



State Water Resources Control Board



Alan C. Lloyd, Ph.D.
Agency Secretary

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Arnold Schwarzenegger
Governor

DEC 30 2005

To: Lake Arrowhead Hearing Mailing List

**ORDER ADOPTING CEASE AND DESIST ORDER NO. 262.31-18 AND
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. 262.5-40 AGAINST THE LAKE
ARROWHEAD COMMUNITY SERVICES DISTRICT**

The enclosed draft order regarding a cease and desist order and administrative civil liability against the Lake Arrowhead Community Services District is scheduled for consideration at the State Water Resources Control Board (State Water Board) meeting on Friday, January 13, 2006. The Board Meeting will be held at 10:00 a.m. in the Coastal Hearing Room on the second floor of the Joe Serna/Cal-EPA Building at 1001 I Street, Sacramento. This information will also be posted on the State Water Board's website at http://www.waterrights.ca.gov/Hearings/lake_arrowhead_cdo_hearing.html.

Each person will have a brief opportunity to comment on the proposed order. All presentations should be limited to five minutes. Comments should be limited to the general acceptability of the order or possible technical corrections. Parties may not introduce evidence at the State Water Board meeting. Parties should submit in writing any comments or changes to the proposed order they would like the State Water Board to consider at the meeting. All written comments must be received by the State Water Board by 5:00 p.m. on January 10, 2006. Written submittals may be addressed to:

Selica Potter
Acting Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

You may also submit written comments to Ms. Potter by fax at (916) 341-5620, by e-mail at commentletters@waterboards.ca.gov, or by delivery to the following address:

Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
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California Environmental Protection Agency

Lake Arrowhead Hearing Mailing List
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Couriers delivering comments must check in with lobby security and have them contact the Executive Office on the twenty-fourth floor at 916-341-5600. Please include in the subject line, "COMMENT LETTER - 01/13/06 BOARD MEETING ITEM NUMBER 3." Any faxed or e-mailed items must be followed by a mailed or delivered hard copy with original signature.

If you have any questions regarding this notice, please contact Barbara Leidigh, Staff Counsel IV, at (916) 341-5190 or Ruben Mora, Water Resource Control Engineer, at (916) 341-5387.

Sincerely,



Lewis Moeller, Chief
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Enclosure

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2006 -

In the Matter of Draft Cease and Desist Order No. 262.31-18

and

Administrative Civil Liability Complaint No. 262.5-40

against the

Lake Arrowhead Community Services District

SOURCE: Little Bear Creek Tributary to Deep Creek thence Mojave River

COUNTY: San Bernardino

**ORDER ADOPTING CEASE AND DESIST ORDER
AND ASSESSING CIVIL LIABILITY**

BY THE BOARD:

1.0 INTRODUCTION

In this order, the State Water Resources Control Board (State Water Board) orders the Lake Arrowhead Community Services District (LACSD) to take corrective actions to ensure that LACSD does not use more water for consumptive purposes from Lake Arrowhead and its source, Little Bear Creek, than its pre-1914 water right provides.

In this order, the State Water Board also assesses administrative civil liability (ACL) against LACSD in the amount of \$112,000.

On November 8, 9, and 28, the State Water Board conducted a hearing on draft Cease and Desist Order (CDO) No. 262.31-18 and on ACL Complaint No. 262.5-40, issued by the Chief of the Division of Water Rights to the LACSD on August 1, 2005. The hearing was an adjudicative hearing governed by certain provisions regarding administrative adjudication in the Administrative Procedure Act (Gov. Code, §§ 11400, et seq.), as specified in the State Water

Board's regulations commencing at California Code of Regulations, title 23, section 648. The State Water Board issued a Notice of Public Hearing for this proceeding on September 19, 2005.

The issues for hearing were (1) whether, and if so with what, if any, modifications, the State Water Board should issue a CDO against LACSD, and (2) whether the State Water Board should order an ACL against LACSD and the amount of the liability.

In this hearing, a staff Prosecution Team (PT) presented the case for adopting the draft CDO and for imposing civil liability as requested in the ACL complaint. The parties to the proceeding are the LACSD and the PT. Several additional persons and entities participated in the hearing. The State Water Board has considered all of the evidence and arguments in the hearing record, and the findings and conclusions herein are based on the evidence in the hearing record.

2.0 BACKGROUND

The draft CDO and the ACL complaint allege that LACSD's pre-1914 appropriative right does not authorize the use of water from Lake Arrowhead for municipal purposes, and that LACSD is diverting and using water from Lake Arrowhead for municipal purposes. The draft CDO and ACL also allege that the only pre-1914 right at Lake Arrowhead is for recreational purposes, to maintain a lake level of 5106.7 feet above mean sea level, and that LACSD's diversion and use of water may be adversely impacting recreation at Lake Arrowhead and water right holders within the Mojave River basin. The Chief of the State Water Board's Division of Water Rights (Division) issued the draft CDO and the ACL complaint after the Division investigated two complaints filed with the State Water Board by the Arrowhead Lake Association and by Ted Heyck, respectively, against LACSD.

2.1 Authority to Issue a CDO

The State Water Board is authorized to issue a CDO when it determines that any person is violating or threatening to violate any requirement described in Water Code section 1831, subdivision (d). Under subdivision (d), the State Water Board may issue a CDO in response to a violation or threatened violation of any of the following:

“(1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division.

