

**State Water Resources Control Board
Administrative Hearings Office**

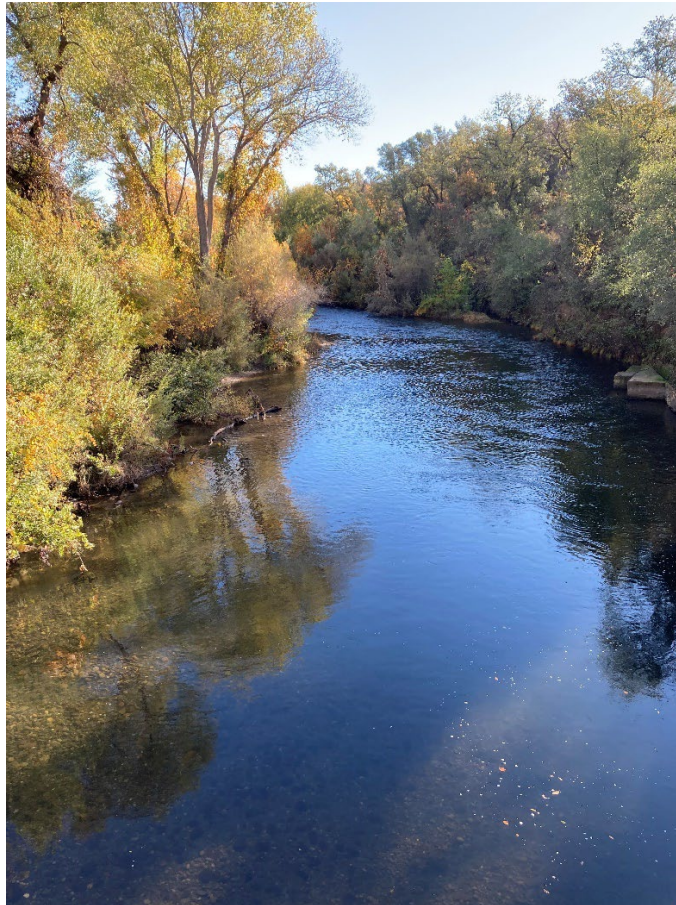
**Report of Investigation of the Tompkins Family Trust's
Claimed Pre-1914 Appropriative Water Right and
Proposed Instream Flow Dedication and Downstream Water Transfer**

Megan Knize, Hearing Officer

Nicole Kuenzi, Presiding Hearing Officer

Alan Lilly, Senior Hearing Officer

Date: May 29, 2024



View from Battle Creek Bridge, facing east, Anderson, CA.
Credit: AHO Staff, Nov. 3, 2021 Site Visit

1.0 INTRODUCTION

In the spring of 2020, the Wildlife Conservation Board (WCB) contacted the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) to inquire whether the Division could investigate the validity and transferability of a claimed pre-1914 appropriative water right of the Tompkins Family Trust (Trust) to divert and use water from Battle Creek in Tehama County. WCB has entered into an agreement to fund a purchase of this claimed water right for an instream flow dedication in Battle Creek and subsequent conveyance of water under the right through the Sacramento River to the Willow Creek Mutual Water Company (WCMWC). WCMWC would divert and convey water through facilities of the Glenn-Colusa Irrigation District for ultimate use on lands within WCMWC's service area and the Sacramento National Wildlife Refuge. The WCB requested the State Water Board's opinions on some questions regarding this proposed dedication and transfer before funding the proposed purchase.

Upon recommendation from the Division, the State Water Board's Executive Director (Executive Director) assigned this investigation to the Administrative Hearings Office (AHO) under Water Code section 1112, subdivision (c)(3). AHO hearing officers have investigated and prepared this report. This report has not been presented, and will not be presented, to the State Water Board for any action.

This report concludes that the Trust probably does not own any pre-1914 appropriative water right to divert or use water from Battle Creek. This is because the Trust's predecessors owned lands that were likely riparian to Battle Creek, and, when they diverted water for irrigation and other uses, they did so under a riparian right and therefore did not perfect any appropriative rights. Thus, when the Tompkins family purchased the land that became the Tompkins Ranch, they did not purchase any valid appropriative right. Alternatively, even if the Trust's predecessors perfected a pre-1914 appropriative water right, the Trust likely forfeited that right through non-use during 2016 and subsequent years. Accordingly, the Trust would not have any pre-1914 appropriative water right to dedicate to instream flows or for downstream diversions or uses.

2.0 BACKGROUND

2.1 Report Background and Purpose

On August 18, 2021, the Executive Director issued a memorandum to the AHO, explaining that the Division had received an inquiry from the WCB about whether Division staff could investigate: (a) the validity of certain water right claims; (b) the amounts of water that could be available for diversion under these claims; and (c) the amounts of water that potentially could be dedicated to instream flows. (2021-08-18 E. Sobeck memo to A. Lilly (Tompkins Family Trust), citing 2021-08-03 E. Ekdahl memo to E. Sobeck (Tompkins Family Trust).)

The WCB asked whether the Division could assess the Tompkins water right claims and investigate related issues. The WCB has entered into an agreement with Trout Unlimited to support the acquisition of a pre-1914 appropriative water right, the dedication of that water right to instream flow in lower Battle Creek, and changes to the right's authorized point of diversion, purpose of use and place of use to provide for downstream diversions and use to enhance wetlands on lands managed as part of the Sacramento National Wildlife Refuge complex. (2021-08-03 E. Ekdahl memo to E. Sobeck (Tompkins Family Trust).)

The Trust claims to own a portion of a 50 cubic feet per second (cfs) pre-1914 appropriative right to divert water from Battle Creek for irrigation purposes. In 1993, the Tompkins family sold to California Department of Fish and Wildlife (CDFW) lands that historically were irrigated with water diverted under this claimed right (Tompkins Ranch). The Trust retained its claimed pre-1914 appropriative water right when it sold these lands and now wants to sell this claimed right to WCMWC for the development of new wetlands and enhancement of existing wetlands in the Sacramento National Wildlife Refuge. (2021-08-03 E. Ekdahl memo to E. Sobeck (Tompkins Family Trust).)

The Executive Director's memorandum asked the AHO to investigate the Trust's pre-1914 water right claims, prepare a report of investigation, and transmit this report to the WCB. (2021-08-18 E. Sobeck memo to A. Lilly (Tompkins Family Trust).) Water Code section 1112, subdivision (c)(3), authorizes a hearing officer from the AHO to perform

additional work, at the Board's request, that includes "overseeing investigations." (Wat. Code, § 1112, subd. (c)(3).) The purpose of this report is to answer the WCB's questions that are listed in the Executive Director's August 18, 2021 memorandum. Following the directions in that memorandum, the AHO has prepared this report as a report of the AHO hearing officers listed on the report cover. The AHO has not presented this report to the State Water Board members at a public meeting for any action by the Board and does not intend to do so. This report is not a precedential water right decision or order. The Board may change the conclusions expressed in this report based on evidence that the AHO had not received as of the date of this report.

2.2 AHO Investigation

On August 27, 2021, AHO Hearing Officer Megan Knize sent representatives of the Trust and other interested parties (Parties) an introductory letter summarizing the Executive Director's referral of this investigation to the AHO.¹ The letter proposed dates for a virtual meeting to discuss the scope of the investigation, the procedure for transmittal of documents to the AHO, timelines, and dates for a site visit. In a subsequent letter, the AHO invited comments on the proposed agenda items.

On September 14, 2021, the AHO met by Zoom teleconference with representatives of CDFW, Trout Unlimited, the Trust, and WCB. The AHO then sent a follow-up letter on September 23 with additional details about the intended process of the AHO's investigation and asked the Parties to provide additional documents related to: (a) the funding for the sale of the claimed water right (grant application and agreements); (b) historical diversions and uses; (c) perfection of the claimed water right; (d) transferability of the claimed water right; (e) past attempts to acquire the claimed water right; and (f) past attempts to sell the claimed water right.

The Trust and WCB provided documents in these categories, and the AHO filed these documents in the AHO's folder within the State Water Board's FTP site. The AHO also filed in its folder on the FTP site the statements of water diversions and use associated

¹ Division staff compiled a list of possible contacts, which the AHO used as a starting point for communications in this investigation.

with this investigation, which the AHO retrieved from the State Water Board's electronic Water Right Information Management System (eWRIMS). Because some of the files for this matter contain sensitive information related to grant funding, the files for this proceeding are in a password-protected folder on the FTP site. The AHO has given each interested party a unique password to upload, view, and download the files.

In a September 23, 2021 letter, the AHO asked questions on which it sought legal briefing from the Parties. These questions were about: (1) the bases on which the Trust claimed that its predecessors had perfected a pre-1914 water right; (2) amounts available for diversion and use at the historical point of diversion at the historical place of use under the claimed right; (3) whether the Trust forfeited its claimed appropriative right because of a period of nonuse beginning in 2016; (4) amounts of the claimed right that could be dedicated to instream flows in Battle Creek and the Sacramento River; (5) amounts of the claimed right that could be diverted at the new point of diversion; and (6) what each party understood would be the process for seeking approval for a change in point of diversion of the claimed right under Water Code section 1707.

On November 3, 2021, AHO staff conducted a site visit of parts of Battle Creek, the historic point of diversion from Battle Creek into the Orwick Ditch, turnouts for delivery of water from the Orwick Ditch to the lands that were formerly the Tompkins Ranch, the historic place of use, the proposed point of diversion at the Glenn-Colusa Irrigation District, and the proposed place of use at the Sacramento National Wildlife Refuge.² Representatives of CDFW, the Orwick family,³ the Trust, WCB, and other interested parties participated in the site visit, although not every person or party attended every part of the visit. WCB and the Trust submitted legal briefs addressing the questions in the AHO's September 23, 2021 letter. On March 4, 2022, the AHO requested clarification about the chain of title for the parcels that made up the former Tompkins

² Documents related to the site visit, including a sign-in list of attendees, photos taken by AHO staff, and the Trust's maps of the proposed place of use, are available in the folder for this investigation on the Water Board's FTP site.

³ The AHO understands that Charles Orwick passed away in late 2021 and at least some of his heirs, identified as the Nipar family, participated in the site visit for this investigation.

Ranch and the claimed pre-1914 appropriative water right. The Trust and WCB responded to this request.⁴

The AHO circulated a draft version of this report to the Parties on June 9, 2022. The AHO invited the Parties to comment on any aspect of this report and to provide additional documentation related to the issues addressed in this report. On August 29, 2022, counsel for WCB and counsel for the Orwick Trust each sent comments on the draft report. On August 31, 2022, Peter Kiel, attorney for the Tompkins Trust, sent his comments on this draft report.

On September 2, 2022, Alan Lilly, who was the Presiding Hearing Officer of the AHO at that time, sent a reply e-mail to Mr. Kiel responding to Mr. Kiel's comments. Mr. Lilly also advised Mr. Kiel that, if he or another attorney for the Trust wanted to submit any additional documents or other evidence that addressed the comments in Mr. Lilly's September 2 e-mail, then they should do so on or before October 31, 2022. The AHO never received any response from Mr. Kiel or any other attorney for the Trust. The AHO received additional e-mails from John Cavellini of the Trust, which did not appear to be directed to specific language of the draft report but instead urged actions outside the scope of this investigation. The AHO saved these into the administrative record for this investigation.⁵ On January 3, 2023, Mr. Lilly e-mailed Mr. Cavellini, with a copy to the remaining Parties, and asked whether the Trust would provide any additional documents. The AHO did not receive a response. On September 11, 2023, Megan Knize of the AHO provided a timeline to the Parties for completion of this investigation as well as a final opportunity to provide additional documents and comments. The AHO

⁴ The Trust provided documents that will be discussed in section 4.0. WCB stated that it was satisfied with the documents the Trust provided related to chain of title and that it would accept the AHO's opinion on the transferability of the water right. (2022-03-23 WCB Letter Regarding Chain of Title).

⁵ On September 30, 2022, the Trust stated, for the first time, that "[t]he [Trust] Successors desire to have the indigenous people have an input to the AHO review...." He stated that the Trust's claimed water right is "federal water" and asked the AHO to "encourage the WCB to fund the grant and for the indigenous people will [sic] end up with this right." (2022-09-30 Re:AHO-FTP-INV-Tompkins ANCESTRAL WATER.) The Trust also contacted the Water Board's Tribal Liaison, which then referred the Trust back to the AHO. (2022-10-14 Re: Tompkins Battle Creek Water Right.)

received no documents but received e-mailed comments from members of the Trust in fall 2023 and on January 1, 2024.⁶ None of these comments changes the AHO's analysis in the June 2022 Draft Report. The AHO also circulated its second Draft Report on April 9, 2024, for final review and comments from the parties. The AHO received no comments in response to circulating this draft.

