have become invalid 30 days after last year's decision ended CPUC jurisdiction.

## **Future Public Status?**

Masnada treated the separation of the entities as temporary, saying, "Until the litigation is resolved, the utility will continue to operate as a separate corporate entity." Regarding VWC, he said "We would dearly love to take it public." But he suggested SCOPE was "waving the red flag of AB 134" against allowing it to become public. An attorney for CLWA, Jeffrey Dunn of Best Best & Krieger, put it more strongly: "They are trying to stop the public from getting public ownership of a private water company." Dunn said nobody had heard "a rational reason for why somebody would do that, other than that they just want to sue."

From SCOPE's side Plambeck favored a standalone public status for VWC: "It would be wonderful if the (VWC) ratepayers owned their own company and could hold elections." But she opposed its incorporation with CLWA, saying it would create a less accountable "vertical monopoly" between CLWA, as a water wholesaler, and VWC, as a water retailer. She said a public agency is supposed to safeguard the resources and the long-term sustainability of the community, and "what they are doing is directing water to special interests, not protecting the community."

## **Legislative Suspicions**

A side dispute developed this spring when SCOPE questioned whether CLWA could be seeking legislative ratification of its hope to run VWC directly, as happened with AB 134. This year's AB 727 by Assemblymember Scott Wilk, D-Santa Clarita, provides for adjustments to CLWA's enabling legislation. SCOPE especially questioned whether the old AB 134 boundaries that limit retail housing might be expanded by a phrase authorizing activities in groundwater basins "both within and outside the boundaries of the agency." But Wilk's office wrote that he "has made sure since day one that this legislation not improve or alter the issues concerning CLWA ability to provide retail water." And Masnada wrote that "The intent of that language had nothing to do with administration of VWC's groundwater resources on a retail (or any other) basis." Instead he wrote that it had to do with recharging aquifers with recycled and imported water. The bill has been held over until next year.

<b>Attachment</b>	<b>Size</b>
<a href="#">031015 Valencia Water ruling.pdf</a>	418.51 KB

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