

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Application 28210)	
U. S. SHASTA-TRINITY NATIONAL FOREST,)	ORDER: WR 86-12
Applicant,)	
LARRY ZUKOWSKI,)	SOURCE: Unnamed Spring
Petitioner.)	Tributary to
)	Barker Creek
)	COUNTY: Trinity

ORDER DENYING PETITION FOR RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

The U. S. Shasta-Trinity National Forest (applicant) having filed Application 28210 for a permit to appropriate unappropriated water; the applicant and Mr. Zukowski (petitioner) having participated in a field inspection conducted in accord with Water Code Section 1345; an analysis recommending approval of the application having been prepared and mailed to the petitioner; the petitioner having requested a hearing pursuant to Section 1347; the Chief, Division of Water Rights, State Water Resources Control Board having denied the request for hearing; and the petitioner having petitioned the Board for reconsideration pursuant to Section 1357, the Board having reviewed the records pertaining to this matter finds as follows:

2.0 SUBSTANCE OF APPLICATION

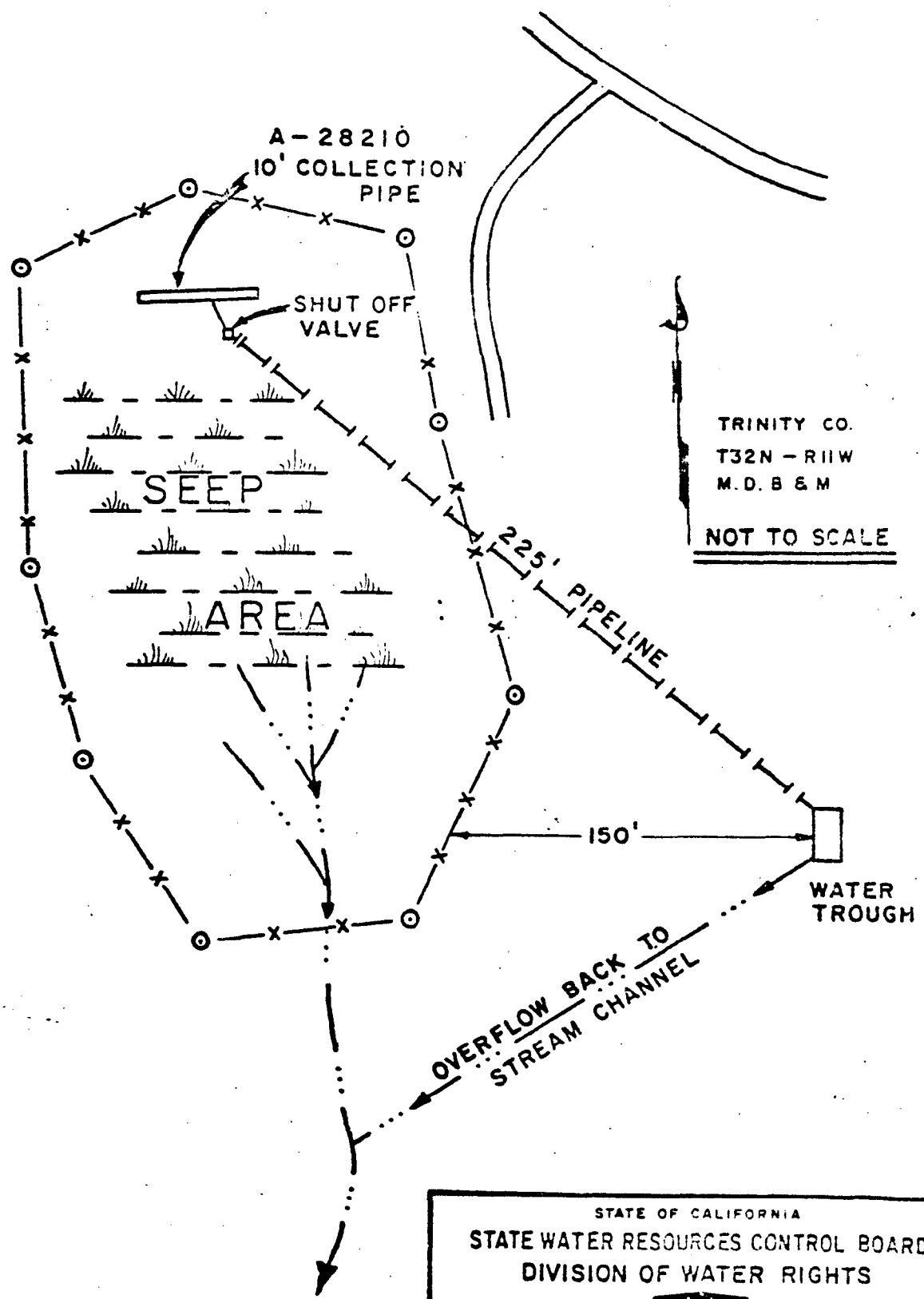
Application 28210 is for the direct diversion of 300 gallons of water per day from May 1 to October 31 of each year for the purpose of stockwatering.