The AHO has addressed comments it has received as of the date of this report in a separate section at the end of this report, and where appropriate, the AHO has made changes and revisions to the report based on the Parties' comments.

3.0 BATTLE CREEK AND SACRAMENTO RIVER GEOGRAPHY; BATTLE CREEK DIVERSION AND TURNOUTS FOR DELIVERY FROM ORWICK DITCH

Battle Creek, a major tributary to the Sacramento River, forms a border between parts of Shasta and Tehama Counties. (2/2006-09-27 Fish Screen EA, pp. 10, 79.)⁷ Battle Creek terminates at the Sacramento River approximately five to seven miles southeast of the town of Cottonwood. (2/2006-09-27 Fish Screen EA, p. 20.) Flows in Battle Creek average 500 cfs annually but are normally higher than this average in the winter and decrease to about half of this average in the summer. (*Id.* at pp. 13, 32.) The creek is an essential fish habitat for all races of Central Valley Chinook salmon. (2/2006-09-27 Fish Screen FONSI, p. 20.) The creek also contains primary spawning habitat for salmon and steelhead trout. (5/2001-08-30 WCB Board Mtg Minutes Agenda Item 37, p. 7.)

⁶ In September 2023, the Trust sent e-mails to the AHO summarizing its understanding of the history of the water right, questioning other agencies' actions regarding this water right, and asking the AHO to "counsel WCB to fund the grant". (2023-09-11 D. Cavellini email to M. Knize (3), p. 2.) On January 1, 2024, the AHO received e-mail correspondence from the Trust's successors, asking the AHO not to let the grant period from the WCB "sunset" and stating that "[t]he most prudent thing is for WCB to fund the grant and end up owning the pre1914 [sic] right." (2024-01-01 D. Cavellini email to AHO.) As explained in this report, the evidence available to the AHO does not support the conclusion that the Trust owns a valid pre-1914 appropriative water right.

⁷ The AHO has identified documents on the FTP site by the folder number and then the title of the document. Here, this document is in Folder 2, "2/Historical Diversion and Use" and saved with the relevant date.



Battle Creek, facing east looking upstream. Credit: AHO Staff, Nov. 3, 2021 Site Visit⁸

3.1 Battle Creek Diversion and Orwick Ditch

Battle Creek contains a rock weir on the south side of the creek at creek mile 7.3 (measured in miles upstream from the creek's confluence with the Sacramento River). (2/2006-09-07 Fish Screen EA, p. 9.)



Battle Creek rock weir (with Orwick Ditch in foreground), facing north.

This rock weir directs water from the creek into a ditch called either the Southside Ditch or, more commonly, and as used in this report, the Orwick Ditch (named after

⁸ Unless otherwise noted, AHO staff took all photos included in this report during the site visit on November 3, 2021.

landowner Charles Orwick). At least one document from the interested parties states that there was no way to measure flows from Battle Creek into the Orwick Ditch until 2006, when a headgate and a replacement fish screen were installed. (2/2006-09-27 Fish Screen EA, p. 13 [“Currently, diversions must be manually regulated using the existing headgate control structure, which requires adjustment of the headgate, when stream flow and creek water surface levels change, for proper operation of the fish screen and to maintain diversion levels.”].) The Trust asserts that water is diverted into the Ditch at rates up to 50 cfs, but the ditch flow is not normally measured. (1/2019-09-10 Tompkins WCB Grant Application, p. 59, Attachment, p. 1.) The Trust stated: “Tompkins conducts visual inspections of the Ditch to determine when the Ditch is flowing full, suggesting that 50 cfs is diverted. At times when the Ditch is flowing full the full Tompkins’ portion (11.7 cfs) is being diverted. Tompkins is not able to estimate flows when the Ditch is not flowing full.” (*Ibid.*) However, the Orwick family claims flows have been “historically measured via staff gage” and that those measurements have been reported to the State Water Board for 50 years.⁹

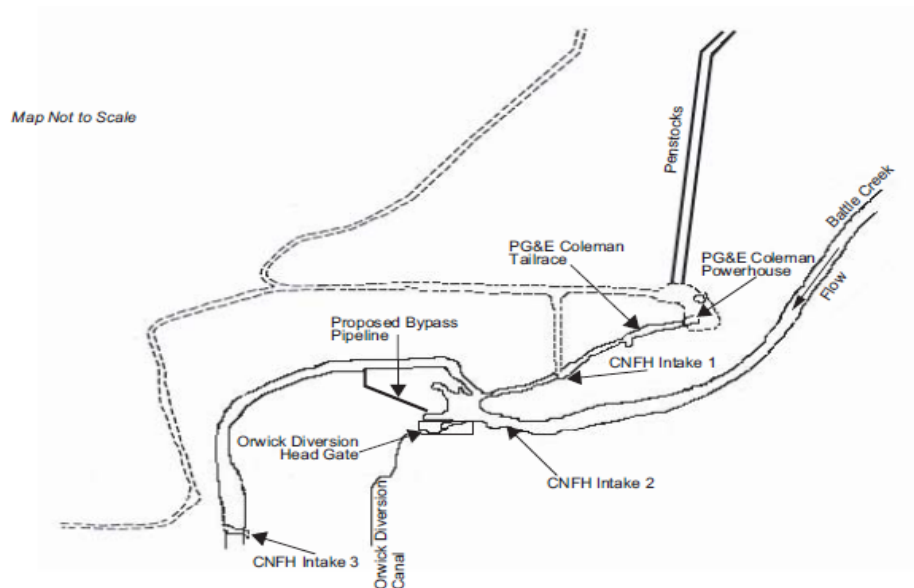
At the time of the AHO’s site visit, it appeared that the water diverted from Battle Creek at this location flows through a CDFW-owned metal diversion structure that is 33 feet long and 10 feet high, and that has a fixed headgate for flows of 50 cfs. (1/2019-09-10 Tompkins WCB Grant Application, p. 59, Attachment, p. 1; see also AHO Fig. 1; 2/2006-09-27 Fish Screen FONSI, p. 5.) Water also passes through a rectangular weir downstream of the headgate and diversion structure. The Parties have not provided evidence to establish when the weir was installed on the Orwick Ditch, although information from the Orwick family suggests that measurements by staff gage have been occurring and reported to the Water Board “going back over five decades.” (2022-08-29 Orwick re Tompkins, pp. 2-3.).

⁹ The U.S. Fish and Wildlife Service collaborated with BLM, CDFW, National Marine Fisheries Service, and Charles Orwick to design, install, and operate the fish screen. This replaced an earlier fish screen installed in 1998. (2/2006-09-07 Fish Screen EA, pp. 9, 62; S000732/Initial Statement of Diversion and Use, p. 17.)



CDFW fish screen, with fish bypass pipe in background.

CDFW maintains a 734-foot-long, 12-inch diameter underground fish bypass pipe on Bureau of Land Management (BLM) land that conveys some of the diverted water (and diverted fish) to Battle Creek. (2/2006-09-27 Fish Screen EA at pp. 9, 59, 62; 2/2006-09-27 Fish Screen FONSI, p. 19.) This bypass pipe is the “Proposed Bypass Pipeline”.



Map of Orwick Diversion Fish Screen Improvement Project
(2/2006-09-27 Fish Screen EA, p. 12.)

The remaining diverted water flows down the seven-mile-long earthen Orwick Ditch. (1/2019-09-09 Tompkins Family Water Rights Summary, p. 6.) During the November 3, 2021 site visit, AHO staff observed the 12-foot-wide rectangular measurement weir that is in the Orwick Ditch a few hundred yards downstream of the fish screen. The water was flowing through this weir at a height of between seven and eight inches in the staff gage to the left of the weir. The AHO calculated that this height indicated a flow rate through this weir of between 17.42 and 21.22 cfs.¹⁰



Orwick Ditch rectangular measurement weir, facing west.

The Ditch terminates on Orwick's property along lower Battle Creek near its confluence with the Sacramento River. (S015631/Attachment to 2019 SSWDUs, p. 2.)

¹⁰ The AHO calculated these amounts using the following website for conversion of flow rates for rectangular weirs, using seven- and eight-inch heights:
<http://irrigation.wsu.edu/Content/Calculators/Water-Measurements/Rectangular-Contracted-Weir.php>.



View of Orwick property near termination of Battle Creek, as seen from Jellys Ferry Road, looking east.

3.2 Turnouts from Orwick Ditch to Former Tompkins Ranch Diversion Works

The Ditch passes through the former Tompkins Ranch between miles 3 and 4 down the Ditch from the headgate. (6/1993-06/29 Grant of Easement for Underground Water Pipeline; S015986/Initial Statement of Diversion and Use, p. 7.) There were two turnouts for delivery of water from the Ditch on the former Tompkins Ranch lands. First, water could be delivered through “[o]ne metal gate in the ditch [that] can open the water into a 10” transit line that goes under the road and approximately ½ mile underground to the western edge of the Tompkins property. There are 4” risers off this line to feed sprinkler irrigation lines on about 60 acres.” (2021-11-03 Site Visit/POD and POU, p. 6; AHO Fig. 2.) Second, the “other metal gate can be opened and feed[s] water into an underground line that runs under the road and into another concrete box located just below the west side of the road. An underground line then goes in each direction along the road for a total of approximately 1,000 feet. Valves are located every ten feet to flood irrigate the pasture on about 12 acres.” (*Ibid.*)



Turnout from Orwick Ditch onto former Tompkins Ranch lands.



Irrigation box on former Tompkins Ranch, facing west toward Battle Creek.

The western portion of the former Tompkins Ranch historically contained two reservoirs. One is “an older pond of approximately one-half acre” that is filled by irrigation tailwater and by opening selected valves of the 10” transit line. The other reservoir has a surface area of three acres “and can be filled to a much greater capacity” using the same irrigation tailwater and selected valves. A document from the Trust explained that “Mr. Tompkins has constructed a large island in this pond to provide cover and nesting sites for waterfowl.” (2021-11-03 Site Visit / POD and POU, p. 7.) During the site visit, the AHO observed the larger pond, which appeared to be fed by a pump.¹¹ This pond is depicted as the “stockpond” in the following image. Finally, “[a]long the eastern portion of the property, both around and on the downhill side of the ditch, is an area of lush wildlife habitat, created by the water seepage from the ditch.” (*Ibid.*)



Stockpond on former Tompkins Ranch, east of Jellys Ferry Road.

¹¹ Originally a paddle wheel lifted water into a trough so water could flow by gravity into the “upper reservoir,” but “a downstream landowner evidently felt that this paddle wheel was slowing down the flow of water in the ditch and requested a different method to move the water into the reservoir.” The Trust later installed a five-horsepower pump to lift water into the reservoir. (2021-11-03 Site Visit/POD and POU, p. 7.)



Diversion structure for stockpond on former Tompkins Ranch.

The Trust has not provided any documents showing how it measured flow rates at its two turnout points from Orwick Ditch. The historic purpose of use was irrigation of walnut orchards and pasture and, more recently, management of waterfowl habitat. (E.g., 6/Brief Tompkins Property Description, p. 2; 2021-11-03 AHO Site Visit POU and POU, p. 2 [aerial view of walnut orchard and irrigated pasture in 1962; aerial view of irrigated pasture in 1983]; S015986/Initial Statement of Diversion and Use, p. 7; 2021-12-08 Tompkins Family Trust Br. [Trust Br.], p. 6.) According to a map the Trust created, the historic place of use for the claimed pre-1914 water right appears to be the area west of Jellys Ferry Road and south of the Battle Creek Bridge, although the Trust has not provided further information about the historic place of use during the time that the Tompkins family owned the property. (2021-11-03 AHO Site Visit POU and POU, p. 2; AHO Fig. 2.)