“(2) Any term or condition of a permit, license, certification, or registration issued under this division.

“(3) Any decision or order of the board issued under this part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.” (Wat. Code, § 1831(d).)

The State Water Board may issue a CDO only after notice and an opportunity for hearing. Such notice shall be by personal notice or certified mail, and shall inform the person allegedly engaged in the violation (respondent) that he or she may request a hearing within 20 days after the date of receiving the notice. The notice shall contain a statement of facts and information showing the violation. On August 1, 2005, in accordance with Water Code section 1834, subdivision (a), the Division Chief issued Draft CDO No. 262.31-18 to the LACSD alleging unauthorized diversion and use of water. By letter dated August 18, 2005, LACSD requested a hearing.

If LACSD violates a CDO, the State Water Board may proceed pursuant to Water Code section 1845, subdivision (a). Under section 1845, the penalties for a violation of a CDO are injunctive relief issued by a superior court and liability for a sum not to exceed \$1000 for each day in which the violation occurs. Either the court or the State Water Board may impose civil liability against a violator of a CDO.

2.2 Authority to Assess Civil Liability

The diversion or use of water subject to Division 2 of the Water Code, other than as authorized in Division 2, is a trespass. (Wat. Code, § 1052, subd. (a).) Under Water Code section 1052, subdivision (b), the State Water Board is authorized to assess an ACL against any person who, without authorization, diverts or uses water that is subject to appropriation in accordance with

Division 2 of the Water Code. Under section 1052, the State Water Board may impose an ACL in an amount not to exceed five hundred dollars (\$500) for each day in which the trespass occurs. If LACSD fails to pay, the State Water Board may seek recovery of the ACL as provided in Water Code section 1055.4.

2.3 Physical Setting and History of Development at Lake Arrowhead and on Little Bear Creek

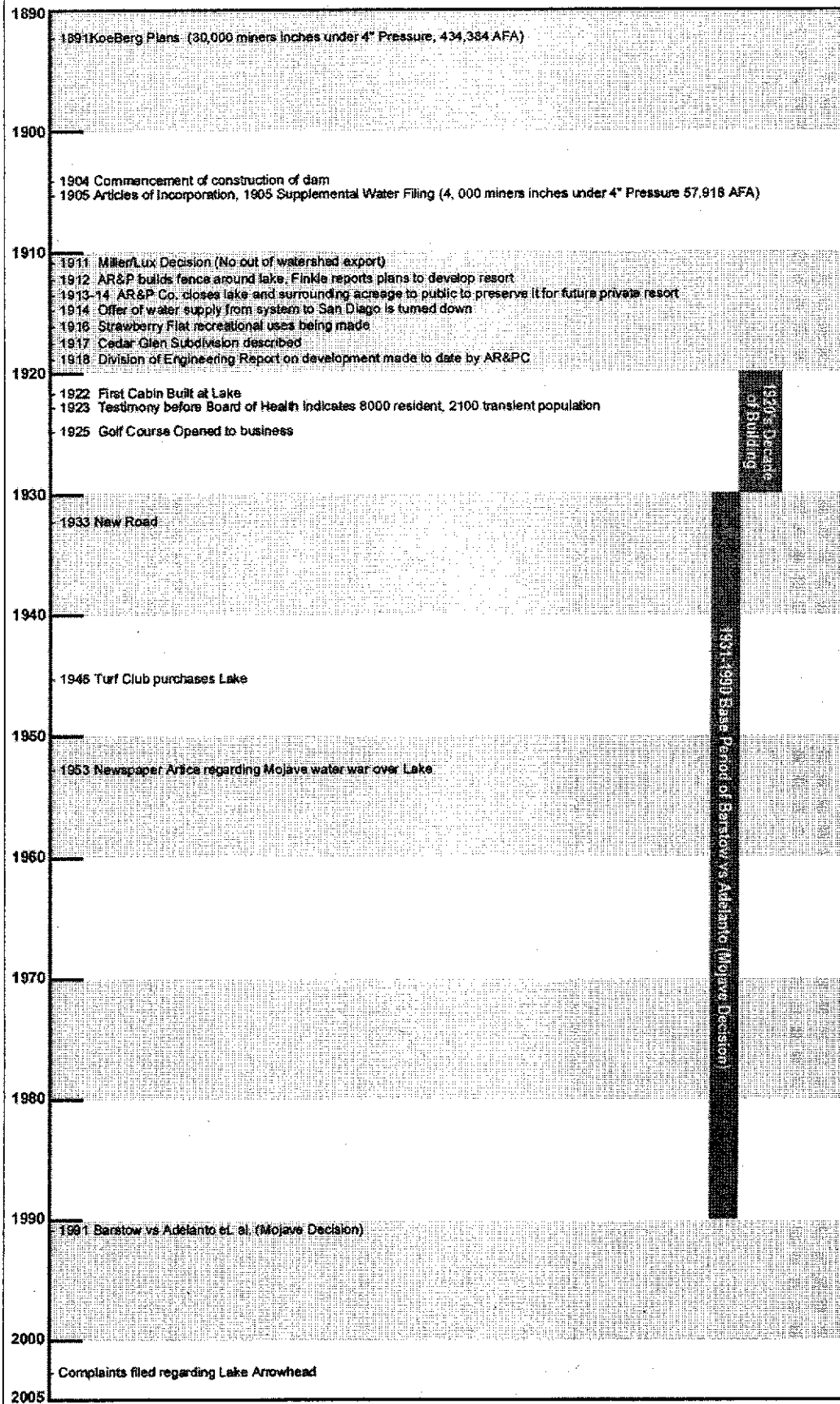
Lake Arrowhead is located in the San Bernardino Mountains about 25 miles north of the City of San Bernardino. The origin of Lake Arrowhead traces back to the late 19th Century when a group of businessmen acquired the area known as “Little Bear Valley” to construct a reservoir (now the site of Lake Arrowhead) to supply water to nearby lowlands. (PT 36, 36-19-01.)