3.0 PROJECT DESCRIPTION

The applicant proposes to bury about 10 feet of perforated pipe in a seep to collect water. The water will be piped to a stockwatering trough that will be located about 150 feet from the unnamed stream fed by the seep and the overflow from the trough will be returned to the unnamed stream (see Figure 1). The unnamed stream joins Barker Creek. The point of diversion and the place of use are on U. S. forest property and the quantity of water sought for appropriation is about the amount of water used by the average household.

4.0 PROTESTS TO APPLICATION 28210

Protests to the application were filed by four families and the Barker Creek Landowners Association. The protestants who own land adjoining Barker Creek alleged that the proposed diversion would cause injury to vested rights for the use of water. During the course of the investigation concern was expressed regarding the use of U. S. forest lands for cattle grazing and the effect of such grazing upon the quality of the water in Barker Creek. The petitioner is among those persons residing along Barker Creek and is recognized as an interested party in this matter.

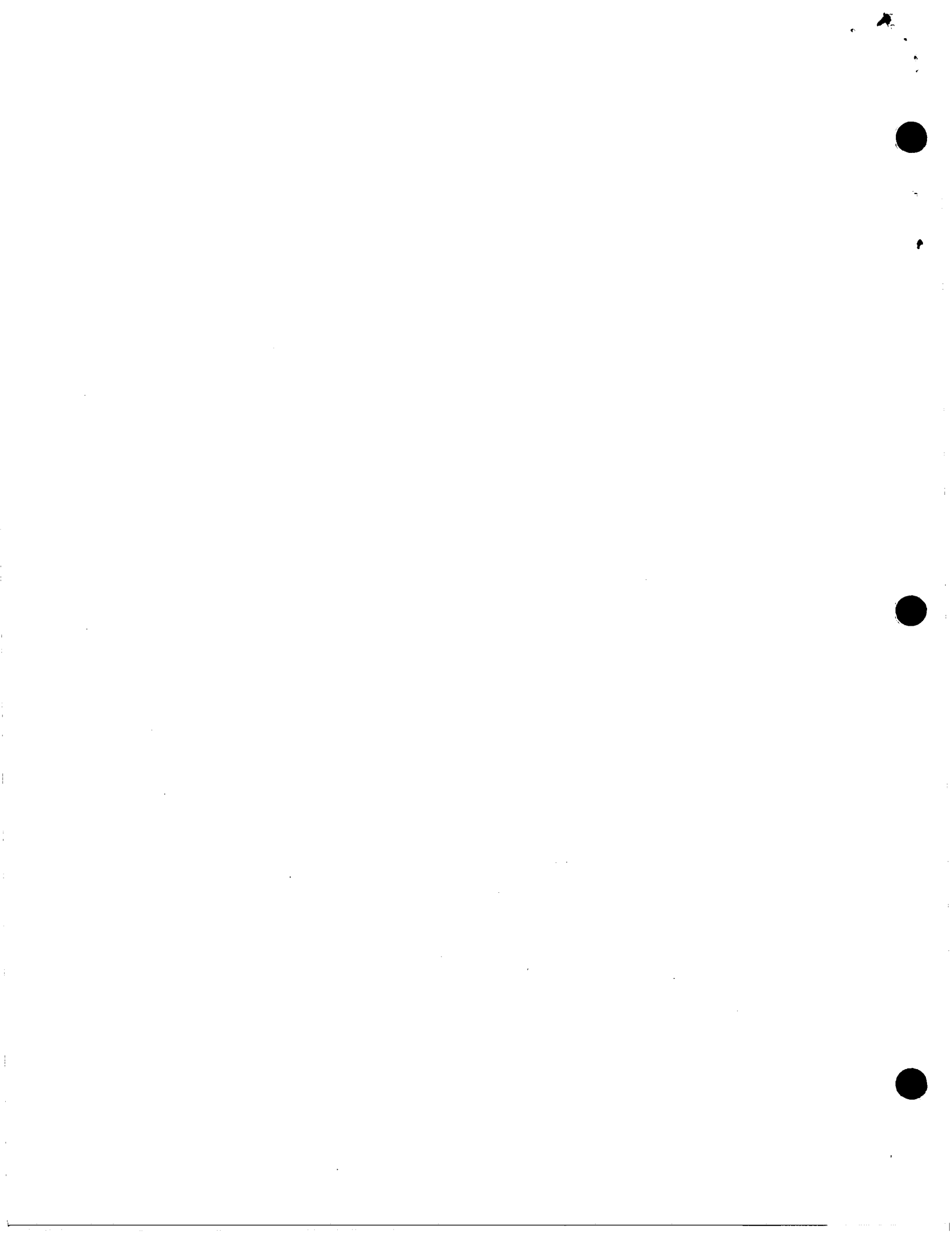


STATE OF CALIFORNIA
 STATE WATER RESOURCES CONTROL BOARD
 DIVISION OF WATER RIGHTS

APPLICATION
 28210

**SCHEMATIC
 DIAGRAM**

DATE: 12/31/85 | DRAWN: JSCW | CHECKED: LKB | DWG: 3348



5.0

FIELD INVESTIGATION/ANALYSIS

Application 28210 is a minor protested application (Water Code Section 1348). A field investigation was conducted on April 25 and on September 12 and 13, 1985 in accord with Section 1345. The following are excerpts from the staff analysis:

"The protestant's [sic] are concerned that the applicant's project will draw more cattle to the unnamed stream. The applicant contends that it is unlikely that more than four or five head will water from the trough at one time and believes keeping the cattle from watering directly in the streambed will improve the present water quality conditions in Barker Creek. The majority of Barker Creek water users take water directly from the stream without filtering or treatment." (p. 4)

* * *

