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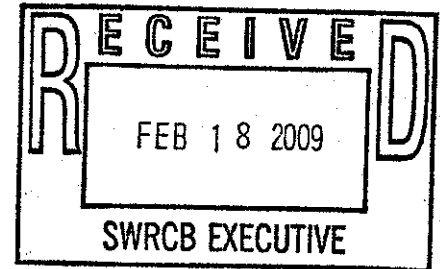
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February 18, 2009

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100



**RE: COMMENT LETTER – 03/03/09 BOARD MEETING: LAWC/ALPINE COUNTY  
DRAFT DECISION**

Dear Ms. Townsend:

These comments are submitted on behalf of the Lake Alpine Water Company (LAWC) and Alpine County regarding the draft Order approving petition for partial assignment of SFA and petition for change.

For simplicity, we have attached a copy of the draft Order with our comments in tracked changes (~~strike~~ and underline format). We believe all of our suggested changes are mere technical corrections. However, we did notice that the time to complete beneficial use expires December 31, 2020. We had requested 25 years during the hearing and in our closing brief. We are unsure whether the 2020 expiration date is due to the Board counting the years from when the petitions were originally filed, which was in 1996, or some other reason. Regardless of the reason, we do reassert and request that the petitioners be granted a 25-year period of time, or until December 31, 2034, to complete beneficial use.

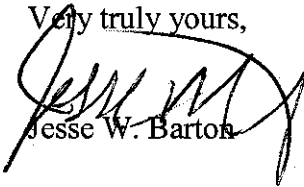
There is ample reason for this in both the record and current events. As testified to during the hearing, a small water company like LAWC is going to need several years to begin building the additional housing for the project (RT, pages 15-17, 24-31). This is especially true due to the current economic climate, slumping housing sales, and surplus of existing housing. Once built, beneficial use is expected to grow more slowly than it would under normal circumstances, because increases in beneficial use will be tied to the economy as it gradually recovers over a period of years. It would not be unreasonable to assume that it will take three to five years for the economy to recover and for this project to be completed, which will reduce the amount of time available to complete this project to a mere five years. Five years is not enough time for a company like LAWC that provides municipal water to complete beneficial use. Municipal providers are typically provided more latitude in putting water to beneficial use. (See, e.g. Board Order WR 2000-13, at p. 14; Board Order WR 2006-0017; WC §§ 106.5, 1203.)

If the permit is issued with the existing development period, we will have to consider filing a petition for extension of time as soon as the permit is issued, because in our experience, it takes

about ten years to obtain a petition for extension of time (RT, page 16, lines 18-19). Requiring our clients to take this action, after all the time and money that has already been invested in this project, and when it is currently before the Board and can be resolved at this time, would be incredibly unfortunate. Worth emphasizing is that the 25-year period of time to complete beneficial use was discussed during the hearing and there was no comment or evidence submitted that questioned the need or the basis for such period of time.

We appreciate your time and consideration and look forward to appearing at the Board meeting.

Very truly yours,



Jesse W. Barton

Enc. (1)  
cc. Charles Toeniskoetter (w/enc.)  
Bob Wagner (w/enc.)  
Brad Herrema (w/enc.)

LAWC Service List

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**DECISION XXXX**

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In the Matter of Lake Alpine Water Company and the County of Alpine's Petition for Partial Assignment of State Filed Application (SFA) 5648 under Application 5648(07), Petition for Changes to SFA 5648, and Application 31523

**LAKE ALPINE WATER COMPANY AND THE COUNTY OF ALPINE  
Petitioners and Applicants**

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SOURCE: Bear Creek tributary to Bloods Creek thence the North Fork of the Stanislaus River  
COUNTY: Alpine

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**DECISION APPROVING PETITION FOR PARTIAL ASSIGNMENT OF STATE FILED APPLICATION AND PETITION FOR CHANGE**

BY THE BOARD:

**1.0 INTRODUCTION**

In this decision, the State Water Resources Control Board (State Water Board) conditionally approves Lake Alpine Water Company and the County of Alpine's (jointly referred to herein as "Applicants") petition for partial assignment of State Filed Application (SFA) 5648. The portion of SFA 5648 requested by the Applicants is identified as Application 5648(07). The State Water Board also approves the Applicants' petition to change the place and purpose of use and the point of diversion for Application 5648(07).

On July 30, 1927, the Department of Finance filed SFA 5648 for irrigation and domestic use on 310,000 acres within an area roughly comprising Amador County, Calaveras County, Stanislaus County, and Eastern San Joaquin County. An SFA is held by the State Water Board, which may release from priority or assign any portion of the SFA when "the release or assignment is for the purpose of development not in conflict with such general or coordinated plan or with water quality objectives established pursuant to law." (Wat. Code, § 10504.) The State Water Board may not release from priority or assign an SFA if the county in which the water originates would be deprived of water necessary for its development. (Wat. Code, §§ 10505, 10505.5.)