4.0 HISTORY OF LAND AND WATER RIGHT CONVEYANCES

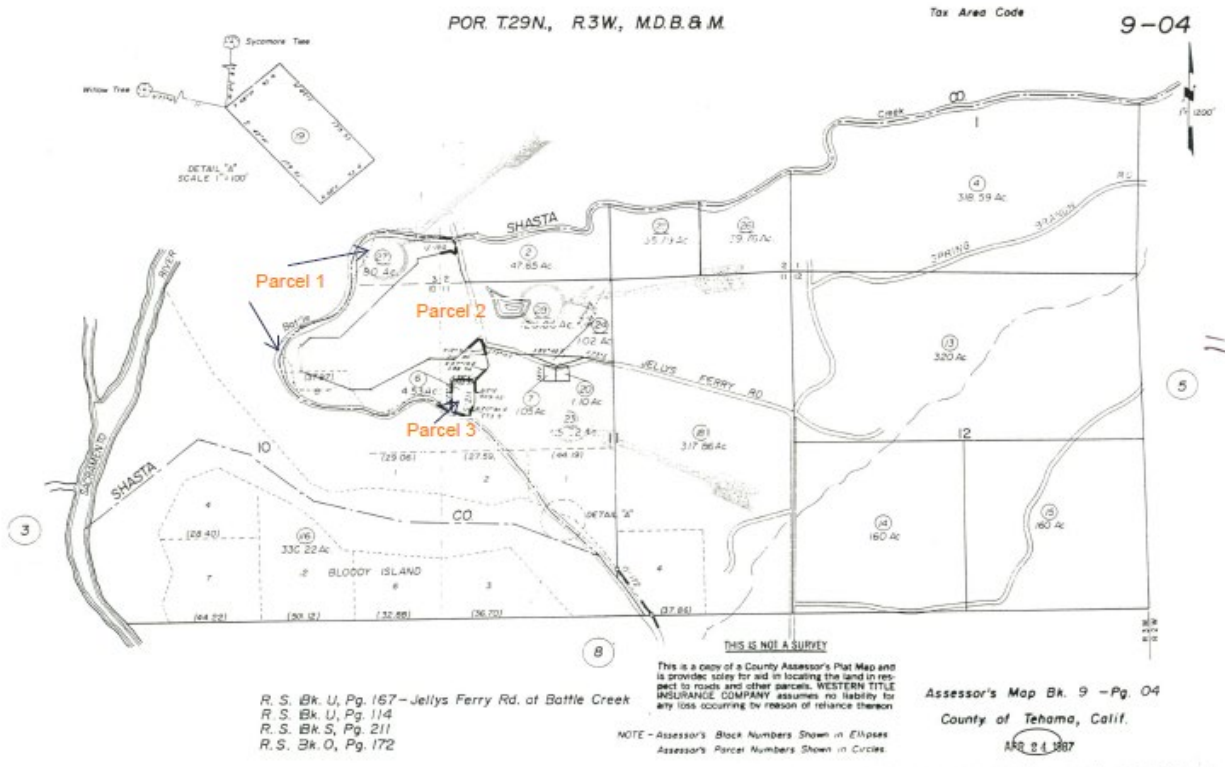
4.1 Parcel Chains of Title

The history of the Trust's claimed pre-1914 water right involves other water right holders, including BLM, CDFW, and Orwick.¹² Together, all these parties claim a right to divert a total of 2,000 miner's inches at the Orwick Ditch point of diversion on the south side of lower Battle Creek for irrigation and stockwatering purposes. (2/2006-09-27 Fish Screen EA, pp. 13, 79; S25803 Initial Statement of Diversion and Use, p. 11.)

The Trust has provided what documents it has for the chain of title for the former Tompkins Ranch and associated claimed water rights, for conveyances between 1913 and 1993. The chain of title for the land conveyances appears to be based on a May 14, 1991 chain of title analysis by Fidelity National Title (Fidelity). CDFW requested this analysis as part of the process that led to CDFW's acquisition of the former Tompkins Ranch in 1993. In 2022, the WCB indicated satisfaction with this chain of title analysis as to "both the water right in question and the lands now under ownership by the State of California Department of Fish and Wildlife." (3/Chain of Title, 2022-03-24 J. Schroeder e-mail to AHO and attached letter from John P. Donnelly.)

In its chain of title analysis for Tompkins Ranch, Fidelity provides chain of title assurances according to "Exhibit A." While no document labeled with this description was attached to the copy of the analysis the AHO received, the remaining portion of the chain of title guarantee describes the three parcels depicted on the following map. (3/Chain of Title, 1991-05-14 Chain of Title Guarantee, p. 3.)

¹² BLM owns part of landowner Orwick's water right and reports this diversion and use under Statement S000732, discussed in section 5.3.



(3/Chain of Title, 1991-05-14 Chain of Title Guarantee, p. 12.)

1. Parcel 1 was bordered by Battle Creek and contained 80 acres west of Jellys Ferry Road. (*Id.* at pp. 3-4, 12 [describing a boundary “93.66 feet to the centerline of Battle Creek; thence upstream on and along said centerline of Battle Creek”].)
2. Parcel 2 encompassed an area to the west of Jellys Ferry Road. The parcel description did not list total acreage. (*Id.* at p. 12.) The Tompkins family eventually came to own this parcel, known as Tompkins Ranch. (3/Chain of Title, Tompkins Family Land and Water Right Chain of Title 1913 to Present, p. 1.)
3. Parcel 3 was located to the south of both parcels and appeared to be bordered by Battle Creek. (*Id.* at pp. 9, 12 [describing a border “to the right or south bank of Battle Creek, then down the said right bank of Battle Creek to a point on said bank...”].) The parcel description does not list total acreage. (*Id.* at pp. 9-10.)

This parcel is relevant insofar as its owners appear to have participated in water rights agreements from 1920 and 1980.

4.1.1 Parcels 1 and 2 Conveyed by Same Deeds Until 1982

The Fidelity analysis contains parcel descriptions and a list of conveyance deeds. The list of conveyance deeds indicates that the same deeds conveyed the lands in both Parcels 1 and 2 until 1982. (Compare 3/Chain of Title, 1991-05-14 Chain of Title Guarantee, pp. 3-4 [conveyance of Parcel 1] with pp. 6-7 [conveyance of Parcel 2].) Because the descriptions of conveyances in Fidelity's analysis are identical for Parcel 1 and for Parcel 2 until August 1982, it appears that one landowner owned and conveyed these properties until 1982. (*Id.* at pp. 4, 7 [description in List Number 12 for Parcel 1 and Parcel 2 show that in 1982 landowner conveyed Parcel 1 to the State of California and Parcel 2 to Richard Ramsey].) The AHO does not have copies of the deeds for subsequent separate conveyances of Parcel 1. The AHO has copies of deeds for the conveyances of Parcel 2 and cites those in the analysis below where appropriate.

As for conveyances of Parcel 2, the Trust has stated that the Fidelity chain of title guarantee "indicates that there were no conveyances of the former Tompkins Ranch between 1913 and ... 1944," when Jerry Buckley deeded his property to R.G. and Marie Frey on April 1, 1944. (2022-03-17 Letter from P. Kiel to AHO, p. 2; 3/Chain of Title, 1991-05-14 Chain of Title, pp. 3, 6.) The Trust does not have a copy of the deed for this conveyance. (*Ibid.*) The Trust also does not have copies of deeds for conveyances from 1946 and from 1951, when R.G. Frey and his wife Marie Frey conveyed property to "Russell G. Frey as community property." (*Ibid.*)

In 1963, Russell G. Frey and Marie V. Frey conveyed a 135.48-acre parcel and a 58.09-acre parcel with "all water rights" to Grace V. Copeland, a conveyance which includes what is now Parcels 1 and 2. (3/Chain of Title, 1991-05-14 Chain of Title, p. 6; see also 3/Chain of Title, 1963-08-13 Parcel 2 #4 Frey to Copeland, p. 3; see also 2022-03-17 Letter from P. Kiel to AHO, p. 3 ["Property legal description includes all of former Tompkins Ranch property plus an 80-acre parcel conveyed by Huggitt to the State of California in 1982"].)

Following a trustee sale, the Freys reacquired the land that Fidelity now describes as Parcels 1 and 2 and sold it to Robert Milton and Gwin Milton in 1968. (3/1991-05-14 Chain of Title, pp. 4, 6; see also Chain of Title, 1968-07-12 Parcel 2 #6 Frey to Milton; 1968-08-14 Parcel 2 #5 Copeland Trustee to Frey, pp. 3-4.) The Miltons then conveyed the land that is now Parcels 1 and 2 back to the Freys. (3/1991-05-14 Chain of Title, pp. 4, 6; see also 3/Chain of Title, 1968-08-25 Parcel 2 #7 Milton to Frey.) In 1970, the Freys conveyed their property to Russell G. Frey and Helen Gail Frey. (3/1991-05-14 Chain of Title, pp. 4, 6; see also 3/Chain of Title, 1971-04-22 Parcel 2 #8, p. 3.)¹³ In 1977, Russell G. Frey and Helen Gail Frey conveyed the land that is now Parcels 1 and 2 to Adkorp. (3/1991-05-14 Chain of Title, pp. 4, 6; see also 3/Chain of Title, 1977-12-15 Parcel 2 #10 Frey to Adkorp, p. 2.)

In 1980, Adkorp conveyed the land that is now Parcels 1 and 2 to William J. Huggitt and Geri L Huggitt. (3/Chain of Title, 1991-05-14 Chain of Title, pp. 4, 7; see also 3/Chain of Title, 1980-04-15 Parcel 2 #11.) In August 1982, William Huggitt subdivided his lands and conveyed what is now Parcel 1 to the State of California. (3/Chain of Title, 1982-10-13 Parcel 1 #12 Huggitt to CA.)¹⁴ This deed excepts “therefrom and reserve[es] unto the remaining lands of grantor, his successors and assigns which are contiguous to the real property herein described, the water, appropriate [sic] water rights, and riparian water rights which are not appurtenant to said remaining lands....” (*Ibid.*) The deed was recorded on October 13, 1982. Also in August 1982, Huggitt conveyed what is now Parcel 2 to Richard Ramsey. (3/Chain of Title, 1982-08-17 Parcel 2 #12 Huggitt to Ramsey, p. 3.) This deed excepted “all that portion conveyed to the State of California” by deed recorded October 13, 1982. (*Ibid.*).

On December 23, 1985, Ramsey conveyed Parcel 2 to the Trust. (3/Chain of Title, 1985-12-13 Parcel 2 #13.) No total acreage is listed in this deed. (6/Brief Tompkins

¹³ The Trust has submitted two copies of this deed, and one file name contains “#8” after Parcel 2 and one contains “#9.”

¹⁴ The Trust has submitted two copies of this document, which appear to be identical, although one file is larger than the other. Because these files appear to be identical, we assume the duplicate documents were submitted in error and rely on the larger 572 kilobyte file here.

Property Description, pp. 2, 4; 1993-08-25 WCB Memo to CDFG Director.) Ramsey also provided a “water rights guarantee” to the “buyers of AP #009-040-28-1.” (3/Chain of Title, 1985-12-27 Ramsey to Tompkins Water Right Guarantee.)

On June 29, 1993, the Trust conveyed Parcel 2, which was 127.88 acres described as Assessor’s Parcel Numbers (APN) 009-040-028 and 009-040-024, to the Department of Fish and Wildlife for the Battle Creek Acquisition and Enhancement Project. (3/Chain of Title, 1993-06-29 Parcel 2 #14 Tompkins to State of California, p. 3.)¹⁵ The deed for this conveyance has a property description that matches Fidelity’s description of Parcel 2 and that includes two exceptions: (a) “excepting therefrom all that portion conveyed to the State of California by deed recorded October 13, 1982,” and (b) “excepting therefrom and reserving unto the grantors, their successors and assigns, whatever appropriative water rights grantors may have to Battle Creek, as shown in a Notice of Appropriation, dated May 7, 1913, executed by J.W. Long, Jerry Buckley and L.J. Blodgett.” (3/Chain of Title, 1993-06-29 Parcel 2 #14.)

4.1.2 Parcel 3’s Ownership Related to Water Rights Claims

Different landowners historically owned Parcel 3. Parcel 3 is important because the landowners of this property were part of the 1980 Orwick Huggitt Agreement regarding ownership of the pre-1914 appropriative water right (section 4.2). The Fidelity analysis for Parcel 3 contains descriptions of parcels and a list of conveyances from Jerry Buckley to G.F. Herbert to Mrs. Fillmore. The last conveyance was to widower George Walters in 1989. (3/Chain of Title, 1991-05-14 Chain of Title, pp. 8-9.). The Trust has represented that the successors to the Fillmores conveyed their property to the State sometime after 1991. (2022-03-17E-mail from P. Kiel to M. Knize, Tompkins Family Land and Water Right Chain of Title 1913 to Present, p. 1.)

¹⁵ These APNs are found on S025803, Initial Statement of Diversion and Use, p. 14. These two parcels together include 127.88 acres (APN 009-40-028 [126.86] + APN-009-40-024 [1.02].)