Figure 1 graphically shows the development of the Lake Arrowhead project over time.

Arrowhead Reservoir was completed in 1912 to a height of 160 feet and later raised to 184 feet in 1921.

The Arrowhead Reservoir Company (1891 – 1905) and its successor in interest, the Arrowhead Reservoir and Power Company (AR&PC) (1905 – 1921), contemplated a phased plan of development of the waters of the upper Mojave River watershed that included consumptive water uses for recreational and domestic uses. (LACC 1, p. 1.) The Arrowhead Reservoir Company reorganized as the AR&PC in 1905 and stated in its purposes of incorporation that part of its general business was for “stores, hotels, restaurants, parks, eating houses, and other places of refreshment and amusement.” (LACC 10, p. 257 and LACSD 1, p. 1.) AR&PC owned land in the San Bernardino Mountains and began supplying hydroelectric power to construction camps and other facilities around its mountain storage reservoirs. (LACC 1, p. 19.) AR&PC built a fence around its land in the vicinity of Little Bear Lake in 1912 or 1913 and closed the lake and surrounding acreage to the public in 1913 – 1914 to preserve it for future use as a private summer resort. The Southern California Trout Association appealed to the officials of the AR&PC to open the lake to public use and the company turned down the request because it “hope[d] to make the lake a summer resort some day” (LACC 1, p. 12.) Public pressure to open the lake to fishing and other public uses caused the company to allow fishing and camping around the lake in 1915. (LACC 1, p. 13.)

Progressive Development of Lake Arrowhead



In 1921, AR&PC sold its properties to Arrowhead Lake Corporation, which pushed forward with development of a resort. The whole property was designated as an exclusive community, which was subdivided. The first cabin on the Lake was completed in May 1922. (LACC 1, p. 21.) Development increased rapidly through the 1920s, which included construction of a clubhouse and golf course. (LACC 1, p. 27 and LACC 10, p. 257.) Development continued as ownership of Arrowhead Reservoir and the properties owned by AR&PC changed ownerships several times eventually leading to the formation of Lake Arrowhead Community Services District in 1978, which took over distribution of Lake Arrowhead water. (PT 36, 36-19-01.)

2.4 Positions of Hearing Participants

The parties in this proceeding are PT and LACSD. PT asserts that the CDO and the ACL should be issued in the amount of at least \$182,500. LACSD, which is the respondent, opposes issuance of the CDO and the ACL.

Several other persons and entities participated in the hearing as non-party participants, providing evidence and arguments to support their positions as to the action that the Board should take. The Arrowhead Lake Association, which manages Lake Arrowhead for recreation and which filed one of the two complaints against LACSD's diversion and use of water, signed a settlement agreement with LACSD and did not present evidence in the hearing. Lake Arrowhead Country Club, which operates a golf course using water from Lake Arrowhead, opposes issuance of the CDO and the ACL. Ted Heyck, who filed the other complaint against LACSD's diversion and use of water, takes the position that the ACL should not be issued, and that the withdrawal of an average of 1,500 acre-feet per annum from Lake Arrowhead should be authorized after an adjustment period. Mojave Water Agency argues that if LACSD has a valid pre-1914 water right to take water from Lake Arrowhead for consumptive use, then it should be limited to 705 acre-feet per year and that LACSD should be required to maintain a wastewater discharge of not less than 1,500 acre-feet per year to the Mojave basin.

3.0 APPLICABLE LAW

Before 1914, there were two different ways to obtain an appropriative water right. The non-statutory method was to simply divert the water and put it to beneficial use. The second method, enacted in 1872, was achieved by following the Civil Code provisions at sections 1410 - 1422. The Civil Code appropriations have some advantages over the non-statutory appropriations, but both methods were available until 1914.

3.1 Changes, Including Changing a Non-Consumptive Use to a Consumptive Use

LACSD argues that it has a pre-1914 water right at least to a non-consumptive use of water impounded in Lake Arrowhead, and that it can incrementally convert its non-consumptive use of water stored in the lake to a consumptive use to serve the municipal, irrigation, and domestic uses surrounding Lake Arrowhead. LACSD bases its argument on Water Code section 1706 and section 39 of the Water Commission Act, which was repealed in 1925. Section 39 allowed the conversion of other uses of water to domestic uses. It has not been in effect since 1925, however, and consequently cannot be the basis of changes that LACSD may have made since 1925.

Section 1706 allows a pre-1914 water right holder to change its point of diversion, place of use, or purpose of use if others are not injured by the change. A change to add domestic and irrigation uses of water to a non-consumptive right for recreation or power generation would be a change of purpose of use, and by the plain terms of section 1706, the pre-1914 water right holder could make the change, assuming it does not cause injury and does not run afoul of any other legal constraint. In light of the time at which the court in the Mojave adjudication¹ found that overdraft commenced in the Mojave basin, however, it appears that any change since the mid-1950's from non-consumptive to consumptive uses of water by LACSD would be prohibited under section 1706 because it would injure another legal user of water.