"Protestants have submitted documentation of a pre-1914 appropriative water right filed July 28, 1888 by William Barker for diversion of 350 miner's inches (8.75 cfs) from Barker Creek for irrigation and domestic use on Barker Creek Ranch. The major use of water on the ranch was apparently curtailed in 1972 when the ranch was subdivided. Water use declined until 1976 when use of the diversion ditches ceased. Many of the parcels within the present Barker Creek subdivision are vacant and appear to have not used any water since the ranch was subdivided. The parcels likely have lost any pre-1914 right because of nonuse for a period in excess of five years. Those parcels which have maintained a beneficial use of water appear to have lost any appropriative right to the water in excess of that actually used on the parcel." (p. 4)

* * *

"It is staff's opinion that hydraulic continuity between the seep and Barker Creek would only exist as a result of runoff due to rainfall or snow melt. During the summer months when there is low flow in Barker Creek, hydraulic continuity from the seep would not exist." (p. 3)

* * *

"[T]he total existing use downstream from the applicant's point of diversion is approximately 363,500 gpd or 0.56 cfs. Flow and water use data shows that during the season when hydraulic continuity may exist, unappropriated water is available for Application 28210."
(p. 6)

* * *

"[T]here is sufficient water in the watershed to satisfy the applicant's project and the existing demands of the downstream users in the Barker Creek subdivision in most years. In addition, evidence gathered at the field investigations indicates that hydraulic continuity does not exist between the applicant's point of diversion and Barker Creek during the driest part of the season when the flow of water in Barker Creek may be reduced.

"In regard to the water quality issues, the protestants' greatest concern appears to be focused on the land management practices of the Forest Service which mandates cattle grazing in that portion of the National Forest. Control of this practice is not within the Board's jurisdiction and, for purposes of Application 28210, the proposed use of the water is considered beneficial. In addition, the applicant's project should improve conditions in the stream by not allowing the cattle to water directly in the seep area.

