

## **Kennedy/Jenks Consultants**

303 Second Street, Suite 300 South  
San Francisco, California 94107  
415-243-2150  
FAX: 415-896-0999

Technical Memorandum  
2A- Water Rights  
Evaluation for Phase 1  
Conjunctive Use and  
Enhanced Aquifer  
Recharge Project:

November 2010

Prepared for  
County of Santa Cruz  
Environmental Health Services  
701 Ocean Street  
Room 312  
Santa Cruz, CA 95060-4011

K/J Project No. 0864005

**Funding for this project has been provided in full or in part through an agreement with the State Water Resources Control Board. The contents of this document do not necessarily reflect the views and policies of the State Water Resources Control Board, nor does mention of trade names or commercial products constitute endorsement or recommendation for use.**

16 November 2010

## Technical Memorandum 2A – Water Rights

To: Mike Cloud and John Ricker, Santa Cruz County Health Services Agency

From: Steven Wallner, Meredith Clement, Sachi Itagaki, Michael Maley, Kennedy/Jenks Consultants

Subject: **Water Rights Evaluation**  
Santa Cruz County Conjunctive Water Use and Enhanced Aquifer Recharge Study  
K/J 0864005

---

### 1. Introduction

Kennedy/Jenks Consultants (Kennedy/Jenks) is pleased to provide the Santa Cruz County Health Services Agency (County) with Technical Memorandum 2A (TM2A) in support of the Conjunctive Use and Enhanced Aquifer Recharge Project (Conjunctive Use Project). The Conjunctive Use Project is one of sixteen projects funded by a Proposition 50 Water Bond grant from the State Water Resources Control Board to the Regional Water Management Foundation, a subsidiary of the Community Foundation of Santa Cruz County. The Conjunctive Use Project is Project #3 of the grant and is being administered by the County.

Water rights in California are a complex legal issue. TM2A provides a brief summary for general informational purposes only and does not constitute legal advice. Because the law is constantly evolving, the information provided in the above summary may not reflect the most current legal developments. A more detailed water rights assessment will be necessary if acquiring water rights is required for the Conjunctive Use Project.

#### 1.1 Purpose

The objective of the Conjunctive Use Project is to assess most the appropriate approaches for coordinating water projects and increasing groundwater storage to provide reliable drinking water to the lower San Lorenzo River Watershed (Watershed), mitigate declines in groundwater levels, and increase stream baseflow (Figure 1). The Conjunctive Use Project will investigate the opportunities to use water exchanges, winter streamflow diversion, and/or reclaimed wastewater to replenish groundwater storage in the Santa Margarita Groundwater Basin (Figure 1). It should be noted that the context for this water rights evaluation is framed by the fully appropriated status of the San Lorenzo River and its tributaries during the period from June 1 through October 31. More recently, the fisheries/natural resources agencies have proposed fully appropriating the San Lorenzo River and its tributaries year round. To date, this proposal has not been resolved.

For the Conjunctive Use Project, a source of water is necessary. One potential source of water is unclaimed surface water during high winter runoff periods. For this, it is important to have an understanding of the existing and potentially available water rights in the area. TM2A provides

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 2

a brief summary of the known surface water rights in the Watershed as part of Task 2 Water Rights Assessment of the Conjunctive Use Project Scope of Work. TM2A provides an evaluation of the following items:

- A review of existing water rights by large utilities and water districts within the lower San Lorenzo River watershed to provide an updated tabulation of entitlements held to assist in determining if additional water is available for diversion to a conjunctive use program.
- A tabulation of existing water rights and entitlements to water supplies for diversion and storage for Zayante, Bean, Carbonera and Newell Creeks, and the San Lorenzo River (Figure 2) based on a review of the State Water Resources Control Board (SWRCB) electronic Water Rights Information Management System (eWRIMS).
- A brief description of the potential to modify and/or utilize existing water rights.

The purpose of TM2A is to summarize the existing water rights in the Watershed to provide appropriate background information for the screening-level analysis of alternatives for the Conjunctive Use Project. The focus is on entitlements to divert and store water for domestic, irrigation and municipal uses are held by agencies and individuals on Zayante Creek, Bean Creek, Carbonera Creek, and the San Lorenzo River, as well as on tributaries to these streams in the project area.

## 2. Background

The Conjunctive Use Project will evaluate a wide-range of potential alternatives including winter streamflow diversion, and/or reclaimed wastewater to replenish groundwater storage to use water exchanges.

### 2.1 Study Area

The Watershed covers 138 square miles in the Santa Cruz Mountains along the Central California Coast in northern Santa Cruz County (Figure 1). The San Lorenzo River empties into the Pacific Ocean in the City of Santa Cruz. Small, steep tributaries feed the river from the west at Ben Lomond Mountain, while wider, more gently sloping tributaries feed the river from the east and northeast (Santa Cruz County, 2001, SLVWD, 2009).

The Watershed is home to approximately 41,000 residents inhabiting 17,174 developed parcels, outside of the City of Santa Cruz (County of Santa Cruz, 2001). Approximately 3,150 of the developed parcels are within the City of Scotts Valley (County of Santa Cruz, 2001). The large remainder of the Watershed is unincorporated under county jurisdiction and includes the communities of Felton, Mt. Hermon, Ben Lomond, Brookdale, Boulder Creek, Lompico, and Zayante. All residents of the Watershed derive their water supply from surface and groundwater

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 3

in the Watershed. The River directly provides 60% of the water supply for 90,000 customers served by the City of Santa Cruz (Santa Cruz County, 2001, SLVWD, 2009).

Water use in the Watershed has increased as population has increased. The San Lorenzo Valley was sparsely inhabited and dominated by summer homes through the 1950s. Since then, houses within the watershed have been converted to permanent residences and some 3,300 new units were built by the 1970s (County of Santa Cruz, 2001). With the exception of the City of Scotts Valley, and some small sewered communities, some 13,000 properties are served by individual onsite sewage disposal systems (County of Santa Cruz 2001). The County (2001) reports that, "Growth rates of over 30% occurred in Bear Creek, Upper Zayante, Bean Creek, and Branciforte." Scotts Valley also experienced an increase in development of 80% from 1980 to 2000 including large industrial complexes (Santa Cruz County, 2001, SLVWD, 2009).

The San Lorenzo River historically supported the largest salmon and steelhead fishery south of San Francisco Bay; the fourth largest steelhead fishery in the state. Coho salmon and steelhead are now listed as threatened or endangered species (Santa Cruz County, 2001, SLVWD, 2009).

### 2.2 Water Rights Overview

Since water rights in California are a complex legal issue, a brief overview of California water law is provided. This overview is for general informational purposes only, and does not constitute legal advice. This summary is based on three references which are attached as appendices for more definitive information on California water rights. These include:

- Appendix A – Information Pertaining to Water Rights in California by the California State Water Resources Control Board - 1990
- Appendix B –California Water Rights Fact Sheet, United States Bureau of Land Management (BLM), August 15, 2001
- Appendix C – A Summary of California Law of Surface Water and Groundwater Rights by Bartkiewicz, Kronick & Shanahan, 2006.

California's system of water rights is referred to as a "dual system" in which both the riparian doctrine and the prior appropriation doctrine apply to water rights (SWRCB, 1990, BLM, 2001, Bartkiewicz, Kronick & Shanahan, 2006). There is also a separate doctrinal basis for ground water, so a more accurate classification of California's system would be a "plural system". Water rights in California are use rights. All waters are the property of the state. A water right in California is a property right allowing the use of water, but it does not involve ownership of the water. California's water law is contained in the California Code of Regulations, Title 23, and can found at: <http://www.calregs.com/>. The primary classes of water rights in California include:

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 4

- Pre-1914 Appropriate Rights
- Riparian Rights
- Appropriative Rights

Appropriative rights are acquired by putting surface water to beneficial use. Prior to 1914, appropriative rights could be claimed by simply diverting and using the water, posting a notice of appropriation at the point of diversion, and recording a copy of the notice with the County Recorder. Since 1914, the acquisition of appropriative rights has required an application through the State Water Board (SWRCB, 1990, BLM, 2001).

Riparian rights result from the ownership of land bordering a surface water source (a stream, lake, or pond). As a class, these rights are senior to most appropriative rights, and riparian landowners may use natural flows directly for beneficial purposes on riparian lands without applying for a permit (SWRCB, 1990, BLM, 2001). A riparian right arises by virtue of ownership of the riparian land, and is not gained by use nor lost by nonuse. Generally, the riparian right is superior to the other types of surface water rights, but the riparian right does not apply to water that is stored for later use. The riparian right may be junior to an appropriative water right that was perfected before a patent on the riparian land was issued by the United States. The riparian rights of owners of land that are riparian to the same source are “correlative,” in that, if there is insufficient water under the riparian right for all riparians, each is entitled to a fair share of the available supply based upon the amount of their land and their reasonable water supply needs (SWRCB, 1990, BLM, 2001, Bartkiewicz, Kronick & Shanahan, 2006).

Appropriative rights to surface water are rights to use unappropriated water, that is, water that is surplus to the needs of riparian owners and prior appropriators and prescriptors. Appropriative rights are based not on land ownership, but on actual diversion and use of water. They are rights of priority, in that, if the available surface water supply is insufficient to meet the needs of all appropriators, the one with the earliest priority date is entitled to satisfy his or her needs fully before those with later priority are entitled to any water. An appropriative right may be established to use water for any reasonable, beneficial purpose on any land no matter where located, and to store water from one season for use in a later season, or from one year for use in subsequent years. Just as appropriative rights are gained by use, conversely, once acquired, they may be lost wholly or in part by five years’ nonuse during a time when the water was physically available for use (SWRCB, 1990, BLM, 2001, Bartkiewicz, Kronick & Shanahan, 2006).