4.2 Water Right Chains of Title

On April 21, 1913, landowners J.W. Long, Jerry Buckley and L.J. Blodgett agreed to appropriate 1,200 miner's inches of water from an unbuilt ditch that would convey water from Battle Creek to their lands. (3/Chain of Title, 1913-04-21 Agreement, p. 1.)¹⁶ The agreement stated that the first 200 miner's inches would belong to Blodgett, and that, of the remaining amount, one-third would belong to Buckley and two-thirds to Long. (*Ibid.*) The headgate from Battle Creek would be on the land of D.L. Gover. (*Ibid.*) Long, Buckley, and Blodgett agreed that, if they wished to appropriate a greater amount of water, they would use the same proportions of right as provided in the agreement. (*Id.* at pp. 1-2.)

On May 7, 1913, Long recorded a Notice of Appropriation of Water, which stated that Long, Buckley and Blodgett claimed 2,000 miner's inches of water flowing in Battle Creek, measured under a four-inch pressure, "opposite the point where the tailrace from the Coleman Power Plant discharges into said creek" and that the proposed appropriation was for irrigation, stockwatering and domestic purposes. (3/Chain of Title, 1913-05-09 Notice of Appropriation.) The notice stated that water would be diverted by a ditch that would be four feet wide at the bottom, ten feet wide at the top, and three feet deep (*ibid*), and that water would to be used "in sections 1, 2, 3, 10, 11, 12, 13, 14 and 23 in Township north range 3 west." (3/1913-04-17 Notice of Appropriation Book 1 Water Notices p. 54.)¹⁷ The notice did not state any maximum annual diversion rate.¹⁸

In 1919, Buckley granted to G.F. Herbert one-fifth of his share in the "Long, Buckley, Blodgett ditch." (3/Chain of Title, 1919-11-30 Buckley to Herbert Water Allocation

¹⁶ This agreement was recorded with Tehama County on March 7, 1924.

¹⁷ This file is saved with the date of April 17, 1913, the date the notice was posted on a sycamore tree on the west bank of the Sacramento River. This notice was recorded May 7, 1913.

¹⁸ The Initial Statement of Diversion and Use for S025803 indicates that in 1995, Orwick identified an annual diversion limit of 25,200 acre-feet and referred to the original May 7, 1913 Notice of Appropriation as the source for this limit. (S025803 Initial Statement of Diversion and Use, p. 34.) The 1913 notice does not specify any annual diversion limit, but a constant diversion at the maximum rate of diversion identified in the notice of 2,000 miners' inches (approximately 40 cfs) equals 28,958.8 acre-feet per year.

Agreement.) If Buckley had a claim to 600 miner's inches (one-third of the 1,800 miner's inches that remained after Blodgett's 200 miner's inches was subtracted from the 2,000 miner's inch total), then, after Buckley's conveyance to Herbert, Herbert had a claim to 120 miner's inches and Buckley had a claim to the remaining 480 miner's inches. (1919-11-30 Buckley to Herbert Transfer Agreement.)

In 1929, James Long built a headgate on Battle Creek to divert water into the ditch. (2/2006-09-27 Fish Screen EA, pp. 81, 89.)

A 1980 agreement identified Charles Orwick as the successor to Blodgett and stated that two individuals owned the claimed water right of 2,000 miner's inches flowing in the Orwick Ditch. Orwick and Huggitt agreed that Orwick (successor to Blodgett) owned the first 200 miner's inches plus 73.4% of the 1800 miner's inches that remained of the original claimed water right of 2,000 miner's inches. (2/1980-08-22 Huggitt Orwick Agreement, p. 1.) Orwick's right included a 6.7% portion, belonging to Fillmore (successor to Herbert), of the 1800 miner's inches that remained of the original claim.¹⁹ They also agreed that Huggitt (successor to Buckley) owned the remaining 26.6% share of the remaining 1800 miner's inches. (*Ibid.*)

Thus, in 1980, Orwick's portion of the claimed pre-1914 water right was 200 miner's inches (as successor to Blodgett) plus 1,200 miner's inches (as successor to Long, who claimed two-thirds of the remaining 1,800 miner's inches). (1/2019-09-10 Tompkins WCB Grant Application Attachment F, Water Right Summary, p. 5.) Huggitt's portion was 480 miner's inches (as successor to Buckley, who claimed one-third of the remaining 1,800 miner's inches, minus Buckley's conveyance in 1919 of 20 percent of his water right (120 miner's inches) to Herbert). (*Ibid.*) The Trust claims to own Huggitt's water right. Fillmore's portion was 120 miner's inches (as successor to Herbert). CDFW

¹⁹ Fillmore, the successor to Herbert, would take her one-fifth share (6.7%) allotment through a metering box "as part of Mr. Orwick's allotment and will be conveyed down the ditch along with Mr. Orwick's water for use by her." ((2/1980-08-22 Huggitt Orwick Agreement, p. 1.)

appears to have acquired the Fillmores' water right when it purchased the former Herbert property from Fillmore in 1982. (*Ibid.*)

In 1982, when Huggitt sold Parcel 1 to the State, he excepted from and reserved to Huggitt the water rights of the 80-acre parcel for use on his remaining lands with this language: "EXCEPTING therefrom and reserving unto the remaining lands of grantor, his successors and assigns which are contiguous to real property herein described...." (3/Chain of Title, 1982-10-13 Parcel 1 #12, pp. 3-4.) During the AHO's investigation, the Trust provided a document that appears to have been connected to an undated appraisal. This document offers a similar understanding that Huggitt retained water rights for use with "his remaining lands": "[t]he Tompkins Ranch has extensive water rights from Battle Creek. At one time the ranch had extensive frontage along Battle Creek. In October 1982 the former owner of the Tompkins Ranch [Huggitt] sold 80 acres consisting of frontage on Battle Creek to the State of California. The ranch [Parcel 2] retained all the water, appropriative water rights, and riparian rights together with a reasonable right of access for the exercise of those rights." (2021-11-03 Site Visit\Tompkins Ranch POD and POU, p. 6.)

Huggitt's 1982 conveyance of Parcel 2 to Ramsey, which occurred at the same time as the conveyance of Parcel 1 to the State, was silent about water rights. Ramsey's 1985 conveyance to the Trust included his "water rights guarantee" to the buyers of AP-009-040-28-1 for "water rights as shown in that certain Notice of Appropriation of Water recorded in Book 1, page 54 of Water Notices." (3/Chain of Title, 1985-12-27 Ramsey to Tompkins Water Right Guarantee.) The Trust's 1993 conveyance of Parcel 2 to the State excepted and reserved "unto the grantors, their successors and assigns, whatever appropriative water rights grantors may have to Battle Creek, as shown in a Notice of Appropriation, dated May 7, 1913, executed by J.W. Long, Jerry Buckley, and L.J. Blodgett." (3/Chain of Title, 1993-06-29 Parcel 2 #14 Tompkins to State of California, p.1.) The Trust then intended to loan its claimed pre-1914 appropriative water right to CDFW. (S015630 Initial Statement of Diversion and Use, pp. 16-17.)

In 1993, CDFW purchased Parcel 2 (Tompkins Ranch lands) and for “preservation and enhancement of riparian and wetland habitat.” (6/1993-05-06 WCB Board Mtg Minutes Agenda Item, pp. 5-6). CDFW understood that the Trust was selling “all riparian rights on the subject.” (*Ibid.*; see also 5/1994-08-01 CDFG R. Elliot Memo Recommend Purchase Tompkins Water Right, p. 1.)

In 2002, a CDFW staff member prepared a memorandum explaining that CDFW diverted water from the existing water diversion system, a concrete metering structure, to irrigate 50 acres “including creating riparian habitat and wetlands (ponds)” and 15 acres of pasture, plus the three-acre pond. (2/2002-05-17 CDFG S. Arrison Tompkins Water Use Memo.)

While most of the Parties’ documents focus on claimed pre-1914 appropriative rights, at least some documents indicate that previous landowners diverted and used water under riparian rights. In correspondence with State Water Board staff in 2016, a representative of the Trust stated that the deed for Parcel 1 to the State “is an IMPORTANT discovery, as the Grant Deed to F&G states that William Huggitt retained all the Appropriative and RIPARIAN rights. The Riparian rights were separated out at the time the border was sold. I feel, although Tompkins may have acquired the riparian right, he was unaware of it. It is a non-issue as the subject property has always been irrigated with the appropriative ditch.” (S015630 Initial Statement of Diversion and Use, p. 14 (capitals in original).) This representative also stated, “Tompkins acquired all of the water rights from Richard Ramsey...who acquired the rights from Huggitt when he foreclosed on the property” and that “Edward L. Tompkins acquired both the appropriative and riparian ... water rights, in a deed from [the Ramseys].” (*Id.* at pp. 14-15.)

5.0 STATEMENTS OF WATER DIVERSION AND USE

5.1 Statutory Background: Water Code Sections 5100-5107

To analyze (1) the amounts of water that could be available for diversion under the Trust’s pre-1914 appropriative water right claims; and (2) the amounts of water that potentially could be dedicated to instream flows (which are the second and third questions in the Executive Director’s memorandum to the AHO), the AHO considered

the statements of water diversion and use for the claimed right. The relevant statements are S000732 (Orwick's reporting through 2006 and BLM's reporting from 2007 onward); S025803 (Orwick's reporting from 2016 onward); and S015630 and S015631 (CDFW's reporting of the Trust's loaned right, beginning in 2003, and Tompkins' reporting from 2016 onward). After reviewing the relevant statutory background, we discuss each statement of diversion and use in turn.

Water Code sections 5100 to 5107, first enacted in 1965, specify the requirements for filing statements of water diversions and use and supplemental statements with the Board. A "diversion" means "taking water by gravity or pumping from a surface or subterranean stream flowing through a known and definite channel, or other body of surface water, into a canal, pipeline, or other conduit, and includes the impoundment of water in a reservoir." (Wat. Code, § 5100, subd. (c).) Sections 5101 and 5102 provide that any person diverting water, or an agency (on behalf of the diverting person), shall file a statement of water diversion and use for diversions made after December 31, 1965. (Wat. Code, § 5101, 5102.)

These statements must contain specified information, including the name of the stream or other source from which water was diverted; the place of diversion; and the capacity of the diversion works and any storage reservoir. (*Id.* at § 5103.) The person diverting the water, or the agent of the person diverting the water, must file supplemental statements that list the quantities of water diverted each year, the rates of diversion by month, and any other changes in information. (*Id.* at § 5104.) These statements do not constitute evidence of a right to divert or use water. (*Id.* at § 5106.) The making of willful misstatements is a misdemeanor and following a proceeding, the Board may administratively impose civil liability for failing to file a statement, tampering with a measuring device, or making a material misstatement. (*Id.* at § 5107.) Effective February 2, 2010, following repeal of Water Code section 5108, the failure to file

statements of water diversion and use, or the inclusion of errors in reporting, could have legal consequences.²⁰

5.2 Converting Miner's Inches into Cubic Feet Per Second

A miner's inch is a measurement of the quantity of water flowing through a one-square-inch orifice under a prescribed head or pressure. The flow rate equal to one miner's inch depends on the head of the water above the orifice. (See *Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 756, fn. 12.) Water Code section 24 and earlier versions of this statute provide that "the standard miner's inch of water is equivalent to one and one-half cubic feet of water per minute, measured through any aperture or orifice." (Wat. Code, § 24.) This would be "the equivalent to one-fortieth of a second-foot" measured under a six-inch pressure. (*Barr v. Branstetter* (1919) 42 Cal.App. 725, 734-735 [citing *Lillis v. Silver Creek & Panoche Land & Water Co.* (1917) 32 Cal.App. 668, 674]; see also *Pleasant Valley Canal Co.*, *supra*, at fn. 12.) Before adoption of this statute, one miner's inch was understood in some parts of California to be the amount of water passing through an orifice one-inch square under a four-inch pressure, which is "the equivalent of one-fiftieth of a cubic foot per second." (*Barr, supra*, 42 Cal.App. at 734; see also Civ. Code, § 1415.) To convert miner's inches to cubic feet per second, one must multiply the amount of miner's inches by either 1/40 or 1/50 depending on whether the water was flowing under a head of six inches or four inches.²¹

²⁰ Former Water Code section 5108 provided that statements of water diversion and use were filed for "informational purposes only, and neither the failure to file a statement nor any error in the information filed shall have any legal consequence..." and did not establish any right to divert or use water. (Stats. 1965, ch. 1430, § 1, p. 3359.) The Legislature repealed section 5108 on November 4, 2009. (Sen. Bill No. 8, approved by Governor, Nov. 6, 2009, (2009-2010, 7th Ex. Sess., c.2, (S.B. 8), § 7).)