The Applicants submitted their petitions and application on October 24, 2003. The State Water Board issued a public hearing notice on May 21, 2008, and held a public hearing on July 14, 2008 as required by Water Code section 10504.1. At the hearing, Applicants presented testimony and exhibits, and one supporting policy statement was provided on behalf of interested parties (Oakdale Irrigation District, South San Joaquin Irrigation District, Tri-Dam Project, and Tri-Dam Power Authority). The Applicants also submitted a closing brief. The evidence and closing brief have been duly considered and the State Water Board conditionally approves the petitions and finds as follows:

## **2.0 BACKGROUND**

### **2.1 Project Description**

The Applicants seek to obtain water rights for the water system for the community of Bear Valley, Alpine County, within the Stanislaus National Forest. (See Applicants-F, Attachment A, Plate 1 - Project Location Map.)<sup>1</sup> Lake Alpine Water Company (LAWC) owns and operates the community water system that supplies municipal and recreational water to the Bear Valley resort community.<sup>2</sup> The point of diversion is Bear Lake (Reba Dam). Bear Lake is located at the headwaters of Bear Creek, which flows tributary to Bloods Creek thence to the North Fork of the Stanislaus River. Bear Lake (Reba Dam) was completed in 1965 and has an as-built maximum capacity of 360 acre-feet. (See Applicants-F, Attachment A, Plate 2, – Project Boundary Map.)

In 1978, the County of Alpine (County) certified the Bear Valley Master Plan (BVMP) Environmental Impact Report (EIR), which was prepared for modifications and enlargements to the existing master plan for Bear Valley. A mitigation measure in the EIR required the County to develop a guaranteed water supply to serve planned growth under the BVMP. To implement that mitigation measure, the County's proposed project includes the Applicants' water right application and petitions.

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<sup>1</sup> Exhibits introduced at hearing will be referred to throughout this decision, as here, by party name and exhibit letter.

<sup>2</sup> During the 1960s, LAWC initially secured appropriative water rights with the 1961 filing of water right Application 20312 (Permit 13903) and with the 1963 filing of water right Application 21485 (Permit 14541). In 1978 and 1980, the State Water Board issued water right licenses 10840 and 11007 pursuant to

**2.2 The Applicants' Filings**

In 2003, the Applicants submitted an amended petition for partial assignment of SFA 5648 with accompanying Application 5648(07).<sup>3</sup> The Applicants' amended filings seek a combined total diversion amount not to exceed 395 acre-feet-per-annum (afa) (175 afa by direct diversion and 220 afa by storage), during the diversion season of October 1 through July 31, for municipal and recreational purposes within the Bear Valley service area. (Applicants-F.) The Applicants also filed a petition to change the place and purpose of use of SFA 5648, and to add a point of diversion to SFA 5648, because SFA 5648 does not include the Applicants' proposed purposes of use, place of use, or point of diversion.

In the event that Applicants' petitions were denied, the Applicants also filed Application 31523, under claim of area-of-origin preference, in order to qualify for an exemption from the Declaration of Fully Appropriated Stream Listing.<sup>4</sup> Application 31523 is otherwise identical to the Applicants' application accompanying the petition for partial assignment of SFA 5648.

**3.0 PROTESTS TO APPLICATION, PETITION FOR CHANGE AND PETITION FOR ASSIGNMENT OF SFA 5648**

In response to two State Water Board notices, dated June 20, 1997 and December 10, 2004, the State Water Board received ten protests to the subject application, petition for change, and petition for assignment of the state filing. The following table identifies each protestant, the general nature of their protest, and the protest's disposition.

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permits 13903 and 14541. The maximum allowable annual use of water by direct diversion and storage authorized under water rights licenses 10840 and 11007 is limited to 182 afa.

<sup>3</sup> The petition it amended was filed on April 19, 1996. The initial petition and accompanying water right application requested the additional appropriation of water from Bear Creek tributary to Bloods Creek thence the North Fork Stanislaus River, at a maximum rate of 0.78 cfs (139 afa) by direct diversion (October 1 – August 31) and 256 af by storage at Bear Lake (October 1 – August 31) for municipal, recreational, and snowmaking purposes.

<sup>4</sup> State Water Board Orders WR 89-25 and 98-08 provide for the acceptance of new applications that propose appropriations entitled to the benefit of area-of-origin principles. (See, e.g., Wat. Code, §§ 11460 et seq., 10500 et seq.)

**PROTEST SUMMARY**

Protestant	General Nature of Protest	Disposition
1. U.S. Bureau of Reclamation 2. Department of Water Resources	Injury to Prior Rights	Conditionally withdrawn based on inclusion of Standard Terms 80 and 90
3. Stockton East Water District	Injury to Prior Rights	Unconditionally withdrawn
4. Oakdale Irrigation District 5. South San Joaquin Irrigation District 6. Calaveras County Water District 7. Northern California Power Agency	Injury to Prior Rights	Conditionally withdrawn based on inclusion of specific language in the permit
8. Department of Fish and Game	Adverse Environmental Impact	Unconditionally withdrawn
9. Central Sierra Environmental Resources Center	Adverse Environmental Impact	Not accepted based on failure to provide support for protest
10. Delta Water Users Association	Injury to Prior Rights	Protest dismissed due to protestant's failure to respond to State Water Board