An appropriative water right in California can be maintained only by continuous beneficial use, and can be lost by five or more continuous years of non-use. Riparian rights, on the other hand, cannot be lost through non-use. Appropriative rights can also be lost through abandonment, but to constitute abandonment of an appropriative right, there must be the intent not to resume the

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 5

beneficial use of the water right. As a result, abandonment is always voluntary. The rights to waters lost through abandonment or non-use revert to the public, but only after notice has been given and a public hearing is held (Bartkiewicz, Kronick & Shanahan, 2006). It should be noted that there is the potential for a riparian right to be either diminished or lost during a legal adjudication process, especially if the water is not being put to beneficial use. Similarly, appropriate rights can be diminished or lost if they are found to be damaging to the public trust (i.e. environmental water needs). Discussion and resolution of these water rights topics would likely occur during the process of preparation of the Santa Cruz Water Department's (SCWD) Habitat Conservation Plan, other permitting and/or an adjudication process.

### **2.3 Application for New Water Rights**

Any entity in California intending to appropriate water is required to file an application for a water right permit (or a use registration for small scale domestic use) with the SWRCB. The SWRCB provides an example Application for License for Diversion and Use of Water on their website (SWRCB, 2009) and a copy is provided in Appendix D.

The SWRCB has the discretion to decide whether an unappropriated water right exists, and whether the proposed use under the application is reasonable, beneficial and in the public interest. An application for a new water appropriation is approved if it is determined to be for a useful or beneficial purpose and if water is available for appropriation. Approval is conditional on determining that the water use would not result in injury to any other water right and would not unreasonably affect fish, wildlife, or other instream beneficial use (Bartkiewicz, Kronick & Shanahan, 2006). In evaluating an application, the Board considers the relative benefits derived from the beneficial uses, possible water pollution, and water quality. If a permit is approved, it may be approved in full or it may be subject to specified conditions. A decision or order from the State Water Board is reviewable by the Superior Court. Once the State Water Board issues a permit, the use and diversion of water is authorized (SWRCB, 1990, BLM, 2001, Bartkiewicz, Kronick & Shanahan, 2006).

A permit is not required from riparian right holders, ground water users, users of purchased waters, or those who use water from a spring or standing pool lacking a natural outlet on the land they are located. Once the application or registration has been accepted, a priority is established in relation to other appropriators. For domestic registration, the State Water Board provides a Certificate of Registration which establishes general conditions under which the diversion may be made. When an application for a water right permit is filed, public notice is given to interested parties. This indicates an opportunity to file protests against the proposed application (SWRCB, 1990, BLM, 2001, Bartkiewicz, Kronick & Shanahan, 2006).

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 6

### 3. Existing Water Rights by Large Utilities

This section summarizes the water rights for the larger utilities in the lower San Lorenzo Valley Watershed.

#### 3.1 City of Santa Cruz

The SCWD follows a variety of policies, procedures, and legal restrictions in operating the water supply system. In general, the system is managed to take advantage of the better quality and least expensive sources as a first priority, and to retain the maximum amount of water possible in Loch Lomond Reservoir to safeguard against future droughts. In addition to considerations for cost, water quality, and storage, legal constraints on the diversion of surface waters contained in the City's water rights govern the operation of the water system (SCWD, 2006). Furthermore, the draft anadromous fish Habitat Conservation Plan (HCP) prepared by SCWD in compliance with the Endangered Species Act and National Oceanographic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) draft Coho Recovery Plan (CRP) for the San Lorenzo River will likely influence instream flow requirements in the future.

##### 3.1.1 Existing Water Rights

SCWD has water rights to various water sources to provide water supply to the City. A summary of these water rights, as well as those of the other major water diverters, is presented in Table 1. Water supplies are generally dispatched to meet daily demands in the following order:

- North Coast
- San Lorenzo River
- Live Oak Wells
- Loch Lomond Reservoir

Due to the excellent water quality and the lowest production cost, the North Coast sources are used to the greatest extent possible. As pre-1914 sources, the City's North Coast diversions are least affected by water rights limitations. Diversion from these sources is therefore limited primarily by flows. Daily production varies seasonally from 5 million gallons per day (mgd) in spring to 2 mgd in fall (SCWD, 2006). The City's North Coast Diversions are currently not subject to any water right limitations. Diversions from these sources are therefore limited only by flows (Gary Fiske & Associates, 2003).

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 7

Additional water needed to meet daily demands is pumped from the San Lorenzo River at Tait Street. Under normal operating conditions, about 7.5 mgd will be produced from the Tait Street Diversion and wells throughout the dry season (SCWD, 2006). The San Lorenzo River diversion at Tait Street (including the wells) is subject to a 12.2 cubic feet- per-second (cfs) (or 7.9 mgd) maximum diversion rate year round (Gary Fiske & Associates, 2003).

During the summer and fall, when the City's flowing sources are inadequate to meet peak season daily demands, supplemental water is brought in from the Live Oak Wells and from Loch Lomond Reservoir (SCWD, 2006).

The San Lorenzo River diversion at Felton is subject to a 20 cfs (12.9 mgd) year-round diversion rate limit. In addition, the water right for this diversion is limited by instream flow requirements ranging from 10 cfs (8.4 mgd) to 25 cfs (16.2 mgd) in different months of the year with the requirements occurring between September and June (Gary Fiske & Associates, 2003).

On a typical summer day the Live Oak Wells contribute about 1.0 mgd. Withdrawals from the reservoir vary between 2 and 4 mgd depending on weather, customer demand, and the amount of treated water held in storage at the Bay Street Reservoir (SCWD, 2006).

Withdrawals are also made from Loch Lomond during the winter season when the North Coast and San Lorenzo River sources become untreatable due to excessive turbidity from storm runoff. The Felton Diversion is operated intermittently as needed. It is normally used in the winter months of dry years, but the diversion dam is inflated every year for maintenance purposes and to facilitate fisheries research (SCWD, 2006).

### **3.1.2 Water Rights Submittals**

The City of Santa Cruz is also in the process of developing and submitting filings to the SWRCB to rectify a historical technical deficiency in the water rights on Newell Creek and the San Lorenzo River (at Felton), and to extend the time within which the City can put water to full beneficial use on its permits for diversion to storage on the San Lorenzo River in Felton. Based upon the original filings, which were thought to be adequate due to the anticipated use of Loch Lomond storage reservoir, these water rights allow only for diversion to storage and not for direct diversion. This circumstance makes the water supply technically unavailable as a source for City use during times when, for example the reservoir is receiving more inflow from Newell Creek than is released downstream. The water rights filings are intended to correct this historical deficiency and bring the water rights and current operations into conformance. The City will ensure California Environmental Quality Act (CEQA) compliance for these actions, which are independently required and useful to perpetuate the City's ability to use these sources on an ongoing basis (EDAW, 2005).

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 8

The Water Rights Conformance Proposal seeks to add the right of direct diversion to the City's Newell Creek and San Lorenzo River at Felton water rights, rectifying an oversight in the original water right filings (EDAW, 2005). License 9847 at Newell Creek Reservoir allows diversion to storage of up to 5,600 acre-ft per year (AFY) between September 1 and July 1. The Felton water rights allow diversion of up to 3,000 AFY to storage in the reservoir between September 1 and June 30th (Permit No. 16123) and October 1 to June 1 (Permit No. 16601).

### 3.2 San Lorenzo Valley Water District

SLVWD's surface water supply flows primarily from creeks on the western side of the watershed. Together, these creeks, which are tributaries to the San Lorenzo River, provide approximately half of the total water supply (SLVWD, 2009). SLVWD currently operates four standalone water systems with separate water supplies: The Northern System, the Southern System, the Mañana Woods System and the Felton System. Together, these four water systems serve approximately 7,400 connections for 22,500 people (Johnson, 2009, SLVWD, 2009). The Southern System and the Mañana Woods System each serve a portion of the Scotts Valley area. The Southern System and the Mañana Woods system rely solely on groundwater. The major SLVWD water rights are included in the Table 1 water rights summary.

#### 3.2.1 SLVWD Water Rights

The Northern System serves the unincorporated communities of Boulder Creek, Brookdale, Ben Lomond, Zayante and parts of Felton. To supply its northern service area, the District obtains approximately half its total water supply of 1,600 to 2,100 acre-feet per year from seven surface stream intakes, with a combined contributing watershed area of approximately 1,400 acres on Ben Lomond Mountain. The Northern System is supplied by approximately 57% surface water and 43% groundwater sources (Johnson, 2009, SLVWD, 2009). SLVWD relies primarily on surface water during the wet season and on groundwater during the dry season.

Clear, Foreman, Peavine, Silver and Sweetwater are the primary surface water sources for SLVWD. The more detailed water rights for each creek are listed in Table 2. The current average annual stream diversion is approximately 900 acre-feet. SLVWD has appropriative rights to these creeks, although a poorly documented, pre-1914 water uses include powering mills and hydroelectric generators at fairly high diversion rates (Johnson, 2009, SLVWD, 2009). Several water rights were listed in the SLVWD Water Master Plan (Johnson, 2009) as inactive. These are also listed in Table 2.

SLVWD's water rights for its surface water sources on Ben Lomond Mountain do not specify minimum bypass flows. However, the California Department of Fish and Game (CDFG) have stipulated that the Clear Creek diversions should not capture the entire flow. The District leaves a minimum bypass flow of 30 gallons per minute (0.07 cfs) at Clear Creek for the benefit of aquatic habitat (Johnson, 2009, SLVWD, 2009).

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 9

### 3.2.2 Felton Water Rights

In 2008, SLVWD acquired the water system for the community of Felton from the California-American Water Company. The Felton System serves the community of Felton and relies completely on surface water. The District's newly acquired Felton surface water sources are in the Fall Creek watershed. A listing of the water rights that were originally assigned to the California-American Water Company in the SWRCB (2008) eWRIMS database is listed in Table 2.

The California Department of Fish and Game (CDFG) stipulated minimum bypass flows on Fall Creek for the benefit of aquatic habitat. Required minimum bypass flows vary from 0.05 – 1.5 cubic feet per second, depending on the cumulative monthly runoff of the San Lorenzo River, as measured at the Big Trees gage (Johnson, 2009, SLVWD, 2009).