PT argues that LACSD could not make the change it claims to have made from non-consumptive to consumptive uses of water because doing so would cause LACSD to exceed the amount of

¹ *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 [99 Cal.Rptr. 2d 294].

LACSD's appropriation. It is well-settled law that the measure of an appropriator's water right is the amount of water that is actually used. PT cites numerous cases supporting this principle. (*Ortman v. Dixon* (1859) 13 Cal. 33, 38-39; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 31 [198 P. 784]; *Trimble v. Heller* (1913) 23 Cal.App. 436, 443-444 [138 P. 376, 379]; *Natural Soda Products Co. v. City of Los Angeles* (1943) 132 P.2d 553, 560.)

PT goes on to argue, however, that the appropriator cannot change a perfected non-consumptive use to a consumptive use because that would increase the amount of water used by the appropriator, even if the amount used for non-consumptive use was far in excess of the consumptive use. PT cites California cases that hold the appropriator could not increase the amount of flow it was taking without initiating a new right, but it was unable to cite a California case that stated that conversion of a non-consumptive pre-1914 right to a consumptive right initiated a new right. (The Prosecution cited *Santa Paula Water Works v. Peralta* (1896) 113 Cal. 38, 45 [45 P. 168] and *City of San Bernardino v. City of Riverside, supra*, 186 Cal. at pp. 28-29 for limits on increases in the diversion of natural flow, but cited Montana and Oregon cases to argue that increased consumption means the initiation of a new right.)

In California, Water Code section 1706 says, however, that the limit on changes in purpose of use of a pre-1914 right is injury to other legal users of water. The Prosecution seems to be arguing that water use is equated with consumption, and that since a water right is limited by use, then a conversion from a non-consumptive purpose to a consumptive purpose is an increase in use that initiates a new right. The problem with this argument is that any trier of fact in these cases faces the quandary of deciding when a non-consumptive "use" is a "use" that can be changed to a consumptive use. Certainly a non-consumptive use is a beneficial use of water, but in the case of some non-consumptive uses, all of the water returns quickly to the natural watercourse, while in other cases such as a recreational lake or an out-of-watershed transfer it does not return at all, and in some cases it all returns in a later season.²

² Further, trying to define what is a "use" for the purpose of deciding whether a change can be effectuated ignores the statutory standard that a pre-1914 water user can change its purpose of use if there is no injury to other legal users of water. Surely the drafters of section 1706 knew there were pre-1914 water rights for non-consumptive uses of water. If a pre-1914 right holder tried to increase its diversions from the natural flow of a stream, it obviously could injure someone else who is also taking water from the same source. But, if the pre-1914 appropriator had a [footnote continues on next page]

Section 1706 provides that a change in a pre-1914 water right cannot be made if it will injure others. This limitation is not confined to avoiding injury to senior water right holders; because of the priority system, a water right holder cannot in any event injure a more senior water right holder. Section 1706 goes farther, and prohibits injury to *any* water right holder. Therefore, after uses have built up based on the availability of water under subsequent water rights, and no water remains for appropriation, a holder of a pre-1914 water right for a non-consumptive use cannot change its water right to a consumptive use because doing so would result in injury to others. As a result, there are no adverse policy implications of construing section 1706 to mean what it says; what precludes changes from non-consumptive uses to consumptive uses is the prohibition of injury to others.

3.2 Progressive Development

With the exception of non-statutory appropriations for which progressive development is interrupted by a competing Civil Code appropriator, pre-1914 water rights can be developed progressively up to the amount of the intended appropriation. The progressive use and development doctrine allows an appropriator under a pre-1914 appropriation to increase the amount of water diverted up to the amount of the originally contemplated appropriation, if the development is prosecuted "within a reasonable time by the use of reasonable diligence." (*Haight v. Costanich* (1920) 184 Cal. 426, 432 [194 P. 26], citing *Senior v. Anderson*, 115 Cal. 496, 504 [47 P. 454, 456]; see also *Inyo Consolidated Water Company v. Jess* (1911) 161 Cal. 516, 519 [119 P. 934]; State Water Board Order WR 95-10.) If the use of water is not pursued as required, the right to the additional water becomes subject to intervening claims. (*Haight, supra.*) Order WR 95-10 refers to the required expression of initial intent as a "plan of

right to take the water and store it for later use or take it to another watershed, the appropriator would not diminish the natural stream flow when it converted the appropriated water to another use, and therefore would not injure another legal user of water by making the change, because the other legal user's right does not allow it to require that an upstream appropriator continue to abandon increments of water that it has stored from a previous season. (*Stevens v. Oakdale Irrigation Dist.* (1939) 13 Cal.2d 343 [90 P.2d 58]; *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450 [173 P. 994, 997].)