**3.1 Protest by Oakdale Irrigation District and South San Joaquin Irrigation District**

Oakdale Irrigation District and South San Joaquin Irrigation District conditionally withdrew their protests based on the Applicants' acceptance of the following condition, to be included in any permit issued pursuant to Applicants' filings, which is derived from the executed agreement between the permittee and the South San Joaquin Irrigation District and Oakdale Irrigation District, dated March 20, 2007:

*The rights acquired under this permit shall be junior to the rights acquired under the permits issued to South San Joaquin Irrigation District (SSJID) and Oakdale Irrigation District (OID) pursuant to Applications 1081, 3091, 10872, 10978; issued to OID pursuant to Applications, 8892, 9666; issued to SSJID pursuant to Application 2524; and claimed by SSJID and OID pursuant to Statement of Water Diversion and Use 4683. Inclusion in the permit of this provision of the referenced agreement shall not be construed as approval or disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this permit.*

(SWRCB-1, A005648(07) Correspondence File, September 19, 2007 letter to Ernest Mona from Steven Emrick; September 27, 2007 letter to Ernest Mona from Jesse Barton; October 18, 2007 email to Steve Emrick from Ernest Mona.)

### 3.2 Protest By Calaveras County Water District and Northern California Power Agency<sup>5</sup>

Calaveras County Water District and Northern California Power Agency conditionally withdrew their protests to the Applicants' filings based on the Applicants' acceptance of the following protest dismissal term to be included in any permit issued pursuant to Applicants' filings:

*"Calaveras County Water District and Northern California Power Agency filed protests to Water Right Application 5648(07) and Petition for Partial Assignment of State Filed Water Right Application 5648 and associated change petitions. In resolution of those protests, Permittees entered into the following agreements with Calaveras County Water District and Northern California Power Agency entitled: Agreement Resolving Protests of Calaveras County Water District by Calaveras County Water District, County of Alpine, Lake Alpine Water Company (May 2007) and Agreement Resolving Protests of Northern California Power Agency by Northern California Power Agency, County of Alpine, Lake Alpine Water Company (May 2007). In accepting this permit, Permittees acknowledge the terms of those agreements."*

(SWRCB-1 A005648(07), Correspondence File, November 28, 2007 letter to Jennifer Harder, Dawn McIntosh, Michael Dean and Jesse Barton from Ernest Mona; February 27, 2008 letter to Ernest Mona from Jennifer Harder; March 3, 2008 email to Ernest Mona from Jennifer Harder.)

## 4.0 WATER AVAILABILITY

### 4.1 Watershed Description

The source of water for the Applicants' project is the Bear Creek watershed area (Bear Valley) in Alpine County. The Bear Creek watershed area is generally tree-covered, steep and rocky, and ranges in elevation from about 7,200 feet above mean sea level (msl) to about 8,400 feet above msl. Bear Lake has a drainage area of 520 acres. (Applicants-C, p. 24; Applicants-F, p. 2.)

Bear Creek is tributary to Bloods Creek, thence the North Fork Stanislaus River (NFSR), thence the Stanislaus River. The Bloods Creek watershed is comprised of 7,240 acres and is unimpaired (with the exception of Bear Lake) upstream of its confluence with the NFSR. The NFSR watershed at Avery, CA (located approximately 8 miles upstream of the NFSR

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<sup>5</sup> Northern California Power Agency is a public agency created under the California Joint Exercise of Power Act. It generates and transmits electric power for its member entities.

confluence with the Stanislaus River) is composed of 110,419 acres and is unimpaired downstream of its confluence with Bloods Creek. Downstream of the NFSR confluence with the Stanislaus River, the Stanislaus River watershed is composed of 577,506 acres and is impaired at the New Melones Reservoir and at Goodwin Dam (Tulloch Reservoir). Goodwin Dam's drainage watershed is composed of 623,663 acres.

Bear Lake (Reba Dam) is located approximately 58 miles upstream from New Melones Dam and approximately 68 miles upstream from Goodwin Dam. The area of the Bear Creek watershed upstream of Reba Dam (520 acres) is only about 0.09 percent of the Stanislaus River's watershed area above New Melones Reservoir and Tulloch Reservoir (623,663 acres). Roughly 14 percent (90,329 acres) of the Stanislaus River watershed above New Melones and Tulloch, including Bear Creek and other tributaries, lies within Alpine County. (Applicants-F, pp. 2-3; Attachment to this decision, Figures 1 and 2.)

#### 4.2 Hydrology

Because precipitation records at Bear Valley are not readily available, the Applicants provided an evaluation of available precipitation records maintained at Calaveras Big Trees State Park, elevation 4,700 ft above msl. (*Id.*, Appendix B, Table B-5.) These records indicate that for the period of record 1948-2008, the average annual precipitation at Big Trees is about 54 inches, with 85 percent of recorded precipitation occurring during the period November through May. During the period June through October, the records indicate that precipitation gradually diminishes to an amount that produces limited runoff. (*Ibid.*) These records can be used to indicate the pattern of expected precipitation in Bear Valley. As noted above, Bear Valley is located at an elevation almost 3,000 ft above the Big Trees station. Precipitation could be expected to be substantially greater at Bear Valley due to its elevation high in the Sierra Nevada. (*Ibid.*)

Seasonal runoff occurs during October to July, but is most abundant during the snowmelt period of May and June. Runoff due to rainfall or snowmelt is rapid with limited retention. The Bear Creek watershed's seasonal average runoff, at Reba Dam (Bear Lake) and during the requested diversion period of October to July, is estimated to be 1,720 af. (Applicants-F, Attachment A, Plate 1 and Table 5.) In comparison, the reported average seasonal runoff of the Stanislaus River watershed at Goodwin Dam (Tulloch Reservoir) and during the same period is 1,154,276 af. (*Ibid.*) Thus, the Applicants' requested appropriation of 395 afa



represents only 23 percent of the average seasonal runoff of Bear Creek's watershed and 0.03 percent of the Stanislaus River watershed's recorded average runoff during the requested season of diversion.