### 3.2.3 SLVWD Loch Lomond Water Right

In 1958, SLVWD sold 2,500 acres of its property along Newell Creek to the City of Santa Cruz with the agreement that SLVWD would be entitled to purchase 12.5% of the annual safe yield from the future Loch Lomond, to a maximum of 500 acre-feet per year. This percentage was roughly equivalent to the portion of the reservoir project area owned by SLVWD. The City created Loch Lomond Reservoir with the completion of Newell Creek Dam in 1960. The City stipulated in 1965 that SLVWD was entitled to 313 AF/yr (102 MG/yr), or 12.5% of 2,500 acre-feet per year. This was based on Loch Lomond's estimated annual yield of 3,230 acre-feet per year minus the required constant release of 1 cubic foot per second (cfs) or 724 acre-feet per year (Johnson, 2009).

SLVWD has lacked the infrastructure to treat Loch Lomond water in compliance with current federal standards. Thus, SLVWD has not included Loch Lomond among its active water supply sources. In 1996 the City of Santa Cruz provided SLVWD with a draft agreement that (a) acknowledged SLVWD's right to purchase 313 AF/yr (102 MG/yr) of raw Loch Lomond water and (b) offered to sell SLVWD the same amount of treated City water with the exception that it would be interruptible during declared water-shortage emergencies (Kocher, May 1996). In its 2005 Urban Water Management Plan, the City of Santa Cruz stated that 10% of its maximum annual right to divert from Loch Lomond (320 AF or 104 MG) is technically available to SLVWD. SLVWD has taken no action in recent years and has no current plan to exercise its entitlement. Future deliveries to SLVWD of raw Loch Lomond water or treated City water are included as potential future sources of water in the SLVWD Water Master Plan (Johnson, 2009).

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 10

### 3.3 Other Water Districts and Organizations

Other water districts and organizations have water rights to the surface streams in the Watershed. Descriptions of those listed by the SWRCB that are in the vicinity of the Conjunctive Use Project are provided below.

#### 3.3.1 Lompico County Water District Water Right

The Lompico County Water District (LCWD) was issued a permit in 1966 to serve drinking water to the Lompico area which consists of mostly single-family homes with an estimated population of 1,500 people and about 500 service connections. The surface water sources are Lompico and Mills Creeks with a small diversion dam on Lompico Creek (SLVWD, 2009). Lompico Creek is a tributary to Zayante Creek. LCWD has an appropriative right of 26.9 acre-feet per year with a requirement for a minimum release of 0.10 cfs at all times.

#### 3.3.2 Mount Hermon Association Water Right

The Mount Hermon Association is located near to Bean Creek upstream from the confluence with the San Lorenzo River. The Association has three water rights listed in the eWRIMS database. These include:

- A licensed appropriative right to 137.6 acre-feet per year from an unspecified location dated September 1961.
- An appropriative right to Acadia Springs for an unspecified volume dated March 1978.
- An appropriative right to Redwood Springs for 79.1 acre-feet per year dated April 2001.

#### 3.3.3 San Lorenzo Valley Unified Schools Water Right

The San Lorenzo Valley Unified School System is located near to Felton near the San Lorenzo River. The School System has a water right listed in the eWRIMS database for 56.4 acre-feet per year from Ashley Creek dated January 1954.

## 4. Water Rights Search

Kennedy/Jenks Consultants completed a water rights search using the eWRIMS database (SWRCB, 2008). The search focused on streams and rivers within Santa Cruz County that could potentially be diverted to provide a water supply to recharge the Santa Margarita Groundwater Basin. Coastal streams within the County were not considered for this analysis. In addition, unnamed streams/diversions within Santa Cruz County that may be within the San

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 11

Lorenzo River system were not included because it is assumed that these are small diversions. If and when a water rights filing or modification is made, a more detailed analysis of these smaller water rights should be conducted using the eWRIMS GIS map function.

The following streams and rivers and their tributaries were analyzed as shown on Figure 2 that follows:

- Bean Creek
- Zayante Creek
- San Lorenzo River
- Carbonera Creek
- Newell Creek

### 4.1 Search Methodology

The online eWRIMS database managed by the SWRCB was used to collect data for the water rights analysis. Information obtained from the database was processed as follows and can be found in Table 3. The process used to evaluate the water rights using the eWRIMS systems are as follows:

1. All water rights from Santa Cruz County were extracted from the database and exported to a Microsoft Excel worksheet and sorted by stream.
2. Water rights for the five creeks and rivers listed above were extracted and combined with their tributaries to form a complete set of water rights for each creek system.
3. Database inputs for all appropriative rights on the streams in question were downloaded from the eWRIMS database and checked individually. Unlike riparian rights, appropriative rights allow water to be allocated for beneficial uses including storage by properties not immediately adjacent to a water body. These rights are therefore able to serve a larger number of uses and typically have much larger quantities than riparian rights. As a permit or license is required for these rights, there is typically more background information available from the eWRIMS database on their terms and restrictions of use, than for riparian water rights.
4. Statements of Diversions (SODs) represent those records that could include riparian water rights and pre-1914 rights. SODs were typically not quantified by the eWRIMS database and the report for each right has to be individually downloaded and checked to obtain this information. Due to the small size of most of these rights and the large number of filed SODs, an alternative method was used to estimate the amount of water

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 12

claimed by SODs. Rights on the eWRIMS database are categorized as one of the following - Individual, Corporate or Government. It is more likely that the Corporate and Government SODs would have larger quantities associated with them, so these were downloaded and used to conservatively calculate an average diversion amount for each SOD. The average diversion was 12 acre-feet per year which was then assumed to be the amount of each SOD. Although this was a conservative estimate, the results for SODs were not significantly distorted as 12 acre-feet per year is a relatively insignificant amount when compared to the appropriative rights on the streams.

5. When tallying up volumes for water rights, the maximum annual volume was used as a conservative estimate. It is unlikely that this full allowance would be used at all times. If needed, the actual volume used could be determined by a manual search of Annual Water Rights Reports as described previously.
6. In the case where only a maximum direct diversion rate was presented and not a volume, the rate was applied for 365 days per year to estimate a total maximum use, which is also a conservative estimate.
7. This evaluation did not include estimates of future demands for riparian water based on changes/maturing of land uses because such estimates would be extremely speculative.
8. There was a desire to review Annual Water Rights Reports submitted by diverters to the SWRCB's eWRIMS database, however this database is no longer maintained. The Annual Water Rights Reports are filed by diverters to report use of entitlement. It is possible to go in person to the SWRCB offices and manually photocopy hardcopies of the reports, however it is recommended that this task be deferred until it is determined that there is a real need for it.

### 4.1 Search Results

Based on the summary of water rights and the available supply, the following conclusions can be drawn. Table 4 summarizes water rights on the five creek/river systems.

Flows on Bean Creek are largely not appropriated and may be available subject to evaluation of fishery requirements. From Table 4, the eWRIMS database contained 12 SODs and the total estimated existing water rights on Bean Creek were 111 acre-feet.

In 1985, the Santa Cruz City Council relinquished its water rights to Zayante Creek with the request that the State Water Resources Control Board reserve this amount in the name of North Santa Cruz County (Gary Fiske & Associates, 2003). The State Water Resources Control Board holds an inactive right for 17,000 AF of storage held for use by Northern Santa Cruz County. If claimed this would account for more than the entire available flow from Zayante

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 13

Creek. From Table 4, the eWRIMS database contained 7 SODs and the total estimated existing water rights on Zayante Creek were 68.5 acre-feet.

The City of Santa Cruz is the dominant holder of water rights on the San Lorenzo River and this supply forms a critical part of the City's water supply portfolio. From Table 4, the eWRIMS database contained 31 SODs and the total estimated existing water rights on the San Lorenzo River were 339.3 acre-feet. Although the details of each water right have been simplified for this analysis, the City of Santa Cruz holds the following rights on the San Lorenzo River:

- 4,489 AF/yr consisting of a right to divert 6.2 cfs year round (Permit ID # 2372)
- 4,344 AF/yr consisting of a right to divert 6.0 cfs year round (Permit ID # 2738)
- 3,000 AF/yr storage right between 1 September to 1 June (Permit ID # 16123)
- 3,000 AF/yr storage right between 1 October to 1 June (Permit ID # 16601 in conjunction with Permit ID # 16123)

Flows on this Carbonera Creek are largely not generally appropriated and may be available subject to evaluation of fishery requirements. From Table 4, the eWRIMS database contained three SODs and the total estimated existing water rights on Bean Creek were 36 acre-feet.

The City of Santa Cruz holds an appropriative right for 5,600 acre-feet per year of storage between 1 September and 1 July. This right is used to supply the Loch Lomond Reservoir. It is likely that there are some bypass flows available over the 5,600 acre-feet per year storage water right during wet months of wet years. Utilizing this water would require a separate diversion downstream of the reservoir and would therefore require a new water right. From Table 4, the eWRIMS database contained six SODs and the total estimated existing water rights on the San Lorenzo River were 72 acre-feet.

### 5. Potential Options to Utilize Water Rights

Three potential options are summarized below for utilizing existing or applying for new appropriate water rights. These potential options were prepared for TM2A for general informational purposes only, and do not constitute legal advice. The purpose of this section is to illustrate the anticipated level of effort necessary to obtain water rights for a range of potential options in support of the screening-level analysis for the Conjunctive Use Project. A more detailed water rights assessment will be necessary if acquiring water rights is required for the Conjunctive Use Project.

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 14

### **5.1 File for Change in Place of Use and Purpose of Use**

A holder of a water license can file for a change in place of use and purpose of use. References that describe this process in more detail are presented in Appendices A, B, and C.

Because such a change has the potential to impact other water users or the environment, the SWRCB will notify the Department of Fish and Game, other water right holders, and the public. Entities concerned about the impact of the change in the place of use and purpose of use will be allowed to object to the proposed change by filing a protest form with the State Water Board. Because the State Water Board has discretion over whether or not to approve the requested petition, they will require preparation of a CEQA document before approving the change. Preparation of the CEQA document, negotiations with the SWRCB, and dealing with any protests to the petition can take a considerable amount of time and effort and will require legal counsel.