For post-1914 water rights, the State Water Board and its predecessors have eliminated the problem of defining "use" by requiring separate water rights for consumptive and non-consumptive uses of water. By doing this, the maximum consumptive use cannot be increased by converting some non-consumptive uses. If it does nothing else, this separation simplifies the analysis required to determine when there will be injury to other legal users of water due to a proposed change in the purpose of use of the water, and simplifies the analysis of the maximum use of water under the right.

development.” This does not, however, imply that a single document express the entire intent, but rather that there is substantial evidence of the initial intent with respect to the use of water appropriated at Lake Arrowhead. In this case, the evidence in the hearing record is sufficient to constitute a plan of development that would reasonably result in the beneficial use of up to 1566 acre-feet per year for consumptive purposes; this evidence is discussed below.

3.3 Non-Statutory Appropriations

Before 1872, only the non-statutory method of appropriation was available. The courts developed the rules for appropriating water. To initiate a non-statutory appropriation, the appropriator had to undertake some overt act that made it clear that an appropriation was intended. Miners often would post a notice at the proposed point of diversion and then follow up with other actions. In addition to a written notice, other actions, such as construction, blazing of trees, surveys, stakes, etc., could manifest the necessary intent to put others on notice of the intended appropriation. To establish the appropriative right, the appropriator had to divert the water and apply it with due diligence to the intended beneficial use. By following through, the appropriator acquired a right that related back to the date when the appropriation was initiated. Title vested when the appropriation was complete, and the amount of the right was the amount that the appropriator actually had applied to a beneficial use. After the Civil Code provisions were enacted, water could still be validly appropriated using the non-statutory procedure. Further, a non-statutory appropriation that was completed before a Civil Code appropriation was initiated has seniority over the Civil Code appropriation. (Wells A. Hutchins, *The California Law of Water Rights* (1956), pp. 86-89.)

3.4 Civil Code Appropriations

The Civil Code provisions governing appropriation of water in California were enacted in 1872. (Civ. Code, §§ 1410 – 1422.) Civil Code section 1415 specifies the required contents of a notice of appropriation, including point of diversion, amount of flow, intended purposes of use and place of use, method of diversion, and size of the diversion and conveyance facilities. Section 1415 also specifies the time within which a copy of a notice of appropriation must be recorded in the county recorder’s office. Section 1415 further specifies that after the copy of the notice is recorded, the appropriator can change the point of diversion, the place of use, or the method of

diversion if others are not injured by the change. Civil Code section 1416 provides that the claimant of a Civil Code appropriation must commence some activity necessary to appropriating the water within 60 days.

The Civil Code provisions did not take away the non-statutory right of appropriation after 1872, but it impacted the non-statutory appropriators by giving the Civil Code filer seniority over any increases in use of water by a non-statutory appropriator after the Civil Code filer initiated the new appropriation. (Civ. Code, § 1419, [“A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.”]) While this eliminated the right of relation back for a non-statutory appropriator in a dispute with a Civil Code filer, it did not eliminate the right of relation back between two non-statutory appropriators. Thus, if no intervening Civil Code filer appropriated the water, the non-statutory appropriator could continue to maintain seniority for increases in use dating to the initiation of the appropriation against other non-statutory appropriators. (*Haight v. Costanich* (1920) 184 Cal. 426, 433-434.)

Notices of appropriation are to be construed liberally in favor of the appropriator, and in construing a notice of appropriation, other circumstances and documents in existence at and around the time of the notice are relevant to the construction of the notice. (*Meridian, Ltd., v. City and County of San Francisco* (1939) 13 Cal.2d 424 [90 P.2d 537, 552]; *Osgood v. El Dorado Water & Deep Gravel Mining Co.* (1880) 56 Cal. 571.) As discussed below, the 1905 notices of appropriation in this case were made and filed after construction had commenced under a non-statutory appropriation, and the notices therefore further confirmed the appropriation by bringing it under the Civil Code provisions with a priority date no later than the dates of the 1905 notices.

4.0 CEASE AND DESIST ORDER

4.1 Plans for Development and Resulting Pre-1914 Right

4.1.1 Plans of Development of Pre-1914 Right

Plans for development of a water right existed before 1914 for the purposes of developing a resort community around Lake Arrowhead and were commenced in a timely fashion.

Koeberg initially filed for water rights for Lake Arrowhead in 1891 by, claiming an appropriation of 30,000 miners inches under a 4" pressure (equivalent to 434,386 AFA). (PT 16.)

An amended notice of appropriation was filed in 1905 seeking 4,000 miners inches under a 4" pressure (equivalent to 57,918 AFA). (PT 17.) As required under Civil Code section 1416, commencement of construction had occurred prior to 60 days after the May 1905 filing, because construction of the foundation had begun in 1904. (LACC 1, p. 5; LACC 17, p. 10.) The Arrowhead Reservoir Company posted several notices or amended notices of appropriation of water for storage in Lake Arrowhead on May 22, 1905, and filed these notices in the County Recorder's Office on May 24, 1905. (LACSD 12-21.) Each of the notices includes domestic use of water. They also specify the place of use as San Bernardino Valley; however, as discussed above, Civil Code section 1415 allows an appropriator under that section to change the place of use after having filed a copy of the original notice for record, if others are not injured by the change. As discussed below, it became impractical for the appropriator to deliver water to the San Bernardino Valley, which is outside the Mojave River watershed, and so the appropriators instead planned to serve water in the area around Lake Arrowhead, effectively changing the place of use of the consumptive uses of water under the appropriation notices.