**4.3 Effect of Board Decisions and Orders Related to Water Availability**

Applicants seek to divert water from Bear Creek tributary to the Stanislaus River. State Water Board Order WR 89-25 declared the Stanislaus River to be fully appropriated from the confluence of the San Joaquin River upstream from April 1 to November 30, based on the 1929 Stanislaus River Decree and State Water Board Decision 1422 (issued in 1973). However, State Water Board Order WR 98-08 allows state filed applications to be processed on fully appropriated stream systems. In addition, State Water Board Orders WR 89-25 and WR 98-08 provide for the acceptance of new applications that propose appropriations entitled to the benefit of area-of-origin principles. (See generally, Wat. Code, §§ 11460 et seq., 10500 et seq.)

**4.4 Existing Water Rights**

The record includes tables that provide summary lists of recorded water rights within the Bloods Creek watershed upstream of Bloods Creek's confluence with the NFSR, and on the Stanislaus River System represented by the parties who protested the Applicants' filings. (Applicants-F, Attachment A, Tables 1 and 2.) The water right filings with priorities senior to SFA 5648 which are located downstream of the Applicants filings on the NFSR and Stanislaus River include Application 1081 jointly held by Oakdale Irrigation District and South San Joaquin Irrigation District, Application 2524 held by South San Joaquin Irrigation District, Application 3091 held by Oakdale Irrigation District and Statement of Water Diversion and Use 998 held by Utica Power Authority. (*Ibid.*)

**4.5 Water Availability**

Downstream of the Applicants' project, the total annual demand of storage rights senior to SFA 5648 during the Applicants' season of diversion of October 1 to July 31 equals about 142,949 afa. (*Ibid.*) As noted above, the total runoff of the Stanislaus River at New Melones Reservoir, on average and during the season October 1 to July 31, has been reported to be about 1.2 million afa. The Applicants' total requested amount of annual diversion under Application 5648(07) equals only 395 afa (220 afa by storage and 175 afa by direct diversion), or less than one-tenth of one percent of the total average runoff reported at New Melones

Reservoir. Therefore, there is sufficient water available within the Stanislaus River System, during the season of October 1 to July 31, to meet the demand of rights senior to Application 5648(07), as well as the Applicants' annual demand of 395 afa sought under Application 5648(07).

The estimated annual runoff of the Bloods Creek watershed above its confluence with the NFSR is 23,949 afa (see Section 5.3 above). The Applicants' requested annual demand of 395 afa represents only 1.65 percent of Bloods Creek estimated annual runoff. Frequency analysis of water availability provided by the Applicants indicates that the full amount of the Applicants' requested amount of 395 afa would be physically available 99.8 percent of all years evaluated. (Applicants-F, pp, 4-5 and Attachment A, Figures 6-10.) This evaluation supports LAWC's reported water use under existing water right License 11007. This reported water use indicates that Bear Lake has filled and spilled every year dating back to at least 1980. (*Id.*, Attachment B, Appendix C.) Thus, there is water physically available for appropriation under Application 5648(07) at the Applicants' point of diversion. The water available for Bear Creek's fishery resources is discussed in section 6.0 below.

## **5.0 STATE FILED APPLICATION 5648(07) CAN BE ASSIGNED TO THE APPLICANTS**

### **5.1 State Filed Application (SFA) 5648**

SFA 5648 was filed in 1927 to appropriate water for irrigation and domestic uses from various locations on three different major river systems and their tributaries, to wit, the Mokelumne, the Calaveras, and the Stanislaus. The application included a total maximum rate of direct diversion of 3,041 cfs and a maximum amount that could be diverted to storage in any one year of 274,850 af. The place of use is 310,000 acres within Township 1 S, Ranges 10 to 12 E inclusive and Townships 1 to 6 N inclusive, Ranges 9 to 15 E inclusive, within Amador County, Calaveras County, Stanislaus County, and Eastern San Joaquin County. Alpine County is not designated as a place of use under SFA 5648. The proposed place of use is located approximately 11 miles outside the delineated northeast boundary corner of SFA 5648's place of use (Applicants-F, Attachment A, Plate 1).