Some options for filing for a change in place of use could occur either from the SCWD's or SLVWD's current water rights for delivery to customers in the Scotts Valley or for storage of excess wintertime surface water in the Santa Margarita groundwater basin through direct recharge. SLVWD also has rights to the Loch Lomond Reservoir that could be treated at the SLVWD's Felton Water Treatment Plant and delivered to Felton. Existing water rights may preclude delivery of SLVWD's Loch Lomond water to its service area in Scotts Valley. The SCWD has initiated a water rights conformance process to allow for direct diversion of the SCWD's Loch Lomond Reservoir water right.

### **5.2 File for New Appropriative Right**

There appears to be potentially unappropriated water on Bean Creek, Carbonera Creek and the San Lorenzo River. An entity, such as Santa Cruz County, can apply to the SWRCB for a permit to appropriate water. There is a formal form and process for submitting a water rights application. References that describe this process in more detail are presented in Appendices A, B, and C. An example water rights application to the SWRCB is provided in Appendix D. A summary is provided below.

A key concept with an appropriative right is "first in time, first in right"; meaning diverters who have older licenses have greater priority to divert than a junior appropriator. The most senior diverter has the right to take water first and the most junior diverter is last in line; in drought years the most senior diverter has the authority to take water up to their full licensed water quantity, while more junior divers are limited to whatever water is left. Because of this system, any water right obtained by Santa Cruz County would have lower priority than an existing water right, such as held by the City of Santa Cruz. However, if the County of Santa Cruz is not relying on water from this application to meet regular demands, but rather as a replenishment source, having a lower priority is less of an issue.

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 15

A water right applicant must describe the proposed source of diversion, place of use, purpose of use, quantity and season of diversion, the point of diversion, and describe the infrastructure necessary to divert the water. Most significantly the SWRCB will require technical studies on the following:

- **Environmental Impacts.** As described above, the SWRCB will require compliance with CEQA.
- **Streamflow Availability Assessment.** The SWRCB has a formal methodology for calculating the amount of water available for diversion given stream hydrology and diversions by those entities with more senior rights (including more senior applications, even if these applications do not yet have permits or licenses). The SWRCB will accept studies of water availability that do not utilize their methodology, but it can increase processing time and the applicant should expect multiple meetings with the SWRCB. Despite this, many entities choose not to use the SWRCB methodology because there is concern that the SWRCB methodology is inappropriate for intermittent streams.

The SWRCB will notify the Department of Fish and Game, other water right holders, and the public of the application to appropriate water. Entities concerned about the impact of the proposed new diversion will be allowed to object to the application by filing a protest with the State Water Board. If protested, a public hearing would be required, a likely outcome for a new water rights application within the County of Santa Cruz.

Depending on the amount of water requested, complexity of the environmental analysis and the number of protests to the water rights application, obtaining a new water right permit can take several years and will require legal counsel.

### **5.3 Partial assignment of the existing Zayante Creek Right held by SWRCB**

This right was originally held by the City of Santa Cruz to be used for a proposed dam on Zayante Creek. When the dam project did not go ahead, the right was relinquished and is now held by the State Water Resources Control Board. The right is set aside for use within the Northern Santa Cruz County.

To utilize this right, the County would need to file a petition for partial assignment of a state-filed application. This would require the same level of analysis as if filing for a new appropriative right, including CEQA compliance and a water availability assessment. Additionally, this process would require a mandatory public hearing.

The main advantage of pursuing this course of action is that the original filing date of the right (1986) would be recognized, therefore giving the right a higher priority. This benefit is of little significance in this instance given there are no significant filings subsequent to this date on

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 16

Zayante Creek. The restriction on the 17,000 acre-feet of storage on Zayante Creek will need to be evaluated. It may be that the 17,000 acre-feet includes carry-over storage which may allow a multiple years of storage in the reservoir, but does not allow the right to actually divert 17,000 acre-feet in any single given year.

A change in the place of diversion would also be needed to make the best use of this right. The diversion point specified in the right is at the site of the proposed dam, whereas a diversion point further down stream would capture a greater volume of stream flow.

Again, depending on the amount of water requested, complexity of the environmental analysis and the number of protests to the water rights application, obtaining partial assignment of a State held right can take several years and will require legal counsel.

### **5.4 Costs**

If the County wish to pursue more than one of the options discussed in this study, it is possible to file multiple applications at once. This requires payment of multiple application fees which can be significant (approximately \$15,000 – \$20,000 per application for a 1,000 AF filing).

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 17

### 6. References

Balance Hydrologics, Inc., 2009, Technical Memorandum 2B – DRAFT, Streamflow and Stormwater Assessment, Availability of Water Sources for a Conjunctive-Use Framework Approach for Water Resources in the San Lorenzo River Watershed, Santa Cruz County, California, reported prepared for Santa Cruz County Health Services Agency, August 2009.

Balance Hydrologics, Inc., 2007, Watershed Sanitary Survey for the San Lorenzo Valley and North Coast Watersheds, March 2007, report prepared for City of Santa Cruz Water Department as an update to the “San Lorenzo Valley and North Coast Watersheds Sanitary Survey, July 1996”, March 2007, 287 p.

Bartkiewicz, Kronick & Shanahan, 2006, A Summary of California Law of Surface Water and Groundwater Rights, prepared for Northern California Water Association, posted on internet webpage, <http://www.norcalwater.org/waterrights/>, last accessed September 2009.

County of Santa Cruz, Water Resources Program, Environmental Health Services, and Planning Department, 2001, Draft San Lorenzo River Watershed Management Plan Update, December 2001, 78 p.

EDAW, 2005, Draft Integrated Water Plan Program Environmental Impact Report, report prepared for City of Santa Cruz Water Department, June 2005, 627 p.

Gary Fiske & Associates, 2003, City of Santa Cruz Integrated Water Plan, Draft Final Report, report prepared for the City of Santa Cruz Integrated Water Plan Committee (IWPC), June 2003, 207 p.

Johnson, N., 2009, San Lorenzo Valley Water District Water Supply Master Plan, Administrative Draft, report prepared for the San Lorenzo Valley Water District, Boulder Creek, California, May 2009.

Ramlit Associates, 2002, The Lower San Lorenzo Valley – A Conceptual Framework for Conjunctive Use of Water Resources, reported prepared for County of Santa Cruz Water Resources Program, October 2002.

San Lorenzo Valley Water District (SLVWD), 2009, Watershed Management Plan, Part I: Existing Conditions Report, Final Version, May 11, 2009.

Santa Cruz Water Department (SCWD), 2006, 2005 Urban Water Management Plan, prepared by City of Santa Cruz Water Department, February 2006, 151 p.

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 18

State Water Resources Control Board (SWRCB), 2008, eWRIMS – Electronic Water Rights Information Management System, SWRCB internet webpage, <http://www.swrcb.ca.gov/ewrims/>, accessed for this study in October 2008.

State Water Resources Control Board (SWRCB), 1999, Information Pertaining to Water Rights in California by the California State Water Resources Control Board - 1990, SWRCB internet webpage <http://www.waterboards.ca.gov/waterrights/>, last accessed September 2009.

State Water Resources Control Board (SWRCB), example Application for License for Diversion and Use of Water, SWRCB internet webpage, [http://www.waterboards.ca.gov/waterrights/publications\\_forms/forms/docs/app\\_general\\_info.pdf](http://www.waterboards.ca.gov/waterrights/publications_forms/forms/docs/app_general_info.pdf), last accessed September 2009.

United States Bureau of Land Management (BLM), 2001, California Water Rights Fact Sheet, BLM internet webpage <http://www.blm.gov/nstc/WaterLaws/california.html>, last accessed September 2009.

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 19

### Tables

Table 1 – Summary of Water Rights on Existing Diversions

Source	License/ Permit Number	Period	Maximum Diversion Rate (cfs)	By pass Flow Requirement (cfs)	Annual Diversion/ Storage Limit	Normal Year Annual Diversion/ Production	Flow/ Storage Remaining within Water Right	Use for winter exchange with other agencies or GW Recharge?	Notes
<b>San Lorenzo River (River and Tributaries Fully Appropriated 6/1 -10/31)</b>									
City of Santa Cruz: Tait Street Diversion and Wells	001553 007200	Year-round	12.2 cfs/7.9 MGD @ Tait	None	None	7 MGD/10.8 cfs fr Tait and Wells	1.4 cfs/0.9 MGD/ 1,000 AFY	Yes w/ water rights modification that adheres to Section 10 requirements, benefits aquatic life, and is flexible in its timing.	Available after SCWD needs are met
City of Santa Cruz: Felton Diversion to Loch Lomond	016601 016123	October to June 1, September 1- June 30	7.8 20.0 20.0 0.0	10 25 20 --	3,000 AFY (977 MGY)	1,700 AFY (550 MGY)/ 10 months	1,300 AFY (420 MGY)/ 10 months = 1.2 MGD/2 cfs	Yes w/ new water rights change petition that adheres to Section 10 requirements, benefits aquatic life, and is flexible in its timing.	Storage only for pumping to Loch Lomond; Water Rights conformance proposal to add direct diversion right in process; Available after SCWD needs are met
San Lorenzo Valley Water District – Northern System Pre 1914 Water Rights	S008669 S008668 S008670 S008416 S008671	Year-round	1.5 (from five sources detailed in Table 2)	None None	e	900 – 1,200 AFY of 2,200 AFY at Max diversion rate	Minimal - max diversion rate limited by hydrology	No	Use of Northern system water likely limited to SLVWD Service Area
San Lorenzo Valley Water District –Felton Water rights	A005297 A005299 A008845 A008844 A008843 A024652	Year-round	Not applicable (detailed in Table 2)	None	2,392 AFY	400 AFY	933 AFY (licensed) and 1,059 AFY (permitted)	No	A024652 for 1,059 AFY is a water rights permit not yet licensed; the remaining 1,333 AFY are licensed water rights; permits and licenses limit place of use
<b>Loch Lomond Reservoir on Newell Creek:</b>									
City of Santa Cruz: Collection to Storage (max amount/year)	009847	September 1- July 1	No limit	1 (year-round)	5,600 AFY (1,825 MGY)	Varies from 920 AFY(300 MGY) up to 3,069 AFY (1000 MGY)	Varies by hydrology	Yes	Used to supplement North Coast and Tait Diversion; Water Rights conformance proposal to add direct diversion right in process; Includes SLVWD/SVWD as place of use; SLVWD has 102 MGY entitlement; Available after SCWD needs are met
<b>Other Sources</b>									
City of Santa Cruz: North Coast Sources	Pre-1914	Year-round	No limit	Voluntary releases by SCWD currently occur	None	100 MG (5 MGD spring/ 2 MGD fall); Likely to be reduced in future	None No		Highest quality water for SCWD which is used to its maximum when available; diversions limited by available flow; no drought/summer diversions; DFG Streambed alteration permit and HCP in SLR in process; will likely impact fish flow requirement
North Santa Cruz County (on Zayante Creek, 1985)	Held by SWRCB for County	Not specified	Not specified	Not specified	17,000 AFY (5,540 MG)	None	Maximum: 17,000 AFY (5,540 MG); Actual is likely less than maximum	Yes w/ formal filing of water rights for GW recharge	Diversion location is at proposed dam location which would likely be changed; potential to use Felton Diversion for high winter flow diversion