"Based on the above considerations, staff concludes that water is available to satisfy applicant's requested diversion without causing injury to protestants' prior rights." (p. 8)

The analysis also recommended that the following conditions be included in a permit for Application 28210:

- "3. Permittee shall place the stockwatering trough at least 150 feet from the stream channel and shall pipe all overflow back to the stream channel below the seep area.
- "4. Applicant shall fence the seep area surrounding the point of diversion and also the seep area located approximately 100 yards below the point of diversion to discourage cattle from watering directly in the stream channel."

6.0 REQUEST FOR HEARING

On March 13, 1986 the staff analysis was forwarded to the parties with a cover letter indicating that a hearing may be requested but that the request for hearing shall specify the issues unresolved and that the hearing will be limited to consideration of unresolved issues (Water Code Sections 1346 and 1347).

By letter dated April 6, 1986 the petitioner requested a hearing; however, identification of the issues raised was difficult.

Accordingly, on May 7, 1986 the Division of Water Rights responded as follows:

"When requesting a hearing as the result of a staff analysis for a minor protested application, Water Code 1347 states:

'A request for hearing shall specify the issues unresolved among the parties, and the Board shall restrict any hearing to consideration of such unresolved issues.'

"We cannot identify any specific issues in your request for a hearing other than whether it is within the Board's jurisdiction to evaluate the availability of unappropriated water and to issue a permit for the unappropriated water where use by other persons under pre-1914 rights are involved.

"Please notify us if our determination regarding your request is correct or if there are other issues not addressed in our analysis or issues which you disagree with."

On May 6, 1986 the petitioner responded as follows:

"THIS IS A RESPONSE TO YOUR LETTER DATED MAY 7, 1986.

"ADMITTEDLY, WHEN ACTING UPON AN APPLICATION TO APPROPRIATE WATER, IT IS WITHIN WATER BOARD JURISDICTION TO EVALUATE THE AVAILABILITY OF UNAPPROPRIATED WATER! THIS IS NOT AN UNRESOLVED ISSUE.

"UNFORTUNATELY, YOU HAVE ASSUMED IT IS PART OF YOUR JOB TO IGNORE AND/OR DISPROVE OUR PRIOR CLAIM IN ORDER TO AVAIL WATER FOR APPROPRIATION. YOUR REPEATED FAILURE TO RECOGNIZE THE LAWFUL NATURE AND EXTENT OF THE BARKER WATER RIGHT(S), WHILE EXERCISING EXCLUSIONARY ADMINISTRATIVE DISCRETIONS, (WHICH CLEARLY FAVOR THE APPLICANT) IS AN ABUSE OF AUTHORITY.

"CONSIDERING THAT THE APPLICANTS FOREST MANAGEMENT POLICIES HAVE RESULTED IN DOCUMENTED ABUSES TO LOCAL WATER SHEDS, INCLUDING BARKER, AND BECAUSE PROPERTY RIGHTS HERE INCLUDE THE DOMESTIC USE OF BARKER CREEK(S) WATER, VIOLATIONS RESULTING FROM SUCH POLICIES HAVE COMPROMISED THE HEALTH AND WELFARE OF RESIDENTS AS WELL AS THE VALUED DISPOSITION OF THE BARKER RANCH PROPERTIES.

"IN THE DEFENSE OF VESTED PROPERTY RIGHTS, VOLUNTARY ATTEMPTS TO COMPLY WITH STATUTORY PROCEDURES HAVE BEEN IMPAIRED BY ADMINISTRATIVE IRREGULARITIES. THEREFORE, A REBUTTAL TO STAFF CONCLUSIONS, AS WELL AS THE ASSESSMENT OF LIABILITIES RESULTING IN DENIAL OF PROPERTY/RIGHTS WAS IMPRESSIBLY INCLUDED IN MY REQUEST FOR HEARING.

"THROUGH EVIDENCE AND TESTIMONY, IT CAN BE ASSERTED THAT AGENTS OF THE STATE HAVE CONSPIRED TO ACTIONS HOSTILE TO PROPERTY RIGHTS AFFECTED BY APP# 28210. THE PURPOSE OF SAID CONSPIRACY HAS BEEN TO DEPRIVE CITIZENS OF CONSTITUTIONAL GUARANTEES. THE RESULT HAS BEEN ACTS COMMITTED UNDER THE COLOR OF LAW WHICH WOULD SERVE TO DEPRIVE CITIZENS OF PROPERTY.