²¹ The definition of a miner's inch varies in California and differs from state to state. See Western Water's calculator, which lists three ways to convert miner's inches to other values at <https://www.western-water.com/water-calculators/convert-miners-inches-to-other-values>.

Here, the May 7, 1913 Notice of Appropriation provides that the 2,000 miners'-inch water right is to be diverted under four-inch pressure, which is the equivalent to 40 cfs.²² Although the stated purposes of diversion for irrigation, stockwatering, and domestic use would not likely require a continuous flow rate of 40 cfs for 365 days of the year, the maximum annual amount of diversion at this rate would be 28,958.8 acre-feet per year (af/yr).²³

5.3 Statement S000732

In 1967, Barbara Poe, then “part owner and trustee” of the property Orwick came to own, filed the Initial Statement of Diversion and Use for S000732. (S000732 Initial Statement of Diversion and Use, p. 40.) She first reported use of 1,200 miner’s inches from April to September 1966. The minimum and maximum reported usages were between 1,600 and 2,000 miner’s inches in “recent years.” (*Id.* at p. 41.) The reported purpose of use was irrigation and stockwatering. The reported place of use was sections 1-3, 10-14, 23 of T29N, R 3W. The Water Board’s records do not contain a second page for this initial statement. The statement does not state any annual diversion amount, or the type of water right claimed.

In 1970, Poe reported use for 1967, 1968, and 1969 as 1,200 miner’s inches or “1.938 x 10⁷ gallons per day.”²⁴ (*Id.* at p. 40.) She included total annual diversions of between 10,500 to 11,100 acre-feet (af) and stated again that she used the water seasonally.

²² 2,000 miner’s inches x 1/50 cfs/miner’s inches = 40 cfs. For the calculations listed in this section, we relied on the website at <http://convertunits.com/from/miner's+inch/to/cfs> and used the calculation for Idaho, Washington and New Mexico, which are states that use the same rate of conversion as that described in Civil Code section 1415, for the flow of water under a four-inch head.

²³ We convert cfs to af/yr and conduct other conversions using the calculators available on the website Western Water, <http://www.western-water.com>.

²⁴ 1,200 miner’s inches under 4-inch pressure is 1200 miner’s inches x 1/50 cfs/miner’s inches = 24 cfs. 19,380,000 gallons per day equals an average flow rate of 30 cfs. It appears that this discrepancy is because Poe used the conversion factor of one miner’s inch equals 1/40 cfs for pressure under a six-inch head, not the conversion factor for pressure under a four-inch head. (1,200 miner’s inches x 1/40 cfs/miner’s inches = 30 cfs.)

Orwick filed a supplemental statement in 1973, for water use in 1970, 1971, and 1972. He also reported seasonal water use at a flow rate of 1,200 miner's inches for 700 acres for irrigation and stockwater. (*Id.* at p. 39.) Sometimes Orwick's reported use exceeded the maximum instantaneous diversion rate of 2,000 miner's inches for the claimed water right made under the May 7, 1913 Notice of Appropriation as well as the physical capacity of the Ditch. (E.g., supplemental statements in 1982-1984 reported monthly consumptive use of 3,200 miner's inches.) In 1985, Orwick reported that he used water from February to December for 900 acres of irrigation and 600 pairs of (we presume) cattle plus 200 yearlings. (*Id.* at p. 35.)

In 1995, Orwick sold a portion of his claimed water right, for up to 360 af per year, based on what he identified as a "total right of 25,200 acre-feet annually derived from the May 7, 1913 appropriation" to BLM, which BLM transferred to the United States Fish and Wildlife Service (USFWS) for use at the Sacramento National Wildlife Refuge. (S025803, p. 34.) BLM began reporting seasonal diversions and use under S000732 in 2012 and 2015.²⁵ In 2012, BLM reported beneficial use of 1.15 cfs in September and October, with a total of 1,665 af collected to storage, and in 2015, BLM reported beneficial use of 360 af. (S000732 2012 Supplemental Statement of Diversion and Use, p.1.)

5.4 Statement S025803

In 2016, due to BLM's reporting under S000732, Orwick could no longer report his use under S000732. The Division assigned Orwick a new statement number, S025803, for water use formerly reported under S000732. Orwick filed an Initial Statement of Diversion and Use for S025803 in which he claimed riparian and pre-1914 rights and stated that the capacity of the direct diversion works was 50 cfs. The place of use was "Jelly Ranch and Battle Creek Ranch—east side." (S025803 Initial Statement of Diversion and Use, pp. 2, 4.) In 2018, Orwick reported annual use between 35,700 and 50,400 af, based on use for irrigation of 4.2 af per acre for his 1,000 acres of property.

²⁵ BLM also reported use of 1,650 af/yr. under S015986, but this appears to have been based on an acquisition from an adjacent landowner's sale of water rights. (S015986/Initial Statement of Diversion and Use, p. 4.)

(E.g., 2018 S025803 Supplemental Statement.) In 2020, Orwick reported zero acre-feet of water use, but noted in comments, “entire pre 1914 water right of 2,000 miner’s inches (50 cfs) flows by ditch through the ranch on a continual basis. Approximately 1,000 acres of land is irrigated. Based on 4.2 ac ft per irrigated acre, equates to 42,000 acre feet being utilized for irrigation.” (2020 S025803 Supplemental Statement, pp. 1-2.)²⁶ The AHO notes that Orwick’s reported use of 42,000 acre feet (or more) “being utilized for irrigation” well exceeds the limits of the claimed pre-1914 appropriative water right of 2,000 miners’ inches (40 cfs) of flow at a constant rate of 365 days per year.

The Trust has claimed that Orwick diverted and used water under the Trust’s portion of the claimed Orwick Ditch pre-1914 appropriative water right from 2016 to 2021, as reported in Orwick’s supplemental statements for S025803. (Trust Br., p. 12.)

5.5 Statement S015630

In 2003, CDFW filed its Initial Statement of Diversion and Use for S015630, for diversions and use under the claimed water right associated with the former Tompkins Ranch. (Neither the Tompkins family nor CDFW had filed such statements before this time). CDFW stated that the type of water claimed was a “gift from owner of pre-1914 right” for the point of diversion at APN 009-040-028. CDFW did not state any instantaneous rate of diversion in its statement. The stated place of use was “60 acres of irrigated pasture, riparian habitat, wetlands and ponds west of Jellys Ferry Road just south of the Battle Creek Bridge.” (S015630 Initial Statement of Diversion and Use, p. 37.) The stated capacity of a reservoir on the property was six acre-feet. The stated annual water use was 540 acre-feet, or 77.1 acre-feet in each month from April to October. (*Ibid.*)

From March or April to October of 2008, 2009, and 2010, CDFW reported diverting at a rate of 39 cfs for an annual total of 539.7 acre-feet beneficially used. (S015630 2008

²⁶ The interested parties have claimed either a 40 cfs or 50 cfs flow rate, depending on the conversion calculation for pressure over a six-inch or four-inch head. (See section 5.2). The correct calculation, using the information in the 1913 Notice of Appropriation, is to convert the amount of water in miner’s inches passing through an orifice one-inch square under a four-inch pressure, which is “the equivalent of one-fiftieth of a cubic foot per second.” (Civ. Code, § 1415.)

Supplemental Statement filed 2011-06-22, p. 1.) From June to September 2011, CDFW reported total beneficial use of 74 af. (S015630 / 2011 Supplemental Statement filed 2014-06-05, p. 1.) From April to October 2012 and 2013, CDFW reported beneficially using between 132 and 168 af. (S015630/ 2012 Supplemental Statement filed 2014-06-05, p. 1.) From March to October 2014 and 2015, CDFW reported that it diverted 1.22 cfs each month, for a total beneficial use of 118.5 af. (S015630 / 2015 Supplemental Statement filed 2016-06-09, p. 1.) CDFW did not make any statements about diverting any water to storage in any of its supplemental statements.

Notes from Division staff in 2016 state that S015630 “was originally entered as a riparian claim and requested to be change[d] to a pre-1914 appropriative claim in 2015.” (S015630 Initial Statement of Diversion and Use, p. 16.) In 2016, after CDFW informed the Trust that it no longer needed to divert or use any water under the Trust’s claimed pre-1914 water right, CDFW ceased reporting any diversions or use under S015630. (1/2019-09-10 Tompkins WCB Grant Application Attachment F Water Right Summary, p. 1; S015630, Attachment to 2017 SSWDUs, p. 1.)

The Trust filed supplemental statements for S015630 for 2017 to 2020. In each supplemental statement, the Trust explained that no water had been diverted or beneficially used and provided updates to the Board on the Trust’s plans to sell the water rights. For example, in 2017, the Trust wrote in a comment that “[t]he diversion is not measured but the right holder believes that up to 11.7 cfs was diverted, possibly continuously. No water was rediverted in 2017 for consumptive use.” (S015630 / Attachment to 2017 SSWDUs, p. 1.)

We have not received any evidence of any diversions or use reported under this statement since 2021.

5.6 Statement S015631

CDFW filed an Initial Statement of Diversion and Use for S015631 for “diversions at the Fillmore meter box” on the Orwick Ditch in July 2003. The listed type of water right was a pre-1914 appropriative right, and the reported annual use in recent years was 418 af. The reported purpose of use was irrigated pasture, riparian habitat, and wetlands. The

reported place of use was “46 acres of irrigated pasture, wetlands and riparian habitat south of Jellys Ferry Road, ½ mile south of the Battle Creek Bridge.” (S015631 Initial Statement of Diversion and Use, p. 3.) Supplemental statements from 2005 through 2007 stated that the place of use was APN 009-040-028,²⁷ and that water was diverted at a rate of “30.09” from May through October. The statements did not list whether the unit was gallons per minute, gallons per day, or cfs. The stated quantity of water used was 59.7 af, for a total annual diversion of 418 af. (*Id.* at pp. 1-3.) CDFW reported use between 13 and 358 af from 2009 through 2015. (See 2009 to 2015 Supplemental Statements.) CDFW stated that it used no water in 2015 “due to the drought.” (S015631 / 2015 S015631 Supplemental Statement filed 2016-06-09, p.1.) In October 2022, the Trust stated that Tompkins filled an upper pond and “reported on the #S 015631 form (2007),” using water “out of the Fillmore’s Allotment”. (2022-10-31 B. Newby email to AHO, p. 2.)

In 2017 the Trust stated that “any right asserted by CDFW has reverted to Tompkins.” (S015631, Attachment to 2017 SSWDUs, p. 1; S015630 Initial Statement of Diversion and Use_Part 8, p. 2 [note to file, which appears to have been written by Division staff, that “it is likely both statements covered land acquired at the same time in the same general area. I cannot ascertain whether S015631 serves property acquired from Mr. Thompkins [sic]”.) Although it is unclear whether the Trust owns the water right associated with S015631, nonetheless, the Trust filed supplemental statements for 2017 to 2020 as it did for S015630. (2/2019-09-10 Tompkins WCB Grant Application Attachment F, pp. 4-5.) We have not received any evidence of any diversions or use reported under this statement since 2021.

6.0 TOMPKINS FAMILY TRUST’S WATER RIGHT SALE PROPOSALS

The Trust has attempted to sell its claimed pre-1914 appropriative water right five times in the last 30 years.

²⁷ The reference to APN 009-040-028, the APN associated with Tompkins Ranch’s 126-acre parcel, indicates that S015630 and S015631 may be duplicative statements.

1. In 1994, the Tompkins family indicated a willingness to sell its claimed appropriative water right to CDFW (then known by its previous name, California Department of Fish and Game, hereinafter the Department) and the Department appeared to support this sale. (5/1994-08-01 CDFG R. Elliot Memo Recommend Purchase Tompkins Water Right, p. 2.) It is not clear why the Department did not move forward with this proposed purchase.
2. In 2000, the Department sought an appraisal of the Tompkins family's claimed appropriative water right. At a 2001 WCB meeting, the WCB approved a motion to acquire 539.91 af of water rights from the Tompkins family and allocated \$60,000 for this acquisition. (5/2001-08-30 WCB Board Mtg Minutes Agenda Item 37 Tompkins Water Right, pp. 8-9.) Under this proposal, the Tompkins family would have donated most of the value of the water right in exchange for a tax credit. (*Ibid.*) Over the next two years, WCB appeared to move forward with its proposed acquisition but expressed concerns over the chain of title. (5/2002-03-19 DGS M. Butler memo Initial Review Settlement Package TompkinsWaterRight, p. 1.) WCB asked the State Water Board's Division of Water Rights for a memo "indicating Tompkins does own pre-1914 appropriative water rights". (5/2002-04-05 WCB L. Drake Ltr to SWRCB M. Stretars RE Tompkins Water Right, p.1.) It does not appear the Division ever provided a response. On February 17, 2003, Edward Tompkins expressed frustration over the pace of negotiations and withdrew the offer to donate most of the value of the claimed pre-1914 appropriative water right. (5/2003-02-17 Tompkins Ltr to WCB Terminating Donation Agreement Dated 06272001.)
3. In 2004, John Tompkins sought to sell 540 af of the family's claimed water right on behalf of his father, Edward Tompkins, to the Department of Water Resources (DWR). In 2005, a DWR representative sent a letter to John Tompkins stating "[t]he information you provided indicates that the property was transferred to DFG with a riparian water right, but the pre-1914 water right was retained by Mr. Edward Tompkins.... It is unclear from the information provided whether the current water use is made under claim of the riparian right or a combination of riparian and pre-1914 water rights. If DFG is diverting under claim of riparian

right, then you may not be able to divert under the pre-1914 water right for the same property.” (S015630 Initial Statement of Diversion and Use, p. 6.) There does not appear to be further follow-up.