Source – City of Santa Cruz Urban Water Management Plan, (SCWD, 2006) 4/26/10 Discussion with Bill Kocher, Director, Santa Cruz Water Department, and 5/11/10 Discussion with Jim Mueller, General Manager, San Lorenzo Valley Water District

**Table 2 – Detailed Summary of San Lorenzo Valley Water District Water Rights**

Source	Application Number	Year First Used	Filing Date	Maximum Diversion Rate (cfs)	Maximum Diversion Rate (acre-feet/year)
<b>SLVWD Active Water Rights</b>					
Peavine Creek <sup>1</sup>	S008669	1905	1/1/76	0.136	98
Silver Creek <sup>1</sup>	S008668	1905	1/1/76	0.1177	
Foreman Creek <sup>1</sup> S00867	0	1905	1/1/76	0.061	44
Clear Creek <sup>1</sup> S00841	6	1905	1/1/76	1.2	869
Sweetwater Creek <sup>1</sup> S00867	1	1905	1/1/76	0.03	1,110
<b>Total</b>				<b>1.5</b>	<b>2,198</b>
<b>SLVWD Inactive Water Rights</b>					
Harmon Creek <sup>1</sup> S00875	8	1906	3/31/76	0.267	193
Earl Creek <sup>1</sup> S00874	3	1912	3/31/76	0.038	28
Manson Creek <sup>1</sup> S00874	4	1912	3/31/76	0.038	28
<b>Total</b>				<b>0.3</b>	<b>249</b>
<b>SLVWD Felton Water Rights</b>					
Bennett Creek <sup>2</sup> A00529	7	--	12/6/26	--	112
Bennett Creek <sup>2</sup> A00529	9	--	12/6/26	--	112
Fall Creek <sup>2</sup> A00884	5	--	12/5/26	--	514
Bull Creek and Bull Spring <sup>2</sup>	A00884 --		12/5/26	--	304.1
Bennett Creek <sup>2</sup> A00884	3	--	12/5/26	--	291
Bennett, Bull, Fall Creeks and Bull Spring <sup>2</sup>	A024652 --		7/26/74	--	1,059
<b>Total</b>				<b>--</b>	<b>2,392.1</b>

Source: <sup>1</sup>San Lorenzo Valley Water District Water Master Plan, (Johnson, 2009) and  
<sup>2</sup>SWRCB eWRIMS database (SWRCB, 2008)

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 2

**Table 3 – Listing of water rights from Bean, Carbonera, Branciforte, and Newell Creeks and the San Lorenzo River based on SWRCB eWRIMS database.**

Source	Water Right Type	Status	Holder Name	Org Type	Date	Face Amt (acre-ft/yr)	Application ID	Permit ID
<b>Bean Creek System</b>								
BEAN CREEK	Appropriative	Licensed	KIT SIEMER	Individual	7/20/1928	1.7 A005990		3443
BEAN CREEK	Appropriative	Licensed	KENNETH F UPPSTROM	Individual	7/30/1957	0.7 A017747		11240
BEAN CREEK	Appropriative	Licensed	TIMOTHY J WOODS	Individual	11/18/1969	0.6 A023400		16217
<b>Appropriate Rights Subtotal</b>						<b>3.0</b>		
BEAN CREEK	Statement of Div and Use	Claimed	BIG REDWOOD PARK WATER IMPROVEMENT ASSN	Corporation	3/15/1976	0 S008718		
BEAN CREEK	Statement of Div and Use	Claimed	BRADLEY MICHAEL CORSIGLIA	Individual	3/14/1979	0 S009730		
BEAN CREEK	Statement of Div and Use	Claimed	C W RUSSELL	Individual	3/14/1979	0 S009738		
BEAN CREEK	Statement of Div and Use	Claimed	CARMEL E HUFHINES	Individual	3/14/1979	0 S009736		
BEAN CREEK	Statement of Div and Use	Claimed	CLAYTON L FIEDLER	Individual	3/14/1979	0 S009742		
BEAN CREEK	Statement of Div and Use	Inactive	OCEAN PACIFIC INC	Corporation	7/30/2008	0 S010962		
BEAN CREEK	Statement of Div and Use	Claimed	REID O GEASE	Individual	3/14/1979	0 S009735		
BEAN CREEK	Statement of Div and Use	Inactive			5/7/2007	0	S009734	
HOPKINS GULCH CREEK	Statement of Div and Use	Claimed	MICHAEL F WATSON	Individual	1/1/1975	0 S004923		
<b>Subtotal estimated volume from Statements of Diversion and Use</b>						<b>108</b>		
<b>Carbonera Creek System</b>								
CARBONERA CREEK	Stockpond Certificate	Licensed	SERENA THOMPSON KALMAN, UDT 1980	Corporation	1/2/1998	3 C005020		
<b>Appropriate Rights Subtotal</b>						<b>3.0</b>		
CARBONERA CREEK	Statement of Div and Use	Claimed	ALFRED ALICE SCHWEIZER	Individual	3/14/1979	0 S009739		
CARBONERA CREEK	Statement of Div and Use	Claimed	JESSE W WILBUR	Individual	3/14/1979	0 S009745		
CARBONERA CREEK	Statement of Div and Use	Inactive	WIRT R MACMURDO	Individual	8/1/2008	0	S009740	
<b>Subtotal estimated volume from Statements of Diversion and Use</b>						<b>36</b>		
<b>Branciforte Creek System</b>								
BRANCIFORTE CREEK	Appropriative	Licensed	RICHARD J GIOVANNONI	Individual	9/24/1956	25.6	A017293	11495
<b>Appropriate Rights Subtotal</b>						<b>25.6</b>		
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	MACLYN MORRIS	Individual	9/23/2002	18.1	S015297	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	WILLIAM HAND	Individual	3/12/1999	1.8 S015270		
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	CHRIS APPLETON	Individual	3/14/1979	0	S009725	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	DOLE DRIED FRUIT & NUT COMPANY	Corporation	1/1/1980	0 S002866		

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 3

Source	Water Right Type	Status	Holder Name	Org Type	Date	Face Amt (acre-ft/yr)	Application ID	Permit ID
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	DONALD M JOHNSTONE	Individual	5/30/1978	0	S009598	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	FELIX ROBLES	Individual	3/14/1979	0	S009744	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	FRED TAYLOR	Individual	3/14/1979	0	S009741	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	GLADYS E NAMAN	Individual	3/14/1979	0	S009732	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	HAPPY VALLEY CONFERENCE CENTER INC	Corporation	4/19/1977	0	S009207	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	JACK F KIRBY	Individual	3/14/1979	0	S009727	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	L CUNEO	Individual	3/14/1979	0	S009746	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	LEWIS N ERICKSON	Individual	3/14/1979	0	S009720	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	MACLYN MORRIS	Individual	3/14/1979	0	S009719	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	ROBERT A MICHAEL	Individual	3/14/1979	0	S009718	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	ROBERT J BIXBY	Individual	5/12/1978	0	S009589	
BRANCIFORTE CREEK	Statement of Div and Use	Claimed	TOM ROZARIO	Individual	3/14/1979	0	S009723	
BRANCIFORTE CREEK	Statement of Div and Use	Inactive			5/9/2008	0	S009728	
BRANCIFORTE CREEK	Statement of Div and Use	Inactive			11/3/1999	0	S013322	
BRANCIFORTE CREEK AKA (BLACKBURN GULCH)	Statement of Div and Use	Claimed	DAVID WOOD	Individual	5/13/1991	0	S013704	
CRYSTAL CREEK	Statement of Div and Use	Claimed	KYLE FRANDLE	Individual	5/11/2001	0.7	S015426	
CRYSTAL CREEK	Statement of Div and Use	Claimed	GALE A MCGUIRE	Individual	8/8/1977	0	S009364	
<b>Subtotal estimated volume from Statements of Diversion and Use</b>						<b>236.6</b>		
<b>Newell Creek System</b>								
NEWELL CREEK	Appropriative	Licensed	CITY OF SANTA CRUZ	Government (State/Municipal)	12/12/1957	5,600	A017913	11618
<b>Appropriate Rights Subtotal</b>						<b>5,600</b>		
NEWELL CREEK	Statement of Div and Use	Claimed	EDWARD R HILL	Individual	6/12/1978	0	S009680	
NEWELL CREEK	Statement of Div and Use	Claimed	EMILY RICHEY	Individual	5/2/1977	0	S009255	
NEWELL CREEK	Statement of Div and Use	Claimed	GRACE E REICHERT	Individual	4/26/1977	0	S009249	
NEWELL CREEK	Statement of Div and Use	Inactive	J H MORRISON	Individual	4/27/2006	0	S009194	
NEWELL CREEK	Statement of Div and Use	Claimed	MARILYN A GRAY	Individual	4/26/1977	0	S009248	
NEWELL CREEK	Statement of Div and Use	Claimed	MICHAEL FINLEY	Individual	4/13/1977	0	S009200	
<b>Subtotal estimated volume from Statements of Diversion and Use</b>						<b>72</b>		