There are several bases for finding a plan to specifically develop a resort community around Lake Arrowhead prior to 1914. As evidenced in the 1905 articles of incorporation of the AR&PC, one of the company's stated purposes was "establishing and conducting, in connection with and as part of it general business, stores, hotels; restaurants, parks, eating houses and other places of refreshment and amusement". F.C. Finkle, an engineer for the AR&PC, reported in 1912 that the company had plans to develop 4,700 acres owned by the company for summer homes and hotels once construction of the lake was complete. (LACC 11, pp. 2, 27, 58; LACC 1, pp. 11-12.) A 1915 complaint filed against trespassers to the Lake states that the Company was organized in part for the purpose of developing a mountain resort and that lake water would be used for domestic use. (LACC 1, pp.14; 29; 37; 38; 39; 40.)

Early use by AR&PC consisted of supplying hydroelectric power to construction camps and other facilities around its mountain storage reservoirs. (LACC 1, p. 19.) AR&PC built a fence around its land in the vicinity of Little Bear Lake in 1912 or 1913 and closed the lake and surrounding acreage to the public in 1913 - 1914 to preserve it for future use as a private summer resort. The Southern California Trout Association appealed to the officials of the AR&PC to open the lake to public use and the company turned down the offer because it "hope[d] to make the lake a summer resort some day" (LACC 1, p. 12.) Public pressure to open the lake to fishing and other public uses put pressure on the company to allow fishing and camping around the lake in 1915. (LACC 1, p. 13.)

In 1921, AR&PC sold its properties to Arrowhead Lake Corporation, which pushed forward with development of a resort on the 6,000 acres previously held by AR&PC. The whole property was designated as an exclusive community, which was subdivided. The first cabin on the Lake was completed in May 1922. (LACC 1, p. 21.) Development increased rapidly through the 1920s, which included construction of a clubhouse and golf course. (LACC 1, p. 27 and LACC 10, p. 257.) The fact that the reservoir was completed despite the infeasibility of earlier plans to deliver the water to San Bernardino Valley, together with the rapid development of the community as soon as the reservoir project was completed, is further evidence that the service of water to the community was the result of a change in place of use of the reservoir's water, to serve the resort community instead of the San Bernardino Valley.

The ultimate size of the planned resort community is stated in the transcript of a hearing before the State Board of Health in Los Angeles on June 23, 1923. In testimony at this hearing, the ultimate plans for the resort were estimated to be 8,000 resident population and 2,100 transient guests. (LACSD 80, p. 29.)

Development continued as ownership of Arrowhead Reservoir and the properties owned by AR&PC changed ownerships several times eventually leading to the formation of Lake Arrowhead Community Services District in 1978, which took over distribution of Lake Arrowhead water. (PT 36, 36-19-01.) Although the course of development took place over an extended time, the rate of increase in water use reflected development in southern California

generally, accelerating in economically vigorous periods and slowing during the depression and recession periods.

4.1.2 Resulting Pre-1914 Right

The amended notice of appropriation filed in 1905 which sought 4,000 miners inches under a 4" pressure was clearly in excess of the quantities needed to serve the planned resort community. (PT 17.) As stated above, the ultimate size of the planned resort community was estimated in 1923 to be 8,000 resident population and 2,100 transient guests. (LACSD 80, p. 29.)

Using these population estimates, a determination of the expected water use can be accomplished by applying typical water duty and some reasonable assumptions. California Code of Regulations, title 23, section 697, suggests an allowance of 55 to 75 gallons per day per person for inside water use and 18.5 gallons per day per 100 square feet for outside water use. If it is assumed that the maximum amount of this suggested allowance was intended, this results in the inside water use of 672 AFA for the resident population and 87 AFA for the transient population which was assumed to be present 6 months of the year. Assuming 3 people per household in order to determine the number of residences and assuming approximately 1,200 square feet of irrigated shrubbery and garden for each residence results in 498 AFA for outside water use for the resident population from approximately Feb 15th to Nov 15th of each year.

In addition to meeting the demands of the resident and transient population the other large demand for water outlined in the plans and implemented in 1925 was for irrigation of the Lake Arrowhead Golf and Country Club (a.k.a. Grass Valley Golf Club). (LACC 1, p. 24.) The golf course was irrigated by pumping water from Lake Arrowhead in a pipeline reputed to be 6" - 8" in diameter that delivered water at 1,000 gpm continuously from approximately the 4th of July to Labor Day (approximately 70 days). (LACC 1, p. 26.) This draw of water amounts to approximately 309 AFA for supply of the golf course.

Combining the demands determined above results in a total of 1,566 AFA for the planned development of the resort at Lake Arrowhead. The LACSD's pre-1914 water right for consumptive use is therefore limited to 1,566 AFA.

4.2 Passage of Time Does Not Confer a Water Right

LACSD argues that the State Water Board has waited too long to take enforcement action and therefore should be barred from taking enforcement action against LACSD for its illegal diversion and use of water for consumptive uses. LACSD argues, for example, that the State Water Board should have known in 1978 that LACSD was taking Lake Arrowhead water for domestic water supplies because that was the year that LACSD was organized under the Community Services District Law. There is no reason, however, for this information to have come to the attention of the State Water Board. Further, in 1978, LACSD had not yet reached the point of taking water in excess of its pre-1914 water right.