Although there have been numerous requests by many parties in different locations in the Mokelumne and Calaveras watersheds over the years for partial assignments and/or requests for releases of the 1927 priority of SFA 5648, on the Stanislaus River system (the only system related to the Applicants' filings), only 60,000 afa on the Middle Fork Stanislaus were assigned

to Oakdale and South San Joaquin Irrigation Districts in 1953 for use in their Tri-Dam Project; and that portion of SFA 5648 is no longer available. (SWRCB-1, A005648, Correspondence File) The State Water Board records show that on the Stanislaus River system, no other petitions for partial assignment and/or requests for release of the 1927 priority of SFA 5648 have been filed, other than the Applicants' Application 5648(07). (SWRCB-1, Application 5648, Correspondence Files) Upon the basis of the foregoing, the portion of original SFA 5648 which would appropriate water from the North Fork Stanislaus, plus its tributary Highland Creek and on the main-stem Stanislaus itself, amounts collectively to 1,575 cfs by direct diversion and 95,000 afa by storage. This amount is still unassigned and is therefore available for assignment. Those still-available amounts under SFA 5648 are in excess of the Applicants' combined total diversion request of 395 afa (175 afa by direct diversion at 0.78 cfs and 220 afa by storage) during the diversion season of October 1 through July 31 of each year.

## **5.2 The Petition for Assignment is Not in Conflict With the California Water Plan or With Water Quality Objectives**

Although the Department of Water Resources has published numerous updates, the 1957 California Water Plan is the basic State Water Plan. The plan states in part:

[A]s the time approaches for construction in any given area further studies will be made to determine the most feasible solution in the light of conditions then obtaining. That solution may depart considerably from the Plan now conceived."

The objectives of the original State Water Plan for the watershed are to develop fully and distribute local water supplies for all beneficial purposes, including irrigation, municipal, industrial, fish and wildlife, recreation, and power generation; to protect urban and agricultural areas from damaging floods; to convey and distribute the imported water supplies necessary to satisfy fully the ultimate water requirements for all beneficial purposes; and to protect the quality of water by adequate drainage and removal of unsuitable waters. (Cal. Dept. of Wat. Resources, Bulletin No. 3: The California Water Plan (May, 1957) p. 119.)

The most recent update to the State Water Plan was published in 2005. (Cal. Dept. of Wat. Resources, Bulletin 160-05 (Dec. 2005); Applicants-P.) Review of the relevant portions of the bulletin does not disclose plans for use of water from SFA 5648. (*Ibid*; cf. Cal. Dept. of Wat. Resources, Bulletin No. 3: The California Water Plan (May, 1957) pp. 119-130.)

Although there is no conflict with the plan, it is important that the petition seeks to appropriate water for a purpose and place of use that is consistent with the general purpose for which SFA 5648 was initially filed. Fundamentally, SFA 5648 was filed to assure a priority claim on the right to divert and use water from the Mokelumne, Calaveras, and Stanislaus Rivers to supply the future needs of Amador, Calaveras, Stanislaus, and Eastern San Joaquin Counties. In general, the State Water Board should look favorably upon petitions for release of priority or assignment of state filed applications so long as the petitioner seeks to appropriate water for purposes of use and places of use consistent with the state filed application. Although Alpine County is not within the place of use for SFA 5648, it is upstream of the place of use at the top of the watershed, and as Bear Lake is at the headwaters of the stream, Alpine County is the county of origin of the water.

Furthermore, the assignment would not conflict with plans or objectives for water use within the area designated by SFA 5648. Evidence was presented that the project will not conflict with water quality standards or waste discharge requirements (Applicants-H, pp. 6, 21-22). Due to the location and small size of the project, no impact of the project would be expected above New Melones Reservoir. (Applicants- F, p. 6, par. 28, and Attachment A, Figure 1.) Below New Melones, the Bureau of Reclamation and the Department of Water Resources operate the Central Valley Project (CVP) and State Water Project (SWP) to meet water quality objectives in the Sacramento-San Joaquin Delta. (State Water Board Decision 1485 (1978); State Water Board Order WR 95-6; D-1641, Order WR 2000-02.)

Approval of Applicants' petition for partial assignment of SFA 5648 is not in conflict with a general or coordinated plan, or established water quality objectives.

**5.3 Approval of Changes in Points of Diversion, Place of Use, and Purpose of Use Required by Petition for Assignment of SFA 5648**

Applicant's petition proposes to divert water to storage at Bear Lake - at the headwaters of Bear Creek - a point far upstream in the Stanislaus River System from those specified in SFA 5648. To change a point of diversion, place of use, or purpose of use from that specified in an application, an applicant must file a change petition with the State Water Board (Wat. Code, §§ 1701-1705), as Applicants have done. The change will allow Applicants to divert water further upstream on the same stream system. A point of diversion can be changed so long as the change neither initiates a new right nor injures other lawful users of water. (Cal. Code Regs.,

tit. 23, § 791; *Johnson Ranch Water District v. State Water Resources Control Board* (1965) 235 Cal.App.2d 863.)

Because no water has been diverted up to this point under the portion of SFA 5648 to be assigned, the potential for injury from the change is similar to that from assignment of the right itself. No evidence was presented at the hearing showing injury to other lawful users of water, and Applicants have resolved all ten protests of the proposed diversion. (Applicants-F, p. 5, 6; R.T. p. 14, lines 8-13.) The changes proposed do not increase the quantity of water to be diverted as specified in the State filing, and the source remains the same.