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 4

San Lorenzo River System								
BENNETT CREEK	Appropriative	Licensed	CALIFORNIA-AMERICAN WATER COMPANY	Government (State/Municipal)	12/5/1936	291	A008843	5136
BENNETT CREEK	Appropriative	Licensed	CALIFORNIA-AMERICAN WATER COMPANY	Government (State/Municipal)	12/6/1926	112	A005297	3603
BENNETT CREEK	Appropriative	Licensed	CALIFORNIA-AMERICAN WATER COMPANY	Government (State/Municipal)	12/6/1926	112	A005299	3605
BENNETT CREEK, BULL CREEK, BULL SPRING, FALL CREEK	Appropriative	Permitted	CALIFORNIA-AMERICAN WATER COMPANY	Government (State/Municipal)	7/26/1974	1,059.00	A024652	20123
BULL CREEK, BULL SPRING	Appropriative	Licensed	CALIFORNIA-AMERICAN WATER COMPANY	Government (State/Municipal)	12/5/1936	304.1	A008844	5137
FALL CREEK	Appropriative	Licensed	CALIFORNIA-AMERICAN WATER COMPANY	Government (State/Municipal)	12/5/1936	514	A008845	5138
KINGS CREEK	Appropriative	Licensed	MT DIABLO COUNCIL, B S A	Organization/Association	3/7/1966	2	A022412	15261
KINGS CREEK	Appropriative	Licensed	MT DIABLO COUNCIL, B S A	Organization/Association	11/16/1959	1.8	A019084	12795
LOVE CREEK, UNST	Appropriative	Permitted	FREDRIC CHARLES WELLS	Individual	7/21/1988	17.3	A029306	21107
SAN LORENZO RIVER	Appropriative	Licensed	CITY OF SANTA CRUZ	Government (State/Municipal)	6/9/1924	4,488.70	A004017	2372
SAN LORENZO RIVER	Appropriative	Licensed	CITY OF SANTA CRUZ	Government (State/Municipal)	9/2/1926	4,343.90	A005215	2738
SAN LORENZO RIVER	Appropriative	Permitted	CITY OF SANTA CRUZ	Government (State/Municipal)	10/20/1965	3,000.00	A022318	16123
SAN LORENZO RIVER	Appropriative	Permitted	CITY OF SANTA CRUZ	Government (State/Municipal)	3/1/1971	0.00	A023710	16601 (w/ID 16123 = 3,000 AF)
SAN LORENZO RIVER	Appropriative	Licensed	FRENCH AMERICAN INVESTMENT CO INC	Corporation	6/14/1937	12.7	A008999	5299
UNST (AKA BOULDER CREEK)	Appropriative	Pending	FOREST LAKES MUTUAL WATER COMPANY	Corporation	4/2/2003	4	A031409	
<b>Appropriate Rights Subtotal</b>						<b>14,245.8</b>		
CLEAR CREEK	Statement of Div and Use	Claimed	MICHAEL LUSSIER	Individual	6/9/2000	47.7	S015091	
CLEAR CREEK	Statement of Div and Use	Claimed	MICHAEL LUSSIER	Individual	11/7/1997	0	S014846	
FALL CREEK	Statement of Div and Use	Claimed	JAMES K HUMPHREYS	Individual	1/1/1974	0	S008315	
FALL CREEK	Statement of Div and Use	Claimed	SUSAN W CLARRY	Individual	2/14/1978	0	S009556	
FRITCH CREEK	Statement of Div and Use	Claimed	ARDEENE SWAIN	Individual	6/3/1996	0	S014580	
FRITCH CREEK	Statement of Div and Use	Claimed	CAROL G EAKLE	Individual	12/8/1994	0	S014298	
JAMISON SPRING	Statement of Div and Use	Claimed	BIG BASIN WATER COMPANY	Corporation	12/6/1974	0	S008440	

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 5

LOGAN CREEK	Statement of Div and Use	Claimed	KRIS PACHECO	Individual	7/5/1978	0	S009700			
LOVE CREEK	Statement of Div and Use	Claimed	FRANCIS JOHN WEILER	Individual	1/1/1980	0	S003137			
LOVE CREEK	Statement of Div and Use	Claimed	JULIUS HIMMELSBACHER	Individual	1/1/1975	0	S002047			
LOVE CREEK	Statement of Div and Use	Claimed	KENNETH BARTON KORTS	Individual	1/1/1975	0	S003236			
LOVE CREEK	Statement of Div and Use	Claimed	MATTHEW DANIEL SCHWARZBACH	Individual	12/7/1979	0	S010011			
LOVE CREEK	Statement of Div and Use	Claimed	PATRICIA L WILLIAMS	Individual	1/1/1975	0	S003239			
LOVE CREEK	Statement of Div and Use	Claimed	ROSS J HARRIMAN	Individual	1/1/1975	0	S002699			
LOVE CREEK	Statement of Div and Use	Inactive			5/5/2007	0	S009688			
MARSHALL CREEK	Statement of Div and Use	Claimed	JIM KINSLOW	Individual	11/28/1977	0	S009468			
MARSHALL CREEK	Statement of Div and Use	Inactive			5/7/2007	0	S009704			
SAN LORENZO RIVER	Statement of Div and Use	Claimed	PARADISE PARK MASONIC CLUB	Corporation	4/28/2004	2.6	S015526			
SAN LORENZO RIVER	Statement of Div and Use	Claimed	GERALD D ROGERS	Individual	10/29/1975	0	S008632			
SAN LORENZO RIVER	Statement of Div and Use	Claimed	MARK TRAU GOTT	Individual	9/15/2003	0	S015785			
SAN LORENZO RIVER	Statement of Div and Use	Claimed	PARK MUTUAL WATER COMPANY	Corporation	9/13/1977	0	S009408			
SAN LORENZO RIVER	Statement of Div and Use	Claimed	RALPH P GULLIVER	Individual	5/6/1976	0	S008778			
SAN LORENZO RIVER	Statement of Div and Use	Inactive	RAYMOND L MORGAN	Individual	7/30/2008	0	S008634			
SAN LORENZO RIVER	Statement of Div and Use	Inactive	SAN LORENZO WOODS IMPROVEMENT ASSN	Corporation	6/4/1998	0	S009370			
SAN LORENZO RIVER	Statement of Div and Use	Claimed	UMESH PATEL	Individual	7/27/1973	0	S008186			
SHINGLE MILL GULCH	Statement of Div and Use	Inactive	JOHN ROBERTS	Individual	8/1/2008	0	S009958			
UNST (AKA LOVE CREEK)	Small Domestic Reg	Registered	RUSS ANDERSON	Individual	12/7/1987	1	D029149R			
<b>Subtotal estimated volume from Statements of Diversion and Use</b>							<b>339.3</b>			

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 6

<b>Zayante Creek System</b>								
LOMPICO CREEK	Appropriative	Licensed	LOMPICO COUNTY WATER DISTRICT	Government (State/Municipal)	7/1/1925	26.9	A004667	2858
LOMPICO CREEK	Appropriative	Licensed	SANDRA TAMAR BERRY	Individual	1/30/1957	3.5	A017445	11284
ZAYANTE CREEK	Appropriative	State Filing	STATE WATER RESOURCES CONTROL BOARD	Government (State/Municipal)	9/25/1986	17000	A028909 for 17,000 AF	
<b>Appropriate Rights Subtotal</b>						<b>17,030.4</b>		
LOMPICO CREEK	Statement of Div and Use	Claimed	TIMOTHY TONSING	Individual	10/21/1994	0.1	S014249	
LOMPICO CREEK	Statement of Div and Use	Claimed	LEO WEBBER	Individual	1/1/1976	0	S007405	
LOMPICO CREEK	Statement of Div and Use	Claimed			4/16/1985	0	S012207	
MOUNTAIN CHARLIE GULCH	Appropriative	Licensed	SUMMIT WEST MUTUAL WATER COMPANY	Government (State/Municipal)	9/14/1967	8.4	A022905	15881
ZAYANTE CREEK	Statement of Div and Use	Claimed	HERRICK MORGAN	Individual	10/9/1996	0	S014717	
ZAYANTE CREEK	Statement of Div and Use	Claimed	ROBERT A FOSBURGH	Individual	1/1/1975	0	S008541	
ZAYANTE CREEK	Statement of Div and Use	Claimed	RUTH L CLIFFORD	Individual	3/14/1979	0	S009733	
<b>Subtotal estimated volume from Statements of Diversion and Use</b>						<b>68.5</b>		
<b>Cancelled or Revoked Water Rights</b>								
BEAR CREEK	Appropriative	Revoked			4/23/1998	0	A026070	18106
BEAN CREEK	Appropriative	Revoked	REED J LANGDON	Individual	4/9/1998	0	A019658	13519
CARBONERA CREEK	Appropriative	Revoked			8/8/2007	5.5	A026634	19422
GOLD GULCH, TUNNEL GULCH, UNST, WAEZEL GULCH	Appropriative	Revoked			4/10/2002	56	A004842	3444
LOMPICO CREEK	Appropriative	Revoked			9/19/2002	0	A017446	11285
LOVE CREEK	Appropriative	Revoked			11/21/2005	0	A020447	13550
MOUNTAIN CHARLIE GULCH	Appropriative	Cancelled			1/15/2000	0	X	000121
MOUNTAIN CHARLIE GULCH, UNST	Appropriative	Revoked			5/19/2004	1.6	A026831	18929
ZAYANTE CREEK	Small Domestic Reg	Revoked	RAY MURDOCK	Individual	3/16/2007	3	D031079R	

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 7

**Table 4 – Summary of water rights from Bean, Carbonera, Branciforte, and Newell Creeks and the San Lorenzo River based on SWRCB eWRIMS database**

Stream	Appropriative rights		Statements of Diversion and Use		Total Estimated Existing Water Rights (AF)	Annual Streamflow	
	Direct Diversion (AF)	Storage (AF)	Number of claims	Estimated Volume (AF)		Mean <sup>1</sup> (AF)	Average Annual Yield <sup>1</sup> (AF)
Bean Creek System 3			12	108	111	8,000	520
Zayante Creek System	30.4	17,000 <sup>5</sup>	7	68.5	17,068.5	8,000	500
San Lorenzo River System <sup>3</sup>	14,245.8		31	339.3	14,633.1	96,100	1,643 <sup>4</sup>
Carbonera Creek System <sup>2</sup>	3		3	36	39	4,000	480
Newell Creek		5,600	6	72	5,672	Not available	Not available

<sup>1</sup> From Technical Memorandum 2B (Balance Hydrologics, 2009) for this Conjunctive Use Project.