4. In 2007, the Department requested WCB again consider purchasing the Tompkins’ family’s water rights. (5/2007-06-19 Fax from Department of Fish and Game, pp. 1, 5-8.) WCB does not appear to have responded to this request.
5. In 2013, CDFW renewed its request, this time stating that “an attorney representing Mr. John Tompkins” had approached CDFW personnel about selling the water rights. (5/2013-04-03 CDFW N. Manji Support Ltr for Acquisition Tompkins Water Right, p. 1.) Regional CDFW staff supported the proposed acquisition, but in 2016, CDFW stated it was unable to purchase the right because WCB could not verify the chain of title. (S015630 / Initial Statement of Diversion and Use, p. 3.)

Now, the Trust wants to sell its claimed pre-1914 water right for fish and wildlife purposes. Under the proposed transaction, Trout Unlimited (TU) would facilitate the sale of the right from the Trust to WCMWC. WCMWC and TU would file a Water Code section 1707 petition to dedicate this claimed water right to instream flow in the lower 7.3 miles of Battle Creek. The proposed new point of diversion would be downstream on the Sacramento River at the diversion facility of the Glenn-Colusa Irrigation District (GCID), and the proposed place of use would be lower Battle Creek for instream purposes and on lands within WCMWC and the Sacramento National Wildlife Refuge.²⁸

In a draft grant agreement, WCB and TU state that the face value of the Trust’s right is “approximately 12 cfs” with “recent...estimated consumptive use [of] 707 acre-feet.” (1/2021-10-21 DRAFT_2020014_Grant_Agreement, p. 7, fn.1.) Accordingly, also under

²⁸ TU would work with the USFWS, WCMWC and GCID to change the point of diversion downstream to the GCID facility, where GCID would divert the water from the Sacramento River and convey it by canal to WCMWC under an existing wheeling agreement. (E-mail Correspondence/2021-09-07 J. Cavellini e-mail 3 attachment, p. 3.) GCID would distribute this water to private lands within WCMWC that WCMWC manages as part of the Sacramento National Wildlife Refuge. (1/2019-09-09 Tompkins Family Water Right Summary, p.1.)

this proposal, the diversion structure on Battle Creek at the Orwick Ditch would be modified to reduce the continuous rate of diversion by 11.7 cfs.

The benefits of these changes would be to: (a) increase instream flows in the lower seven miles of Battle Creek by 11.7 cfs, improving habitat in that creek reach for anadromous fish; and (b) increase wetland habitat to benefit waterfowl and other wetland-dependent species in the Sacramento Valley. (E-mail Correspondence/2021-09-07 J. Cavellini e-mail 3 attachment, p. 4.)

WCB's brief explains that, if the AHO concludes the Trust's right is valid and transferrable, then WCB will move forward with: (1) a grant to WCMWC to fund WCMWC's acquisition of the right so that the right is dedicated for instream use in Battle Creek and to enhance wetland habitats in the Sacramento National Wildlife Refuge Complex; and (2) a grant to TU to file and pursue the Water Code section 1707 petition.²⁹ WCB agrees that "although the right is a pre-1914 appropriative right, a section 1707 petition is still required because of the funding source used for the grants." (2021-12-08 Wildlife Conservation Board Brief [WCB Br.], p. 2.) If the AHO concludes the right is valid but the transferrable amount is less than described in proposal documents (12 cfs), WCB may move forward with "the effort to execute grant agreements." (*Id.* at p. 1.)

7.0 APPLICABLE LAW

7.1 Riparian Rights

Generally, a riparian right authorizes the diversion and use of water from a stream on land that is contiguous to the stream and located within the watershed of the stream. (*Pleasant Valley Canal Co., supra*, 61 Cal.App.4th at pp. 774-775.) A riparian right normally attaches only to the smallest parcel held under one title in the chain of title

²⁹ Proposition 1, the Water Quality, Supply and Infrastructure Act of 2014, funds objectives of the California Water Action Plan. This legislation added Water Code section 79709, which provides funds expended under Proposition 1 "for the acquisition of a permanent dedication of water shall be in accordance with Section 1707 where the state board specifies that the water is in addition to water that is required for regulatory requirements as provided in subdivision (c) of Section 1707."

leading to the present owner. (*Ibid.*) When a riparian parcel is subdivided, such that a new parcel created by the subdivision is not contiguous to the stream, the riparian right formerly attached to lands within the new noncontiguous parcel is lost, absent proof of intent to retain the riparian right. (*Anaheim Union Water Co. v. Fuller* (1907) 150 Cal.327, 331.) “The clearest expression of intent is when a deed expressly conveys the riparian rights to the noncontiguous parcel, in which case the parcel retains its riparian status.” (*Modesto Irrigation District v. Tanaka* (2020) 48 Cal.App.5th 898, 900.) “[T]he intention of the parties is paramount in determining whether riparian rights have been retained or severed.” (*Id.* at p. 912.) A riparian right cannot be lost by forfeiture. (Hutchins, *The California Law of Water Rights* (1956), p. 291.)

An owner of a riparian parcel may, subject to some exceptions, divert water from the stream upstream of its parcel, and convey the water to the parcel for beneficial uses there:

It is not necessary that the water be diverted on the riparian tract itself, provided that a diversion elsewhere does not impair the rights of others to the use of the stream and that the necessary easements are obtained, and provided also, as noted below, that the intervening upstream riparian owners do not object.

(*Id.*, p. 248 (footnote omitted).)

Riparian rights do not authorize the storage of water during one season for use during a subsequent season. (*Id.*, pp. 246-247.)

7.2 Perfection of Appropriative Rights

Appropriative rights are not dependent on land ownership. (Order WR 2011-0016, p. 8.)

A person acquires an appropriative right by diverting water from a stream and applying it to beneficial use. A valid appropriation of water requires three elements: (1) an intent to apply water to some existing or contemplated beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for the purpose; and (3) an application of the water within a reasonable time to some beneficial use. (Hutchins, *supra*, p. 108 [citing *Simons v. Inyo Cerro Gordo Min. & Power Co.* (1920) 48 Cal.App. 524, 537].)

Before December 19, 1914, the effective date of the Water Commission Act, an appropriative right could be obtained by non-statutory and statutory methods. The non-statutory method entailed simply diverting water and applying it to beneficial use, after having made some sort of objective manifestation of the intent to appropriate the water. (See *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 311-312.) The statutory method of obtaining a pre-1914 appropriative right, which Long, Buckley, and Blodgett used, entailed following the requirements of Civil Code sections 1410 through 1422, which were enacted in 1872. Civil Code section 1415 required posting and recording a notice that contained specified information about a proposed appropriation including, as discussed in section 5.2, the proposed diversion rate in miner's inches, measured under a four-inch pressure. Civil Code section 1416 required construction of the diversion works to be commenced within 60 days of posting the notice and required the work to be conducted and completed with diligence. (Order WR 2011-0016, p. *6 [set aside on other grounds by Order WR 2015-0027-EXEC].) A pre-1914 appropriative right is subject to forfeiture in whole or in part if water is not used under the right for a five-year period when there is a competing claim. (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 899-904.)

An appropriative right is deemed appurtenant to the land where the water is used, so absent contrary evidence, an appropriative right passes with the land. "A thing used with land for its benefit, such as a water right, is an appurtenance thereto and passes with the land in a conveyance of the land with its appurtenances." (Hutchins, *supra*, p. 126 [citing *Crocker v. Benton* (1892) 93 Cal. 365, 369].)

Both pre-1914 and post-1914 appropriative rights were perfected (and post-1914 appropriative rights still may be perfected) by diverting water and applying it to reasonable, beneficial use. The measure of the right is the amount of water applied to reasonable, beneficial use, not the amount of water listed in a notice of appropriation, the capacity of an appropriator's diversion works, the amount of water diverted, or the amount of water authorized to be diverted in a water right permit. (*Haight v. Costanich* (1920) 184 Cal. 426, 431; *Trimble v. Heller* (1913) 23 Cal.App. 436, 443-444; *Akin v.*

Spencer (1937) 21 Cal.App.2d 325, 328; Wat. Code, §§ 1240, 1390, 1610.)
Appropriative rights must be developed with diligence. (Order WR 2011-0016, p. 10.)

An appropriative right may not be perfected for diversion and associated use if the diversion and use is already authorized by a riparian right. (See *Millview County Water Dist.*, *supra*, 229 Cal.App. 4th at p. 905.) That is, a riparian water right holder cannot establish a right to divert and use additional water by claiming a duplicative appropriative right to divert water for a purpose and in a manner that would be authorized under the riparian right. (See *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398 [plaintiff in quiet title action failed to prove appropriative claim of right by showing, among other things, that water was diverted as an appropriator and not in the exercise of plaintiff's rights as riparian owner].)

“To acquire the right to appropriate water in the pre-1914 period, an owner of riparian land was required to establish the diversion of water for beneficial use on noncontiguous lands, as well as the quantity of water so used.” (*Millview County Water Dist. supra*, 229 Cal.App.4th at p. 905.) A riparian right holder may obtain an appropriative right, however, to the extent that the appropriative right would authorize a use or method of diversion that the riparian right does not authorize. (See, e.g., *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 335 [riparian landholder needed appropriative right to store water]; *Pleasant Valley Canal Co. v. Borrer, supra*, 61 Cal.App.4th at pp. 774-775 [appropriative right used on non-riparian lands].) Similarly, it may be possible to hold both an appropriative and a riparian right if the appropriative right confers a higher priority of right. (*Pleasant Valley Canal Co., supra*, at p. 774.)

7.3 Forfeiture of Pre-1914 Appropriative Rights

In *Millview County Water District, supra*, the court held that a pre-1914 appropriative right may be forfeited through five years of continuous non-use, if, during the period of non-use, there is “‘the presence of a competing claim’ to the unused water by a rival diverter who is prepared to use, or is using, the surplus.” (229 Cal.App.4th at p. 900.) The court described “conflicting claims” as follows:

In general terms, a conflicting claim has been asserted if another claimant has actually appropriated the water otherwise covered by the original claim and has perfected that appropriation by making beneficial use of the surplus water, or has attempted to appropriate the water by instituting proceedings to establish a right—for example, in California, by seeking a permit from the Board to appropriate the surplus water or by commencing a legal action for a declaration of rights.

(*Id.* at p. 903.)

7.4 Reasonable Use Doctrine Prohibits Overlapping Riparian and Appropriative Rights

Article X, section 2 of the California Constitution limits water rights to the amount of water reasonably required for the beneficial use to be served. If a beneficial use is or may be served through the exercise of a riparian right, then no additional water is reasonably required to serve that use, and therefore an appropriative right to serve the same use cannot be obtained consistent with Article X, section 2. (See also Hutchins, *supra*, p. 209 “[T]he privilege of claiming dual water rights cannot be made a vehicle for acquiring the right to more water than can be put to reasonable beneficial use . . .”.) “Both [A]rticle X, section 2 of the Constitution and Water Code section 100 establish the state policy that the water resources of the state should be put to beneficial use to the fullest extent possible.” (Order WR 2011-0016, p. 10.)

7.5 Water Code Section 1707 Petitions

Petitions filed under Water Code section 1707 may be used to dedicate pre-1914 or post-1914 appropriative rights, or riparian rights to instream use. Water Code section 1707 provides that “[a]ny person entitled to the use of water, whether based upon an appropriative, riparian, or other right, may petition the board...for a change for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in, or on, the water.” (Wat. Code, § 1707, subd. (a)(1).) The Board may approve the petition subject to terms and conditions if the Board determines the proposed change: (1) will not increase the amount of water the person is entitled to use; (2) will not unreasonably affect any legal user of water; and (3) otherwise meets the requirement of Division 2 (Water Code sections 1000-5976). (*Id.* at subd. (b).) The procedure for filing a petition for change to dedicate a water right to instream flows, including public notice

and answering any protests, is provided at California Code of Regulations, title 23, sections 648, 648.8, 751, 795-796 and is also described generally at https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/instream_flow_dedication/.