Thus, the State Water Board finds that the changes from the points of diversion to those in the petition for assignment will not initiate a new right or injure other lawful users of water.

**5.4 The Water Requested is Subject to County of Origin Protection for the Benefit of Use in Alpine County**

Water Code section 10505 provides that:

*"No priority . . . shall be released or assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county."*

The water which Applicants seek to appropriate to storage in Bear Lake originates in Alpine County. The California Attorney General has opined that "county of origin" is defined as the county in which the water "falls in the form of precipitation;" or in other words, within the county's watershed. (25 Ops. Cal. Atty. Gen. 8, 17 (1955).) Mr. Robert Wagner testified that the water covered by SFA 5648 *in toto* originates in Alpine, Calaveras, and Tuolumne counties. The water originating in Alpine County alone is estimated to be 184,000 afa, of which the Applicants' request of 395 af is 0.2 percent. (Applicants-F, p. 3, par. 12.)

**6.0 ENVIRONMENTAL AND PUBLIC INTEREST ISSUES AFFECTING THE APPLICANTS' PROJECT**

**6.1 Environmental Interest Issues**

On January 14, 2005 the Department of Fish and Game protested this project based on the belief that appropriation of the proposed quantity of water would result in reduced stream flow,

thus potentially impacting both aquatic and riparian resources during periods of low flow in Bear Creek. Downstream of the point of diversion, Bear Creek, Bloods Creek and the North Fork Stanislaus River support populations of rainbow trout (*Oncorhynchus mykiss*), brown trout (*Salmo Truttto*), brook trout (*Salvelinus fontinalis*), and potentially mountain yellow-legged frog (*Rana muscosa*). (Applicants-J, Attachment 2.)

Tom Taylor, Senior Consultant and Aquatic Ecologist for the environmental firm of Entrix, Inc. (Entrix) testified that Entrix was asked to review the Applicants' project for its potential to impact instream fishery resources. (Applicants-J.) Mr. Taylor testified that the fishery in the project area is a recreational fishery composed of brook, brown and rainbow trout, and that no listed or sensitive aquatic species of animals are known to occur in the area. The streams tributary to Bear Lake and Bear Creek are snowmelt-driven headwater streams, only sustaining surface flow for part of the year. These streams are not capable of supporting year-round fishery resources. Year-round flow that can support a fishery is found in and downstream of Bloods Creek. (*Ibid.*)

Further, Bear Creek is a seasonal stream under unimpaired conditions. Under Application 5649(07), the total amount to be taken from the source would not exceed 395 afa, or only 1.65 percent of the Bloods Creek watershed's estimated annual runoff of 23,949 afa. The evidence presented before the Board showed that the effect of the Applicants' project on Bear Creek and Bloods Creek would be inconsequential to the recreational fishery found in this watershed. (*Ibid.*)

On July 5, 2005, representatives of the Applicants and DFG attended a field visit to review the project facilities to develop a resolution to the DFG protest. The Applicants presented a site specific analysis of data as requested by DFG to show that diversions from Bear Creek would not impact Bloods Creek in any significant way. (Applicants-J, Attachment 1.) Bear Creek ceases to flow at the point of diversion after snow melt under unimpaired conditions. The Applicants demonstrated that under the impaired conditions of the proposed project, Bear Creek will cease flow on average four days sooner. Based on DFG's unconditional withdrawal of its protest after site inspection, the State Water Board finds that this is not a meaningful impact under the circumstances of this project. (*Ibid.*, SWRCB-1, A005648(07), Correspondence File, August 19, 2005 memo to Victoria Whitney from Sandra Morey.)

Finally, as John Kramer, Division Manager for Condor Earth Technologies (Condor) testified, the project is located in an area surrounded by public lands with no opportunity to induce growth beyond the preplanned limits of the BVMP. (Applicants-H.)

## 6.2 Public Interest Issues

Charles J. ~~Toeniskoette~~Toeniskoetter, board member and officer of the Lake Alpine Water Company, testified the BVMP calls for additional housing and retail businesses to make Bear Valley and Alpine County a viable and economically successful area. (R.T., p. 25.) Mr.

~~Toeniskoette~~Toeniskoetter also testified that upgraded recreational facilities, both summer and winter, are needed to carry out a very large portion of the BVMP. In order to accomplish this, the 395 afa of additional water rights are required. (R.T., p. 26 lines 12-16.) Mr.

~~Toeniskoette~~Toeniskoetter estimated that Bear Valley's development would add \$3 to \$4 million of surplus funds a year to the county's current \$12 to \$15 million discretionary or general fund budget. (R.T., p.27 lines 3-8.)

Terry Woodrow, Chair of the Alpine County Board of Supervisors, testified Alpine County has a 96 percent public land and a tourism-based economy. (R.T., p. 32 line 4-5.) The Applicants' project will support the economic base of local businesses, the viability of Bear Valley and the Bear Valley ski area, and will create tax revenues. (R.T., p. 32 line 11 -13.)