<sup>2</sup> Branciforte Creek, adjacent to Carbonera Creek, has a Total Estimated Existing Water Rights of 236.6 AF. No estimate of available streamflow was made for Branciforte Creek

<sup>3</sup> Water Rights on creeks within the San Lorenzo River system but on any of the other named creeks in this table were summarized in this category

<sup>4</sup> Quantity remaining of 3,000 AFY diversion right (per City of Santa Cruz permit ID 16123 and 16601) based on WY89 diversion of 1,643 AFY (Ramlit Associates, 2002)

<sup>5</sup> Storage right of 17,000 AF (per Application ID A028909) is inactive and held for use in Northern Santa Cruz County.

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 8

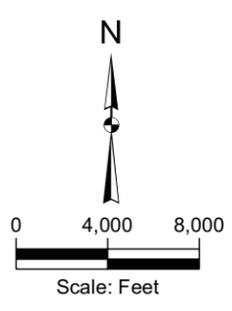
## Figures



Filename: Z:\Projects\SantaCruzCo\Events\20090916\_figures\Basemap\_v2.mxd

**Legend**

- Area Locations
- Water Treatment Plant
- + Santa Cruz Water Department Diversions
- ⊕ City of Santa Cruz Wells (GWUDI only)
- Streets
- Streams
- San Lorenzo River Watershed
- Santa Margarita Groundwater Basin
- Parks and Open Space



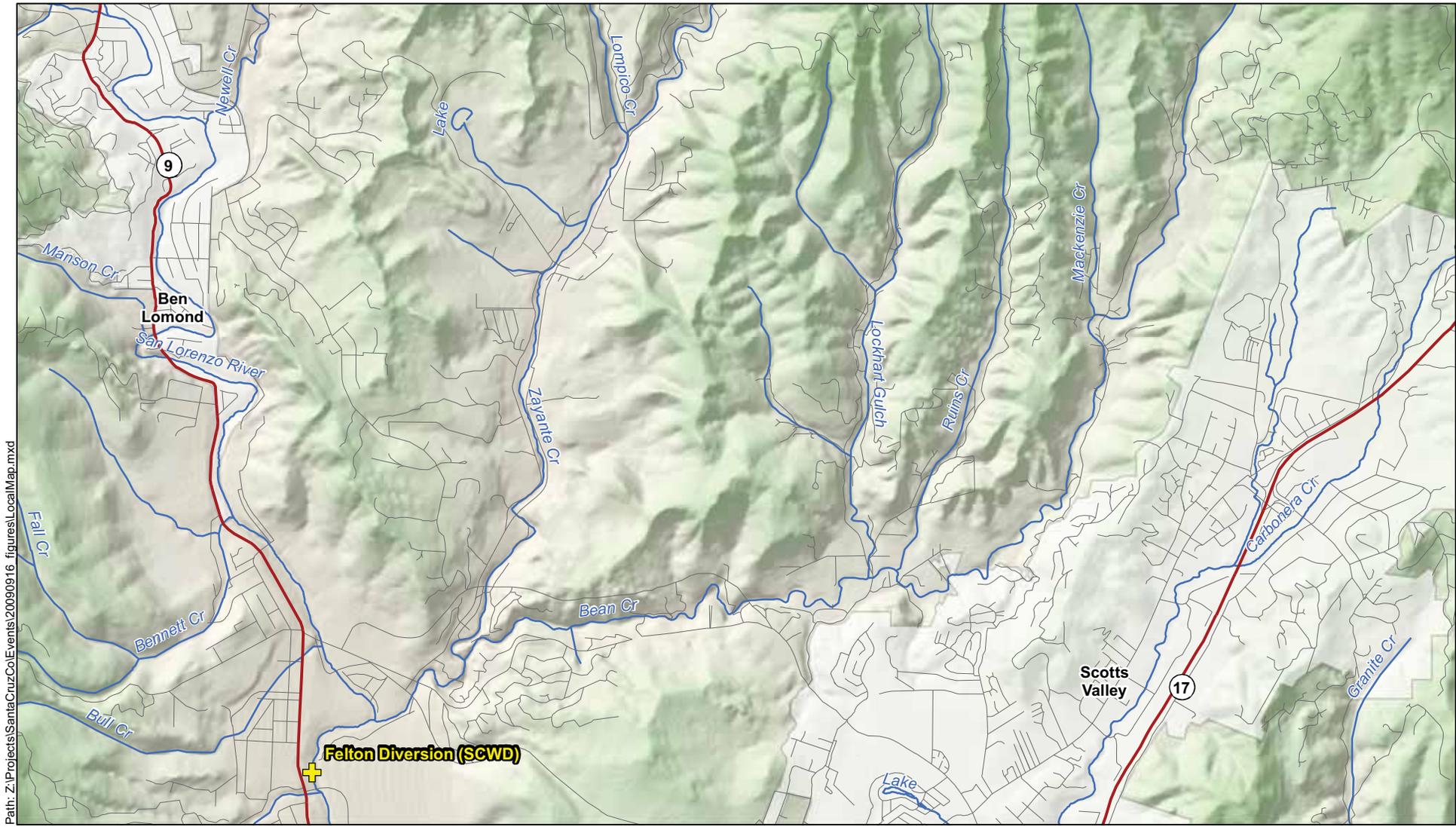
**Kennedy/Jenks Consultants**

TM2A - Water Rights Evaluation  
 Conjunctive Use and Enhanced Aquifer Recharge Project  
 Santa Cruz County, California

**San Lorenzo River Watershed**

K/J 0864005  
 November 2010

**Figure 1**

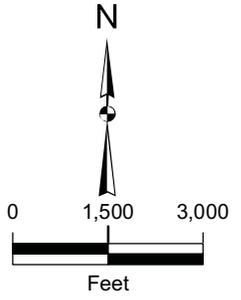


Path: Z:\Projects\SantaCruzCo\Events\20090916\_figures\LocalMap.mxd

Source: Hillshading derived from a USGS 30 meter Digital Elevation Model, Scale 1:24,000.

**Legend**

- + Santa Cruz Water Department Diversions
- State Highways
- Streams
- City Boundary



**Kennedy/Jenks Consultants**  
 TM2A - Water Rights Evaluation  
 Conjunctive Use and Enhanced Aquifer Recharge Project  
 Santa Cruz County, California

**Locations of Streams for  
 Water Rights Evaluation**

K/J 0864005  
 November 2010

**Figure 2**

## Technical Memorandum 2A – Water Rights

Santa Cruz County Health Services Agency

16 November 2010

0864005

Page 11

## Appendices

## Appendix A

---

Information Pertaining to Water Rights in California

**STATE WATER RESOURCES CONTROL BOARD  
INFORMATION PERTAINING TO  
WATER RIGHTS IN CALIFORNIA - 1990**

**TABLE OF CONTENTS**

INTRODUCTION.....	2
GENERAL INFORMATION PERTAINING TO WATER RIGHTS.....	3
APPROPRIATIVE RIGHTS INITIATED PRIOR TO DECEMBER 19, 1914.....	3
APPROPRIATIVE RIGHTS INITIATED SUBSEQUENT TO DECEMBER 19, 1914.....	4
LOSS OF APPROPRIATIVE RIGHTS.....	4
RIPARIAN RIGHTS.....	4
PRESCRIPTION.....	6
VESTED APPROPRIATIVE AND RIPARIAN RIGHTS NOT AFFECTED BY FILING AN APPLICATION.....	7
DISPUTES OVER THE USE OF WATER.....	7
PUBLIC TRUST.....	8
DETERMINATION OF EXISTING RIGHTS.....	9
APPROPRIATION OF UNDERGROUND WATER.....	10
SPRING WATER.....	11
NO ASSISTANCE RENDERED IN SECURING RIGHT OF ACCESS TO POINT OF DIVERSION OR RIGHT-OF-WAY.....	11
PATENTS AND HOMESTEADS.....	11
SUPERVISION OVER DAMS.....	11
PROVISIONS OF FISH AND GAME CODE.....	12
STATEMENTS OF WATER DIVERSIONS AND USE.....	12
STOCKPOND RIGHTS.....	13
GENERAL INFORMATION PERTAINING TO APPLICATIONS FOR PERMITS TO APPROPRIATE UNAPPROPRIATED WATER.....	13
WHO SHOULD FILE AN APPLICATION.....	14
WHO SHOULD <u>NOT</u> FILE AN APPLICATION.....	14
PURPOSE OF FILING.....	14
WHEN TO FILE.....	15
UNAPPROPRIATED WATER AND RESPONSIBILITIES OF PERMITTEES.....	15
OUTLINE OF ESSENTIAL STEPS.....	16
PREPARATION OF APPLICATIONS.....	17
CHANGES IN OWNERSHIP.....	17
APPENDIX -_TABLE OF EQUIVALENTS.....	17

## **INTRODUCTION**

Additional information concerning procedures for appropriating water is available in SWRCB's publications entitled, "How to File an Application/Registration to Appropriate Water in California" and "A Guide to California Water Right Appropriations". These free publications may be picked up from the State Water Resources Control Board, Division of Water Rights, 901 P Street, Third Floor, Sacramento, California 95814. If you wish to write for either one or both of these publications, address your request to the Division of Water Rights, Post Office Box 2000, Sacramento, CA 95812-2000 or telephone (916) 657-2170 and request they be mailed to you.