The reason for the current proceeding is that LACSD cannot use as much water as it currently is using for consumptive purposes without having either a water right permit issued by the State Water Board or obtaining water from another water right holder. In other words, for the part of the water supply it takes in excess of its pre-1914 water right, it is an ongoing illegal diverter and user of water. Since 1914, a new appropriative water right can be obtained only through the process set forth in Division 2, Part 2, of the Water Code, and prescription cannot be obtained against the state. (*People v. Shirokow* (1980) 26 Cal.3d 301 [162 Cal.Rptr. 30, 605 P.2d 859].) Further, a claim of laches³ does not protect an illegal water user. (*Id.*, at 311-312, fn. 14.) Since LACSD has no water right to divert and use the excess water, it cannot argue that it has acquired the right to continue its use of water in excess of its right.

4.3 Contents of Cease and Desist Order

One of the key issues in this hearing is whether a cease and desist order should be issued and if so, what modifications, if any, should be made to the measures required in the draft CDO. The draft CDO was a result of investigation into allegations in complaints by Ted Heyck and ALA. Justification for issuance of the CDO includes the continuation of unauthorized diversions and issuance of new "will serve" agreements by LACSD while the complaint was pending. (PT 24, pp. 2, 3.) The PT asserted that any withdrawal from

³ Laches is an undue delay in asserting a legal right.

Lake Arrowhead to serve consumptive uses is unauthorized. As discussed elsewhere in this order, the State Water Board finds that LACSD has a right to withdraw up to 1,566 AFA from Lake Arrowhead for consumptive use. There exists a continued threat, however, that LACSD will exceed its consumptive use right to withdraw up to 1,566 AF per year despite efforts by LACSD to reduce these withdrawals. (PT. 24, pp. 1,2; CUWCC 1 pp. 2, 3.)

The purpose in issuing the draft CDO was twofold:

1. To require the LACSD to develop and implement a plan to reduce and ultimately cease the unauthorized diversion and use of water from Lake Arrowhead as quickly as practicable; and
2. To stop the LACSD from continuing to make commitments to provide new water connections until LACSD develops a legitimate plan to reduce and ultimately cease its unauthorized diversion and use. (PT 24, p. 3.)

Despite finding that LACSD has a right to make some withdrawals from Lake Arrowhead for consumptive uses, the same two purposes for issuance of a CDO still exist. Further, LACSD should provide reports to the Chief of the Division of Water Rights to ensure compliance with the required plan.

Through both demand reduction and use of alternate sources of water, LACSD was able to reduce its withdrawals from Lake Arrowhead to 1,915 AF in 2004. While this still exceeds the water right by 349 AF, LACSD has identified other alternate supplies of water. In evaluating alternatives for demand management and supplemental water supply to reduce its dependency on Lake Arrowhead withdrawals in 2003, LACSD identified several projects that could be implemented within one year that totaled 1,107 AF in reduced withdrawal from Lake Arrowhead. (PT 31, p. 10.) As evidenced by the reduction in withdrawal in 2004, LACSD appears to have implemented some of the identified projects. It is anticipated that further

implementation of projects by LACSD could accomplish the goal of eliminating unauthorized withdrawals from Lake Arrowhead in less than 2 years from the issuance of this order.

5.0 ASSESSMENT OF CIVIL LIABILITY

The basis in the complaint for assessing civil liability is the LACSD's unauthorized diversion and consumptive use of the water from Lake Arrowhead reservoir for fiscal years 2002-2004. The unauthorized diversion and use of water constituted a trespass within the meaning of Water Code section 1052, subdivision (a). The maximum civil liability that can be imposed by the State Water Board in this matter is \$500 for each day in which the trespass occurred.

In determining the amount of civil liability, Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator. In this case, since 1982, LACSD has exceeded its water right for consumptive use without a basis of right for the excess amount of water, thereby trespassing against the State. LACSD's diversion may have resulted in injury to water right holders in the Mojave River watershed, since LACSD's diversions have increased since the State Water Board determined in 1988 that the Mojave River was fully appropriated year-round. By that time, the Mojave River Basin already was overdrafted and any additional appropriations would further deplete the subsurface water in the basin. LACSD's diversions likely have contributed to the overdraft, thereby incrementally injuring all downstream water right holders.

LACSD has made unauthorized diversions in excess of 1,566 AF in every year after 1981. (MWA 1-I; 1-J(fig. 17); LACSD D-9; C-11.) The basis of the complaint, which led to the proposed ACL, was LACSD's unauthorized diversions and consumptive use from Lake Arrowhead reservoir for fiscal years 2002-04. LACSD had taken steps in the last two years of the complaint period to reduce withdrawals from Lake Arrowhead. (LACSD C-10; C-11; C-12; D-9; PT 24, p.5; CUWCC 1, pp.2-3.) Despite these efforts, LACSD has withdrawn greater quantities of water than its maximum right for consumptive uses. (LACSD C-11; C-12; CUWCC 1; PT 24, p. 5.) The ACL complaint estimates that LACSD's total avoided cost by

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taking water from Lake Arrowhead instead of buying it was \$12.5 million for 2002-2004. Considering that part of the water LACSD withdrew from the lake during that period was within its pre-1914 water right, the total avoided cost is closer to \$5.05 million, which is still substantial.