### 6.2.1 Impact on Prior Rights

Applicants-F, Table 2 indicates five rights senior to SFA 5648 below the Applicants' point of diversion. The evidence presented in Applicants-F, Plate 1, shows that the 395 afa proposed appropriation is such a small amount compared to what is normally available downstream that it will have a minimal effect on downstream hydrology. Bear Creek is normally dry after the snow melt in June or early July and remains dry until late October. (Applicants-F.) It is believed there is a lack of hydraulic connection between the Applicants' point of diversion and downstream prior right holders during the period of July through October; therefore, the project would have no impact on downstream diversions during these months. (Applicants-F.) During the other months there is water available to flow past the point of diversion and contribute to the water available for the five downstream senior rights in all but the driest years. (Applicants-F, fig. 8-10.) As noted in Section 4.5 of this Decision, Bear Lake has reportedly spilled every year dating back to at least 1980. In approximately 80% of the years, annual spill would be about 436 ac-ft if the maximum total authorized diversion at Reba Dam under all rights (577 ac-ft) was

taken. (Applicants-F, fig. 6.) In very dry years, Applicants may be required to make releases through the dam to allow water to reach senior appropriators if their rights are not satisfied.

Based on the lack of negative impacts on prior right holders or downstream reaches, and the positive economic impact this project will have on Bear Valley and Alpine County, the State Water Board finds approval of the project to be in the public interest.

### **6.3 Water Conservation**

In regard to water conservation measures in Bear Valley, the 1978 BVMP requires installation of minimum flow fixtures in all new homes. In addition, LAWC has installed a filtration plant, radio controlled metering devices on all water connections, and has replaced a leaking 300,000 gallon tank. (R.T., p. 29-30.) These combined measures are expected to result in a 10 percent to 20 percent reduction in water use. (Applicants-C, p. 31.) Standard Permit Term 29B, Water Conservation Program, will be added to this permit. To assist the Applicants in the development of their water conservation program, the permit will further require them to adopt the best management practices identified in the latest California Urban Water Conservation Council's Memorandum of Understanding regarding urban water conservation in California.

## **7.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

### **7.1 Adequacy of the CEQA Document**

In accordance with California Code of Regulations, title 14 (CEQA Guidelines), section 15082, the Applicants filed with the Office of Planning and Research and State Clearing House (OPR) a Notice of Preparation of an Environmental Impact Report (EIR) on January 12, 2006. CEQA Guidelines section 15231 requires a responsible agency that was consulted by the lead agency in preparing the EIR to conclusively presume that an EIR is adequate unless (1) the EIR is finally adjudicated in a legal proceeding to be inadequate, or (2) a subsequent EIR is necessary pursuant to section 15162. No circumstances exist to require a subsequent EIR, and no legal challenges were filed within the statutory period. Therefore, the State Water Board is required to presume that the EIR is adequate.

### **7.2 CEQA Findings**

If the CEQA document identifies significant environmental effects, then for each effect a responsible agency must make one of the following findings: (1) changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the



significant environmental effect as identified in the final EIR; (2) such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding, and such changes have been adopted by such other agency or can and should be adopted by such other agency; or (3) specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR. (CEQA Guidelines, § 15091, subd. (a).) A responsible agency's role in considering alternatives and mitigation measures is limited to only the direct or indirect environmental effects of those parts of the project it decides to carry out, finance, or approve. (CEQA Guidelines, § 15096, subd. (g)(1).)

The CEQA document identified a potential significant impact in the increased future demand for additional wastewater treatment and discharge capacity. The Project will result in the availability of new water supplies for the continued development of the BVMP. The wastewater treatment provider may not have adequate capacity to serve the projected future demand. If discharges increase, this impact will be mitigated to a level of insignificance by requiring the revision/update of the Waste Discharge Requirements (WDRs), as already legally required, through the Regional Water Quality Control Board.

#### **7.2.1 Significant Unmitigable Impact**

The CEQA document identified a significant unmitigable impact to property damage and loss of life that could result from possible dam failure due to the project. (Applicants-C, p.33, Table 3.)

This impact is partially mitigated by maintaining compliance with the existing operating permit through the California Division of Safety of Dams. The unavoidable impact was addressed in the lead agency's Statement of Findings and Overriding Considerations. The lead agency found the impact was acceptable in light of the project's benefits, based on the fact that: (a) no change in operation of the dam resulting from the Project threatens to increase the present risk; (b) the risk of dam failure is low; (c) the dam is routinely inspected; and (d) the dam failure was previously identified as a significant but acceptable potential impact in the 1978 EIR. For these same reasons, and because of the economic and social benefits the Project will provide (see section 6.2, *supra*), the State Water Board finds that there are overriding considerations for approving the project.

In Resolution No. R2006-43, the Board of Supervisors of Alpine County certified the Final EIR, issued CEQA findings of fact, made a statement of overriding considerations, and approved certain mitigation measures on September 5, 2006. (Applicants-C, D) The Applicants filed a Notice of Determination with the County Clerk on January 31, 2007. (Applicants-E.) No one filed a legal challenge to the document within the 30-day statute of limitations for CEQA challenges. (CEQA Guidelines, § 11512, subd. (c).)

## **8.0 CONCLUSION**

Partial assignment of SFA 5648 and change in point of diversion, place of use, and purpose of use for the portion of SFA 5648 assigned to the Applicants, will not cause injury to other legal users of water, nor will the petitioned changes initiate a new right. All protests have been resolved. Water is available to be put to beneficial use and CEQA compliance is complete. Partial assignment of the right will not conflict with a general or coordinated plan or with water quality objectives.