8.0 ANALYSIS OF TOMPKINS' PRE-1914 WATER RIGHT CLAIMS, PROPOSED INSTREAM-FLOW DEDICATION, AND PROPOSED WATER TRANSFER

8.1 Trust's Pre-1914 Appropriative Water Right Claim

The Trust has provided a chain of title for its claimed pre-1914 appropriative water right initiated by the May 7, 1913 Notice of Appropriation, that is based in part on the Fidelity chain of title for land conveyances of Parcel 2 (Tompkins Ranch) over a period of more than 100 years. (3/Chain of Title, Chain of Title for Former Tompkins Ranch Property and Tompkins Appropriative Right.)

The Trust argues that the May 7, 1913 Notice of Appropriation, agreements made in 1913, 1919, and 1980, the 1985 "water rights guarantee," and the long history of diversions of Battle Creek water into the Orwick Ditch and delivery of this water for irrigation of Buckley's lands, all show that Buckley perfected a pre-1914 appropriative right for "480 miners' inches or 12 cfs of water from Battle Creek." (Trust Br., pp. 5-6.) The Trust argues that it now owns this claimed right. (*Ibid.*)

The Parties' documents indicate that the lands that Buckley and his successors owned and irrigated were one parcel and were conveyed by the same deeds until 1982, when they were conveyed separately as the Parcels 1 and 2 described above.³⁰ This one parcel that existed before 1982 bordered on or contained Battle Creek and was entirely within the Battle Creek watershed. The original patents for the lands that made up this one parcel also bordered on or contained Battle Creek. Therefore, the parcel likely had

³⁰ We do not have copies of the deeds for the transfer of Parcel 1, but Fidelity's narrative indicates that the same transactions were made to and from the same persons for Parcel 1 and for Parcel 2. Moreover, the size of the pre-1982 conveyances supports the AHO's analysis that one landowner conveyed a 193.56-acre parcel until 1982, when the landowner subdivided his lands. The Tompkins family eventually came to own Parcel 2 and then sold that parcel, or 127.88 acres, to CDFW in 1993. (3/Chain of Title, 1993-06-29 Parcel 2 #14 Tompkins to State of California, p. 3.)

associated riparian rights that authorized the diversions of creek water for beneficial uses on the parcel. (See section 4.0).

The headgate for the Orwick Ditch, through which water was diverted for use on the Buckley parcel (and later the Tompkins Ranch), is located upstream of the Buckley parcel on Battle Creek. As discussed above (see section 7.1), riparian rights normally authorize the owner of the riparian parcel to divert water from the stream upstream of the parcel, and to convey it to the parcel for beneficial uses there, as long as (1) the necessary easements are obtained, (2) diversion from the upstream point does not impair the exercise of any other riparian rights, and (3) the intervening upstream riparian owners do not object. Here, Buckley and his successors had rights to use the Orwick Ditch, and therefore had the “necessary easements.” It is unlikely that any other riparian rights would have been affected by Buckley’s diverting water at the upstream diversion point at the head of the Orwick Ditch, rather than diverting water from the creek at the Buckley parcel, because it appears that Battle Creek always had sufficient flows for all diversions from the creek under riparian rights. (See section 3.0.) Finally, the AHO has no evidence of objections from any intervening upstream riparian owners.

Accordingly, it appears that all the diversions of Battle Creek water through the Orwick Ditch for Buckley and his successors, and all uses of this diverted water by Buckley and his successors on this parcel, were likely authorized by riparian rights. Because all the diversions and uses of Battle Creek water by Buckley and his successors were likely authorized by riparian rights, Buckley and his successors never would have perfected any appropriative rights. (See section 7.2.)

The Trust questions whether the former Tompkins Ranch property (Parcels 1 and 2) has riparian rights to Battle Creek. With their comments on the draft report, the Trust submitted four original land patents dating from when the ranch first entered into private ownership in 1866. (2022-08-31 P. Kiel Comments on Draft Report of Investigation of Tompkins Family Trust Pre-1914 Right [Tompkins Trust Comments] p. 2.) A portion of these four original parcels then became Tompkins Ranch. (*Ibid.*) The Trust has urged the AHO to conduct a “complete riparian chain of title” for each of the four parcels to determine whether the Ranch lands included riparian rights and whether any

appropriative rights were perfected on non-riparian lands.” (Tompkins Trust Comments, p. 1.)

The Trust also claims that it is difficult to determine the historical course of Battle Creek because the creek has migrated significantly. Therefore, “[w]hile the four parcels may have been riparian at the time of patent, subsequent land transactions and parcel configurations affected the contiguity of those lands to Battle Creek.” (*Ibid.*, p. 2.) In response to these comments, the AHO asked at least two times for additional documents supporting the Trust’s claims. The Trust has provided none. Because the Trust has not provided documentation to refute the evidence that Parcels 1 and 2 were riparian to Battle Creek at the time of Buckley’s attempted appropriation, the AHO will not change its conclusion that Buckley likely had riparian rights and did not perfect appropriative rights.

8.2 Severance and Termination of Riparian Rights on Parcel 2

Huggitt eventually came to own Buckley’s lands (Parcels 1 and 2). These lands were riparian to Battle Creek. When Huggitt subdivided and sold some of his land to the State in August 1982, he excepted “the water, appropriate[iv]e water rights and riparian water rights which are now appurtenant to said remaining lands...” (3/Chain of Title, 1982-10-13 Parcel 1 #12 Huggitt to CA, p. 4.) Under *Modesto Irrigation District v. Tanaka, supra*, this meant Huggitt retained his riparian rights for use on his remaining lands. Huggitt then transferred his remaining lands to Ramsey. (3/Chain of Title, 1982-08-17 Parcel 2 #12 Huggitt to Ramsey, p. 3.) This meant that Ramsey now owned the appropriative and riparian rights that Huggitt had retained after he transferred his riparian parcel to the State. Ramsey made an identically worded conveyance to the Tompkins family in 1985. (3/Chain of Title, Parcel 2 #13 Ramsey to Tompkins, p. 3.) Thus, at this point, the Tompkins family appeared to own “appropriat[iv]e water rights and riparian water rights” under the deeds from Huggitt to Ramsey and from Ramsey to the Tompkins family.

However, in 1993, when the Tompkins family conveyed their lands to the State, the conveyance deed did not state whether the Tompkins family intended to retain their lands’ riparian rights. The 1993 conveyance simply stated the Tompkins family would

retain “whatever appropriative rights grantors may have to Battle Creek.” (3/Chain of Title, 1993-06-29 Parcel 2 #14 Tompkins to State of California, p. 1.) Thus, it appears Tompkins intended to retain only appropriative rights associated with their lands. In this transaction, CDFW may have received riparian rights associated with the sale of Parcel 2.³¹

In its comments on the draft report, the Trust argued that the 1991 chain of title guarantee for Parcel 2 included an exception from the property description for a “12 foot wide strip of land for the ‘old mill race’ that lies between the property and Battle Creek,” explaining that the old mill race is a concrete flume visible both upstream and downstream of the old bridge over Battle Creek, which would have severed a portion of the Tompkins Ranch lands’ contiguity to Battle Creek. If so, then any riparian right associated with the Tompkins Ranch may have been terminated. The Trust stated that “mapping is necessary to determine which portions of the original patented parcels may have been affected by the severance.” (Tompkins Trust Comments, p. 4.) The AHO has asked for additional documents that support the Trust’s argument, and the Trust has provided none.

8.3 Uncertainty Regarding Perfection of Appropriative Water Right to Storage in Pond

During the site visit, the AHO viewed a pond on the former Tompkins Ranch. Aerial photographs of this property from 1962 and 1983 also show this pond. (2021-11-03 Site Visit, Tompkins Ranch POD and POU, pp. 3-4.) We have not received any evidence of the pond’s existence before 1962.

It is possible that Buckley and his successors perfected an appropriative water right by storing water in this pond and applying it to beneficial use in a subsequent season. Buckley and his successors would have needed to use the stored water before 1914, or

³¹ This report does not discuss whether the current owner of the former Tompkins Ranch, the California Department of Fish and Wildlife (CDFW), owns any riparian right that may be dedicated to instream flows.

used the water based on a plan of development that was in place before 1914 and then diligently implemented. However, there is no evidence the pond existed before 1914 or within a reasonable time after 1914. There also is no evidence that, even if such a pond existed in that timeframe, Buckley and his successors used the pond to seasonally store water for subsequent beneficial uses. Because Battle Creek has substantial flows throughout the year, there is no apparent reason for such seasonal storage and use. Also, none of CDFW's supplemental statements for S015630 or S015631 list any such storage. (E.g., S015630 Initial Statement of Diversion and Use, p. 37.) Accordingly, it is unlikely that Buckley and his successors perfected an appropriative right to store water in the pond and use it on the Tompkins Ranch lands.

8.4 Potential Forfeiture of Any Pre-1914 Appropriative Rights

For the reasons discussed in sections 8.1 through 8.3, it appears that Buckley and his successors never perfected any pre-1914 appropriative rights. Moreover, even if they did perfect any such rights, such rights may have been forfeited through non-use since 2016.

As discussed in section 5.5 and 5.6, there is no evidence of any diversions or use of water under the Trust's claimed pre-1914 appropriative rights that were reported in Statement S015630 or S015631 during 2016 or any subsequent year. While the Trust has argued that Orwick diverted and used water under the Trust's claimed water right during 2016-2021 (see section 5.4), we have not received any evidence demonstrating that Orwick's diversions or uses increased during this period because of Orwick's alleged diversions and uses under the Trust's claimed right. We also have not received evidence demonstrating Orwick's diversions or uses were authorized under the Trust's claimed right rather than any right Orwick held. Also, as discussed in section 3.1, the water height on the staff gage at the rectangular weir near the beginning of the Orwick Ditch during the November 3, 2021 site visit indicated a total ditch flow of between 17 and 22 cfs, which was far lower than the 50-cfs total for the Orwick and Trust's claimed pre-1914 rights.

Finally, during 2016 and subsequent years, DWR and the Bureau of Reclamation probably used the water that could have been diverted and used under the Trust's claimed pre-1914 appropriative right, to meet Delta outflow and water quality requirements or for export from the Delta during the parts of each year when the diversion prohibition in the State Water Board's Standard Permit Term 91 was in effect. (See generally Order WR 2021-0061, pp. 36-39.) This use most likely establishes a competing claim to the water under the standard set by the court in *Millview*. Therefore, any pre-1914 appropriative right that the Trust may have owned was likely forfeited by non-use from 2016 through 2021.

9.0 CONCLUSION

For the reasons discussed in this report, we conclude that the Trust likely does not have any pre-1914 appropriative right to dedicate to instream flows or to use to support a water transfer to WCMWC.

Date: May 29, 2024

MEGAN S. KNIZE

Megan S. Knize, Hearing Officer

NICOLE L. KUENZI

Nicole L. Kuenzi, Presiding Hearing Officer

Comments on AHO's June 9, 2022 Draft Report of Investigation

AHO Comments:

1. Throughout the June 9, 2022 Draft Report, the AHO used the word "rediversion" to describe water diverted from the Ditch (which was itself diverted from Battle Creek) and onto the former Tompkins Ranch lands. Rediversion generally occurs (1) if water is diverted out of a natural stream and then back into a natural stream and then diverted from this natural stream again, or (2) where water is diverted to storage in an onstream reservoir, released and allowed to flow downstream, and then rediverted from the stream. The term "rediversion", as used in the June 9, 2022 Draft Report, generally is not appropriate to describe diversions from a manmade ditch. We have updated this report to refer to "delivery" to a "turnout," which we believe more accurately describes the diversions that occurred here.
2. The June 9, 2022 Draft Report suggested that the Trust may have owned and sold Parcel 3 to CDFW. The AHO has reviewed the Fidelity chain of title analysis for Parcel 3 and concluded that, consistent with representations from the Trust regarding chain of title, the Trust likely did not own Parcel 3. Accordingly, the AHO has limited its discussion of Parcel 3 to concern only the water right associated with that parcel insofar as the owners of Parcels 1, 2, and 3 had entered into agreements about division of their claimed pre-1914 appropriate water right.