The ACL complaint proposed a liability of \$182,500, which is equivalent to a \$500 liability for each day of unauthorized diversion and use of water that occurred during a one-year period. (\$500 per day x 365 days) The liability amount proposed in the ACL complaint was based on the assumption that the unauthorized diversions by LACSD were at a maximum of 3,157 AF, which occurred in 2002. Because the State Water Board finds that LACSD has a right to withdraw 1,566 AF for domestic and irrigation uses, the actual maximum unauthorized diversion in 2002 was 1,591 AF (3,157 AF – 1,566 AF), which is approximately one-half the unauthorized diversion alleged in the ACL complaint.

The record shows that in the investigation of the complaints, the prosecution staff in the Division requested evidence of LACSD's asserted pre-1914 water right to use water for consumptive uses. As discussed above, LACSD and other interested participants in the hearing submitted adequate evidence that was accepted in evidence during the hearing to demonstrate that LACSD's predecessor had a plan for development of its claimed water supply adequate to serve the Lake Arrowhead community up to 1,566 AF per year. The State Water Board believes that LACSD, if it had exercised reasonable diligence, could have produced this information during the investigation instead of requiring the State Water Board to hold a hearing before producing the evidence. Because of the need to hold a hearing, the State Water Board's costs in this matter have increased substantially over the cost of the investigation alone. As a matter of reasonable prudence, any claimant of pre-1914 water rights should have the documentation at hand to demonstrate that it has the rights it claims. Apparently LACSD did not have this documentation at hand, had not bothered to re-establish its files after an alleged fire, and perhaps did not take the prosecution's investigation seriously until the Division Chief issued the ACL complaint and the draft Cease and Desist Order.

In consideration of LACSD's unauthorized diversions, its failure to maintain documentation of its pre-1914 water rights, and its failure to assemble and provide documentation during the investigation, and the necessity of holding a hearing to obtain the required information, the State Water Board finds that an ACL should be assessed against LACSD. The amount of the ACL should take into consideration the above factors, the smaller amount of unauthorized diversions determined herein, LACSD's efforts in the past two years since the complaints were filed to reduce its withdrawals from Lake Arrowhead, and the costs to the State Water Board of conducting the hearing. The State Water Board has incurred considerable costs, including hearing staff costs, support staff, and prosecution staff costs. Taking all of these factors into consideration, the State Water Board sets the ACL in the amount of \$112,000.

6.0 CONCLUSIONS

1. The State Water Board concludes that LACSD has pre-1914 water rights, with a priority no later than May 22, 1905 (the date of the Civil Code filings), that is sufficient for it to withdraw from Lake Arrowhead for consumptive uses up to 1,566 AF per year.
2. LACSD maximized its use of water for consumptive uses under its pre-1914 water right in 1981. Subsequently, LACSD has withdrawn more water for consumptive uses than is supported by its water right. Further, LACSD could not convert any of its non-consumptive rights to consumptive use rights when it maximized its use of water under its pre-1914 water right, because doing so would injure other water users in the Mojave Basin.
3. The State Water Board concludes that LACSD should pay administrative civil liability in the amount of \$112,000.

ORDER

IT IS HEREBY ORDERED,

- A. The State Water Resources Control Board **ORDERS** that, pursuant to Water Code sections 1831 through 1836, LACSD shall take the following corrective actions and satisfy the following time schedules:

1. LACSC shall within 60 days of the date of this order, submit a plan to initially reduce and subsequently cease the unauthorized diversion and consumptive use of stored water from Lake Arrowhead above the allowable diversion and use amount of 1,566 AF per calendar year. The plan must specify deadlines for implementation of corrective actions that will reduce unauthorized diversions as quickly as practicable, and will result in LACSD not exceeding an annual withdrawal of 1,566 AF from Lake Arrowhead by no later than the year ending December 31, 2007. LACSD shall consider all practical measures to reduce demand or increase supplies, including a moratorium on new water service commitments. LACSD shall modify the plan in accordance with directions from the Chief of the Division of Water Rights (Division Chief) and shall implement the final plan after the Division Chief approves it.

2. LACSD shall submit the following reports to the Chief of the Division of Water Rights semiannually. The first report is due prior to February 1 and shall cover the period July 1 to December 31. The second report is due prior to August 1 and shall cover the period January 1 to June 30. LACSD shall submit the semiannual reports until such time as the Division Chief provides written notification that these reports no longer need to be submitted:
 - (a) A progress report identifying the conservation measures taken and estimated resulting reduction in total diversion of water from Lake Arrowhead; and

 - (b) A monthly reservoir operation report for Lake Arrowhead identifying monthly storage elevation, reservoir capacity, change in storage, evaporation loss, bypass or spills, calculated natural inflow, purchase or groundwater inflows, and diversions from the reservoir.

3. LACSD shall immediately implement an interim moratorium on new commitments to provide water service. LACSD shall maintain this moratorium until notified in writing that the Division Chief has approved the plan identified in item #1.

4. LACSD shall comply with any written directive of the Chief of the Division of Water Rights regarding the unauthorized diversion of water from Lake Arrowhead until such time as the State Water Board directs otherwise.

Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of Part 2 of Division 2 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (b).) Civil liability may be imposed by the superior court or administratively by the State Water Board pursuant to Water Code section 1055.

- B. The State Water Resources Control Board ORDERS that LACSD shall pay administrative civil liability in the amount of \$112,000. This amount is due immediately, and if it is unpaid after the time for review under Chapter 4 (commencing with section 1120) has expired, the Board may seek a judgment against LACSD in accordance with Water Code section 1055.4.

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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 January 13, 2006.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Selica Potter
Acting Clerk to the Board