"WHILE THERE IS NO APPARENT ASCERTAINABLE PUBLIC BENEFIT, OR NEED, SERVED BY APP# 28210, IN THE INTEREST OF FAIRNESS, IT IS ACKNOWLEDGED THAT STATE INVOLVEMENT WAS INITIALLY INVOLUNTARY. HOWEVER, UNLESS ADMINISTRATIVE IRREGULARITIES (UNRESOLVED ISSUES), ARE PROPERLY ADDRESSED BY THE BOARD AND/OR APPLICANT EQUITORIAL REMEDIES MAY BE NECESSARY TO PROTECT VESTED PROPERTY RIGHT(S).

"AMONG UNRESOLVED ISSUES, I OFFER THE FOLLOWING

"A. ADMINISTRATIVE IRREGULARITIES BY BOARD/APPLICANT

1. FAILURE BY BOARD/APPLICANT TO RESPOND TO ALLEGATIONS CONTAINED IN, OR AS A RESULT OF PROTESTS TO APPLICATION 28210, AS REQUIRED UNDER TITLE 23, SECTION 724 OF THE CALIFORNIA ADMINISTRATIVE CODE.

2. DENIAL OF INFORMATION BY THE BOARD/APPLICANT OFFERED BY PROTESTANT(S) AS EVIDENCE IN FAVOR OF PRIOR LEGAL CLAIM.

"B. ILLEGAL ACTIVITIES SURROUNDING APPLICATION 28210

1. ENCROACHMENTS OF PROPERTY RIGHTS RESULTING FROM APP# 28210 BY BOARD/APPLICANT PERSONNEL IS A DENIAL OF PROTECTION OF RIGHTS ENUMERATED IN THE DECLARATION OF INDEPENDENCE, THE BILL OF RIGHTS, THE U. S. CONSTITUTION AS WELL AS THE VARIOUS ACTS OF CONGRESS WHICH GUARANTEE THE RIGHTS OF CITIZENS TO ACQUIRE PROPERTY HELD IN THE PUBLIC TRUST.
2. ASSERTIONS AS TO THE VALIDITY OF THE EXPRESSED BARKER RANCH PROPERTY RIGHTS, AS A RESULT OF APP# 28210, IS A DENIAL OF EQUAL PROTECTION AND DUE PROCESS AFFORDED UNDER CIVIL RIGHTS ACT(S).

"INTIMIDATION, IN THE DEFENSE OF VESTED RIGHTS, THROUGH FEAR OF EXPENSE, AS A RESULT OF IMPROPER STATE INVOLVEMENT (USURPED JURISDICTION) SUGGESTS CRIMINAL INVOLVEMENT, EXERCISED UNDER COLOR OF LAW.

"ADDITIONALLY, THIS APPLICATION DOES NOT ADDRESS OR REFLECT CONCERNS, INTERESTS OR GOALS REPRESENTED BY UNIFICATION EFFORTS OF THE BARKER CREEK HOMEOWNERS ASSOCIATION.

"VERIFICATION OF FACTS RELEVANT TO ALLEGATIONS, BY SWORN DEPOSITION OR SUBPENA, AS NECESSARY, WAS INCLUDED (AS A MOTION) IN MY REQUEST FOR HEARING.

"AS THESE ALLEGATIONS SUGGEST CIVIL IMPROPRIETIES, [sic] A CONTESTED CASE HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE (RATHER THAN THE WATER BOARD) WOULD BETTER SERVE EFFORTS TO RESOLVE THE REAL ISSUES SURROUNDING THIS APPLICATION."

By letter dated August 1, 1986 the Chief, Division of Water Rights, denied the request for hearing because it was concluded that a good faith effort to identify the unresolved issues had not been made. The following points were also made in the letter: There is sufficient

water in the stream to satisfy existing demands and the proposed project in most years; hydraulic continuity does not exist between the proposed point of diversion and Barker Creek in the driest part of the season; the Board does not have the authority to regulate land management practices on federal lands; the project should improve water quality conditions in the stream; no opinion contained in an analysis by the Board's staff can abrogate or reduce any water right; and permits issued by the Board contain an express condition subjecting the permit to the holders of prior water rights.