Comments from the Orwick Trust:

1. The Orwick Trust argues that the statement in the June 29, 2022 Draft Report (pp. 7-8) that historically there was no way to measure flows from Battle Creek into the Orwick Ditch until 2006 is inaccurate because flows "have been historically measured via staff gage" and the AHO should look at Statements of Diversion and Use filed under S000732. (2022-08-29 Letter from N. Jacobs to AHO [Orwick Trust Comments], p. 1.)

AHO Response: The AHO has updated the text and citation and notes that the Statements of Diversion of Use ask for the "water used," not the amount of the diversion. (See S000732 Initial Statement of Diversion and Use, p. 8.)

2. The Orwick Trust argues that the draft report indicates on pages 39-40 that on the day of the site visit, November 3, 2021, the flows in the Orwick Ditch were between 17 and 22 cubic feet per second, and Mr. Nipar of the Orwick Trust overheard representatives of CDFW commenting that CDFW "purposefully restricted" flows to "protect the fish screen and bypass structures during a storm event." (Orwick Trust Comments, p. 2.)

AHO Response: The text is clear that the AHO's observations were based on a single visit and the AHO makes no determination about how much water the Orwick Trust historically used or did not use based on its observation on November 3, 2021.

Comments from the Wildlife Conservation Board:

1. The WCB asks the AHO to clarify the sentence on page 28, regarding costs to purchase water rights in 2001, beginning "At a 2001 meeting, the WCB approved a motion to acquire..."

AHO Response: The AHO has edited the text to better reflect the source cited, which stated: "Staff recommended that the Board approve the acquisition as proposed; allocate \$60,000.00 from the General Fund..." (2001-08-30 WCB Board Mtg Minutes Agenda Item 37 Tompkins Water Right, p. 8.).

Comments from the Tompkins Family Trust:

1. The Trust has asked the AHO to delete conclusory statements from the draft report and "characterize the discussion as non-precedential." (2022-08-31 P. Kiel Comments on Draft Report of Investigation of Tompkins Family Trust Pre-1914 Right [Tompkins Trust Comments] p. 1.)

AHO Response: The AHO has edited the draft report to eliminate conclusory statements where the statements are not appropriate. The final report is a report of the AHO, based on the information received and the AHO's analysis of it. The report will not be a precedential State Water Board decision or order. The AHO has edited the text on page 3 of the report to state that more explicitly.

2. The Trust argues that the AHO only considered records presented to it and "a review of all title records from patent to present is required to determine whether land was riparian to a natural watercourse at the time of patent and whether contiguity to, or express riparian rights to the watercourse, were severed at any time in the chain of title." (Tompkins Trust Comments, p. 2.)

AHO Response: The Trust does not dispute that Parcels 1 and 2, discussed on Draft Report pages 36 and 37, bordered or contained Battle Creek. The comments raise questions regarding whether the parcels that were created by the 1866 land patents were riparian to Battle Creek. The AHO has reviewed the additional documents the Trust submitted to the AHO, Document Nos. 1306, 1310, 1312 and 1314,³² and those documents show that all the parcels depicted in these documents contained portions of Battle Creek, and therefore appear to have been riparian to it. The AHO also asked for additional documentation about the historic courses of Battle Creek and whether a 12-foot wide strip of land severed a portion of the former Tompkins Ranch's contiguity to Battle Creek. The AHO received no additional documentation. Therefore, the AHO has no basis upon which to change its conclusions that the larger parcel that became Parcels 1 and 2 likely had riparian water rights (and thus never perfected an appropriative water right).

3. The Trust argues that it would like language in the draft report that the AHO's conclusions will not prejudice the Trust from later presenting additional evidence of perfecting a pre-1914 appropriative water right.

AHO Response: As noted on page 3, the AHO may change its conclusions in the future if there is additional evidence that the AHO has not received.

4. The Trust disagrees that any appropriative right would have been forfeited due to non-use (see draft report pp. 39-40), because the Orwick Trust reported diversions into the ditch and used the water after CDFW stopped using the water. The Trust would like the AHO to add language that if the evidence provided is not sufficient to support a finding of the diversion and use under the Trust's claimed pre-1914 water right since CDFW stopped using water under the claimed right, the Report will not prejudice the family from later presenting additional evidence of such diversions and use. (Tompkins Trust Comments, p. 4.)

AHO Response: The Trust has provided no documentation to refute the statement that "[w]hile the Trust has argued that Orwick diverted and used water under the Trust's water right during 2016-02021 (see section 5.4), we have not received any evidence demonstrating that Orwick's alleged diversions and use actually increased during this period because of Orwick's alleged diversions and uses under the Trust's right." The AHO asked for additional information, besides the supplemental statements or other documents, to refute the statement in the draft report. The Trust did not provide such additional information. As noted on page 3, the AHO may change its conclusions in the future if there is additional evidence that the AHO has not received by the date of publication of this report.

³² These documents are in the folder called "3-Perfection of Water Right."

Figure 1 Existing Points of Diversion and Turnouts from Orwick Ditch

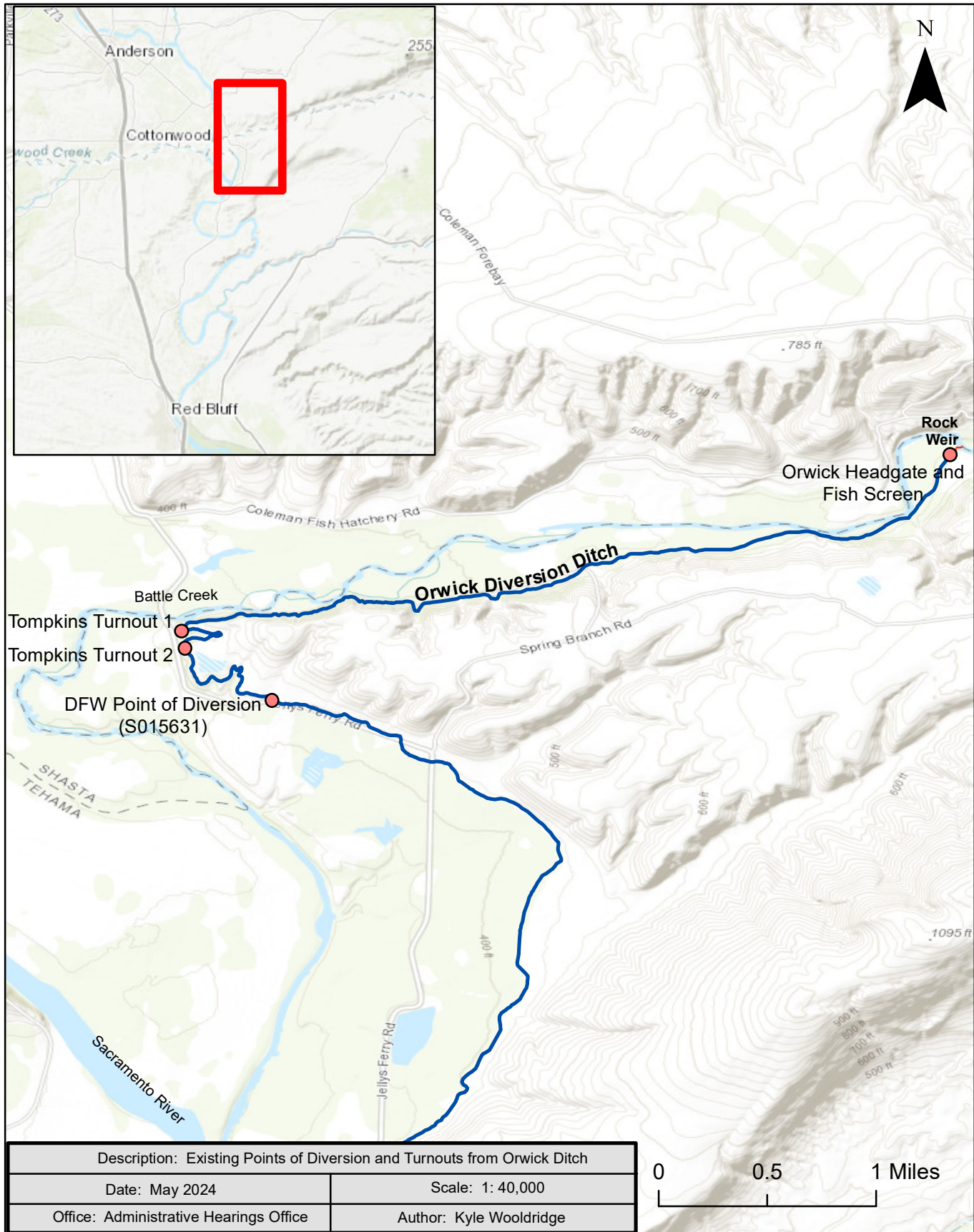
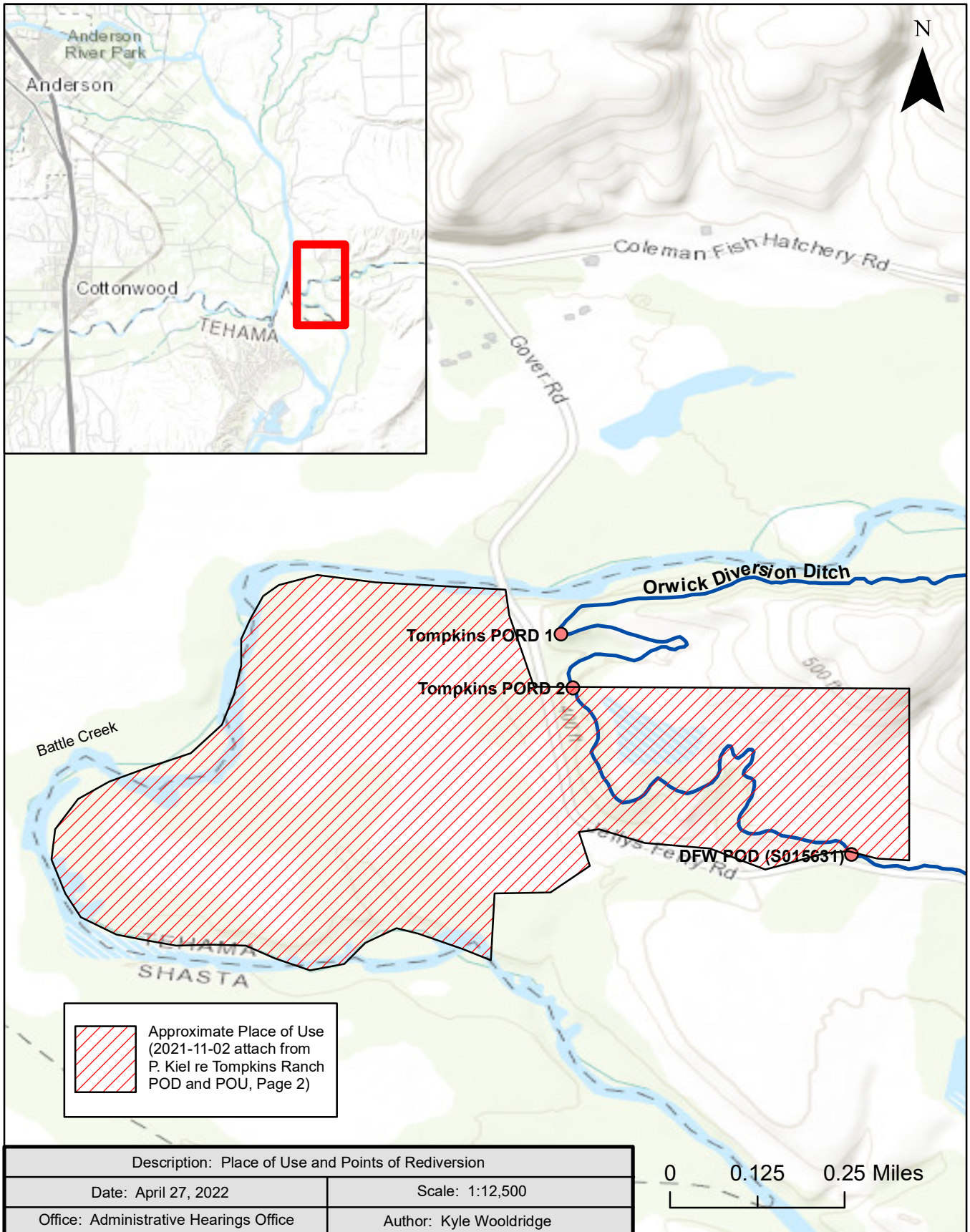


Figure 2 Place of Use and Points Rediversion



SERVICE LIST

By E-mail Only:

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