Under the Applicants' petition for partial assignment of SFA 5648, unappropriated water is available for diversion to storage at Bear Lake from October 1 to July 31 of the succeeding year, and for direct diversion at Reba Dam from October 1 to July 31 of the succeeding year. The State Water Board finds that, subject to appropriate conditions, the petition for partial assignment of SFA 5648 to divert water should be approved. As such, the State Water Board need not further act on Application 31523.

## **9.0 ORDER**

NOW, THEREFORE, IT IS ORDERED THAT

1. The Applicants' petition for partial assignment of state filed Application 5648 is approved subject to conditions included in this Decision.
2. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 0.78 cubic feet per second by direct diversion (not to exceed 175 acre-feet per year) to be diverted from October 1 of each year to July 31 of the succeeding year, and 220 acre-feet per annum by storage to be collected from October 1 of each year to July 31 of the succeeding year. The total amount of water to

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be taken from the source shall not exceed 395 acre-feet per water year of October 1 to September 30.

3. The total quantity of water collected to storage under this permit and License 11007 (Application 21485) shall not exceed 460 acre-feet per year.
4. The capacity of the reservoir covered by this permit shall not exceed 360 acre-feet.
5. The Applicants' Petition for Change of SFA 5648 to include a new Point of Diversion, Place of Use, and Purposes of Use is approved. These changes only apply to the portion of SFA 5648 assigned to the Applicants.
6. The Point of Diversion is at Reba Dam within the SW  $\frac{1}{4}$  of NW  $\frac{1}{4}$  of Section 7, T7N, R18E, MDB&M.
7. The place of use is within the service area boundary of Lake Alpine Water Company, within Sections 7 and 18, T7N, ~~R18E~~WR18E; and within the SE  $\frac{1}{4}$  of Section 12 and the E  $\frac{1}{2}$  of Section 13 within Alpine County, T7N, R17E, MDB&M, as shown on the map filed with the State Water Resources Control Board, dated September 2004. Although this map states the depicted place of use boundary is "approximate," this decision approves the boundary exactly as depicted and no expansion of the place of use beyond the depicted boundary is authorized without further approval by the State Water Board.
8. The purposes of use for the water appropriated under the partial assignment are municipal and recreation.
9. The Applicants' Application A031523 is denied and cancelled.
10. The permit issued under this Decision is subject to standard permits terms 10, 11, 12, 13, 14, 15, 29B, 63, 80, 90 and 119 and the following additional conditions.
11. The Applicants must adopt into their Water Conservation Program (WCP), required under standard term 29B, the best management practices (BMPs) identified in the

California Urban Water Conservation Council's Memorandum of Understanding (MOU) regarding urban water conservation in California ~~in~~. The WCP will include the BMPs in effect at the time the plan is developed. Future updates to the MOU will not necessarily require changes to the WCP.

12. Complete application of the water to the authorized use shall be made by December 31, ~~2020~~2034.
13. Prior to issuance of a permit, the Applicants shall submit a project map that meets the requirements of California Code of Regulations, Title 23, Chapter 2, Article 7.
14. The State Water Board shall have continuing authority to revoke all or any portion of this permit and the partial assignment of Application 5648(07) if permittee fails to diligently place water to beneficial use in accordance with condition 12. All or any portion of the revoked assignment shall return to the State Water Board and be available for the release or assignment to permittee or others consistent with the requirements of Water Code sections 10500, et seq.
15. Permittee shall comply with the following condition that is derived from the executed agreement between the permittee and the South San Joaquin Irrigation District and Oakdale Irrigation District, dated March 20, 2007, and filed with the State Water Resources Control Board:

The rights acquired under this permit shall be junior to the rights acquired under the permits issued to South San Joaquin Irrigation District (SSJID) and Oakdale Irrigation District (OID) pursuant to Applications 1081, 3091, 10872, 10978, issued to OID pursuant to Applications, 8892, 9666, issued to SSJID pursuant to Application 2524, and claimed by SSJID and OID pursuant to Statement of Water Diversion and Use 4683.

Inclusion in this permit of certain provisions of the referenced agreement shall not be construed as approval or disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this permit.

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16. Calaveras County Water District and Northern California Power Agency filed protests to Water Right Application 5648(07) and Petition for Partial Assignment of State Filed Water Right Application 5648 and associated change petitions. In resolution of those protests, Permittees entered into agreements with Calaveras County Water District and Northern California Power Agency entitled Agreement Resolving Protests of Calaveras County Water District by Calaveras County Water District, County of Alpine, Lake Alpine Water Company (May 2007) and Agreement Resolving Protests of Northern California Power Agency by Northern California Power Agency, County of Alpine, Lake Alpine Water Company (May 2007). In accepting this permit, Permittees acknowledge the terms of those agreements.

## CERTIFICATION

The undersigned Clerk 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 \_\_\_\_\_, 2009.

AYE:

NAY:

ABSENT:

ABSTAIN:

**DRAFT**

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Jeanine Townsend  
Clerk to the Board