7.0 PETITION FOR RECONSIDERATION FROM THE DENIAL OF THE REQUEST FOR HEARING

On September 12, 1986 the petitioner filed a petition for reconsideration. As with the preceding letter, the petition is difficult to understand. Nevertheless, we will attempt to summarize the principal points of the petition.

- o The petitioner renews his request for a hearing to present the evidence described in his letter of April 6, 1986.
- o The recommendation of the staff for approval of the application was over the objection of the petitioner.
- o There are no factual issues to be resolved between the applicant and the petitioner.
- o Various authorities are cited from the western states for the following propositions: the petitioner's claimed water right is a grant from the federal government and the Board has no

jurisdiction over the right; the petitioner is entitled to claim, for use, all water in the watershed that may supply his claimed right; the application by the U. S. Forest Service is a violation of civil rights; and, the Board has conspired to deny the petitioner his vested rights.

8.0 APPLICABLE LAW

The Board may order reconsideration of all or a part of a decision on petition of any person interested in an application provided that a petition is filed with the Board within 30 days after adoption by the Board (Water Code Section 1357). Reconsideration must be ordered or denied within 60 days after the petition is filed.

Our regulations provide that reconsideration may be requested for the following causes:

- "(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- "(b) The decision or order is not supported by substantial evidence;
- "(c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing;
- "(d) Error in law." (23 Cal.Admin.Code (737.1))

Among other matters, a petition for reconsideration must state the reason why an action was inappropriate or improper (23 Cal.Admin.Code §737.2(a)(4)).

The Board may (1) refuse to consider the decision if the petition fails to raise substantial issues or (2) deny the petition because the decision was appropriate, set the decision aside, or take other appropriate action (23 Cal.Admin.Code §737.4).

9.0 ANALYSIS

The difficulty with the petitioner's requests for hearing and the petition for reconsideration is that his writing is extremely obscure. While it is quite clear that the petitioner is unhappy with the staff's analysis and recommendation, it does not appear that he wishes to raise issues that can be meaningfully addressed within the context to a water right hearing, e.g., allegations of conspiracy, intimidation, unconstitutional taking, and civil rights violations.

A hearing is most useful for resolving disputed factual issues concerning the appropriation of water. The division of water rights has repeatedly and without success urged the petitioner to be specific as to the matters he wishes to controvert. Neither the April 6, 1986 letter nor the petition for reconsideration identify any factual issues the petitioner wishes to controvert.

After reviewing the above-referenced correspondence, including the petition, it appears that the petitioner is really saying that the staff recommendation for approval of the application is an error in law. The petitioner apparently believes that no application to appropriate water can be approved if the totality of alleged water rights in a watershed exceed the quantity of water available in a watershed. It is important to distinguish the actual use of water from theoretical rights to the use of water.

The reference to the law of other states is only appropriate to aid in the resolution of an ambiguity in California water law. California water law is quite clear on the question of what water is available for appropriation. Accordingly, the petitioner's references to the law respecting the appropriation of water in other states is inappropriate.

Water Code Section 1201 provides that the water available for appropriation in California includes all water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or is otherwise appropriated. The staff analysis concluded that there is sufficient water in the stream to satisfy existing demands and the proposed project in most years. Further, it was found that hydraulic continuity did not exist between the proposed point of diversion and Barker Creek in the driest part of the season. The latter finding means that the source of the water for the application is not part of the natural supply for the persons using Barker Creek during the months of lowest flow.

10.0 CONCLUSIONS

In view of the foregoing, we conclude that the petition for reconsideration should be denied because the petitioner has failed to identify the factual issues he wishes to controvert as required by Water Code Section 1347. In addition, we find that unappropriated water is available for appropriation within the meaning of the California Water Code.

11.0 ORDER

IT IS HEREBY ORDERED that the August 14, 1986 letter denying the request for hearing is affirmed and that the petition for reconsideration of that decision is denied.

CERTIFICATION

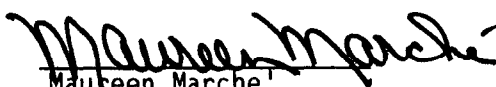
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 5, 1986.

AYE: W. Don Maughan, Chairman
Darlene E. Ruiz, Vice Chairwoman
Edwin H. Finster, Member
Eliseo M. Samaniego, Member
Danny Walsh, Member

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board