The California Code of Regulations, Title 23. Waters, contains the regulations for the administration of water rights and water quality activities of the State Water Resources Control Board. A complete copy of these regulations may be obtained at the current cost of \$15.90 from the California Department of General Services, Publications section, Post Office Box 1015, North Highlands, CA 95660. A renewal service, which provides new and amended regulations also, may be obtained from the California Department of General Services at the current cost of \$20.00 per year.

Booklets containing excerpts from the California Code of Regulations and the California Water Code pertaining to water rights may be obtained free of charge from the Division of Water Rights as described in the first paragraph. These booklets, however, contain information only as of the date the booklets were published.

## **GENERAL INFORMATION PERTAINING TO WATER RIGHTS**

The following general information pertaining to water rights is offered for the guidance and assistance of those who may be interested. While believed to be correct, the information is by no means complete. For additional information, see the California Water Code and case law.

Those to whom this general information is of particular importance or who propose to apply it to specific cases should seek the advice of an attorney or engineer, depending on the kind of information needed.

## **APPROPRIATIVE RIGHTS INITIATED PRIOR TO DECEMBER 19, 1914**

Prior to 1872, appropriative water rights could be acquired by simply taking and beneficially using water. The priority of the right was the first substantial act leading toward putting the water to beneficial use provided the appropriation was completed with reasonable diligence; otherwise, priority did not attach until beneficial use of the water commenced.

In 1872, sections 1410 through 1422 of the California Civil Code were enacted. These sections established a permissive procedure for perfecting an appropriation of water. Provisions were made for establishing a priority of right by posting a notice of appropriation at the proposed point of diversion and recording a copy of the notice with the respective County Recorder. If these procedures were not followed, the pre-1914 appropriative right did not attach until water was beneficially used.

Once acquired, an appropriative right can be maintained only by continuous beneficial use of water. Regardless of the amount claimed in the original notice of appropriation or at the time diversion and use first began, the amount which now can be rightfully claimed under an appropriative right initiated prior to December 19, 1914 therefore has, in general, become fixed by actual beneficial use as to both amount and season of diversion. The conditions under which an appropriative right may be forfeited in whole or in part are set forth under the heading "Loss of Appropriate Rights".

Successful assertion of an appropriative right which was initiated prior to December 19, 1914, where the validity of the right is disputed, requires evidence of both the original appropriation and the subsequent maintenance of the right by continuous and diligent application of water to beneficial use (see California Water Code section 1202(b)). Frequently such evidence consists of oral testimony of persons who have actual knowledge of the relevant facts. As the years pass, such testimony, dependent upon the recollection of individuals, may become difficult or impossible to secure. At least a partial remedy for this situation may be found in the procedure for perpetuation of testimony set forth in section 2017 of the California Code of Civil Procedure.

A record of water use under "pre-1914 Appropriative Rights" should be established by filing a Statement of Water Diversion and Use with the SWRCB.

## **APPROPRIATIVE RIGHTS INITIATED SUBSEQUENT TO DECEMBER 19, 1914**

The two methods of appropriation existing prior to December 19, 1914, the effective date of the California Water Commission Act, no longer are available for appropriating water from surface streams, other surface bodies of water, or from subterranean streams flowing in known and definite channels. An appropriation of such water now requires compliance with the provisions of Division 2, Part 2 of the California Water Code.

The steps which now must be taken in order to initiate and acquire an appropriative water right are described under the heading "General Information Pertaining to Applications for Permits to Appropriate Unappropriated Water".

## **LOSS OF APPROPRIATIVE RIGHTS**

By Abandonment - To constitute abandonment of an appropriative right, there must be concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use, so that abandonment is always voluntary, and a question of fact (1 Wiel, 3d ed., 604, 605).

By Nonuse - Nonuse is distinguished from abandonment. Nonuse means failure to put water to beneficial use for a period of years. The courts have held that pre-1914 rights can be lost as the result of five years' nonuse (Smith v. Hawkins 42 P. 454).

California Water Code section 1241 provides for loss of appropriative rights after five years' nonuse. This section applies only to an appropriative right acquired after December 19, 1914.

## **RIPARIAN RIGHTS**

No California statute defines riparian rights, but a modification of the common law doctrine of riparian rights has been established in this State by decisions of the courts and confirmed by the provisions of section 3, Article XIV of the California Constitution (see California Water Code sections 100, 101). Lands within the watershed of a natural watercourse, which are traversed thereby or border thereon, with the exceptions and limitations hereinafter, indicated, may be riparian. Each owner thereof may have a right, which is correlative with the right of each other riparian owner to share in the reasonable beneficial use of the natural flow of water, which passes his land. No permit is required for such use. The State Water Resources Control Board's (SWRCB) policy is to consider natural flow as not including return flows derived from use of ground water, water seasonally stored and later released, or water diverted from another watershed. In administering the California Water Code, the SWRCB is governed by the following considerations relative to the doctrine of riparian rights as applied to this State:

1. The riparian right exists by reason of ownership of land abutting upon a stream or body of water and affords no basis of right to use water upon nonriparian land.  
(Rancho Santa Marqarita v. Vail, 11 Cal. 2d 501, 81 P. 2d 533)

2. In order to divert water under claim of riparian right, the diverter must use the water on riparian land but need not own the land at the point of diversion. That is, such diverter may divert at a point upstream from his land so long as permission is granted to use that point of diversion, and intervening land owners between the point of diversion and the place of use are not adversely affected by such practices. (*Turner v. James Canal Co.*, 155 Cal. 82, 99 P. 520 (1909))
3. A parcel of land loses its riparian right when severed from land bordering the stream by conveyance unless the right is reserved for the severed parcel. The riparian right also may be destroyed when purportedly transferred apart from the land by grant, contract, or condemnation. Once lost, it cannot be restored.
4. As between riparian owners, priority of use establishes no priority of right; i.e., one cannot claim superior right merely because water was used first. (*Pabst v. Finmand*, 190 Cal. 124, 211 P. 11 (1922))
5. The riparian right is neither created by use nor lost by nonuse.
6. If there is insufficient water for the reasonable beneficial requirements of all riparian owners, they must share the available supply. Apportionment is governed by various factors, including each owner's reasonable requirements and uses. In the absence of mutual agreement, recourse to judicial determination may be necessary.
7. As between riparian owners, one of them may take the whole supply if necessary for strictly domestic use; that is, for so-called "natural uses ... arising out of the necessities of life on the riparian land, such as household use, drinking, watering domestic animals." (1 *Wiel*, 3d ed., *Water Rights in the Western States*, page 795; *Deetz v. Carter*, 232 Cal. App. 2d 851; but see *Prather v. Hoberg*, 24 Cal. 2d 549, 150 P. 2d 405, re an equitable apportionment where the use is commercialized as for resort purposes and therefore is not strictly domestic.)
8. The riparian owner is subject to the doctrine of reasonable use, which limits all rights to the use of water to, that quantity reasonably required for beneficial use and prohibits waste or unreasonable use or unreasonable methods of use or diversion. (Sec. 3, Art. XIV, Const. of Cal.; *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 Pac. 2d 486; *Tulare Irr. Dist. et al v. Lindsay Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 Pac. 2d 972; *Rancho Santa Marqarita v. Vail*, 11 Cal. 2d 501, 81 P. 2d 533)
9. A riparian right may be impaired or lost through prescription. Refer to the following section, "PRESCRIPTION".
10. The riparian right attaching to a particular parcel of land is subject to appropriative rights established by diversion upon vacant public domain before the first valid steps were taken to acquire said parcel of land from the United States, whether diversion was made at points upstream or downstream.
11. The riparian right cannot be transferred for use upon another parcel of land.

12. The riparian right does not apply to foreign water; i.e., water originating in a different watershed cannot be used under claim of riparian right. (E. Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417; Crane v. Stevinson, 5 Cal. 2d 387, 54 P. 2d 1100; Rancho Santa Marqarita v. Vail, 11 Cal. 2d 501, 81 P. 2d 533)
13. Water cannot be stored and withheld for a deferred use (other than regulatory storage) under claim of riparian right. (Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 cal. 206, 287 pac. 93; Colorado Power Co. v. Pac. Gas and Electric Co., 218 cal. 559, 24 p. 2d 495; Moore v. CaliforniaOregon Power Co., 22 cal. 2d 725, 140 p. 2d 798)

A record of water use under riparian claim should be established by filing a Statement of Water Diversion and Use with the SWRCB.

## **PRESCRIPTION**

A right secured by appropriation does not depend upon use for any given length of time. It is complete immediately upon full beneficial use being made of water pursuant to a permit. The right, however, is subordinate and subject to all prior vested rights, whether appropriative or riparian. This limitation may be removed under certain circumstances by continuous use adverse to prior rights for five years and failure of the owners of the prior rights to file legal action to protect themselves during that time. Their cause of action then becomes barred by the statute of limitations. The right of the subsequent appropriator thereafter no longer is subject to the prior vested rights. This result is called a prescriptive right to the use of water.

In order for an appropriative or riparian claim to ripen into a prescriptive right as against the owner of a riparian or a prior appropriative right, the use must be continuous and uninterrupted for a period of five years. During all of such time, the use must be open and notorious, exclusive, under claim of right, hostile and adverse to the title of the prior owner, and an invasion of the prior owner's right. The prior right owner must have had an opportunity to prevent the adverse use by legal action, and such taxes as are assessed must be paid. Absence of any of these conditions is fatal to the acquisition of a prescriptive water right.

Water users ordinarily have no concern with the use of water by others after it has passed their land or point of diversion. The upstream users thus have no legal right to prevent downstream use. A well-established rule is that a prescriptive water right ordinarily cannot be acquired against an upstream user.

A right cannot be acquired by prescription to use a greater quantity of water than reasonably is necessary for the beneficial purpose served, regardless of the amount actually used, in accordance with the constitutional amendment of 1928 (art. XIV, sec. 3).

Since enactment of the California Water Commission Act on December 19, 1914, a right to appropriate or use water (other than as a riparian or overlying owner, or appropriator of percolating ground water, or stockpounds that comply with article 2.5, commencing with section 1226 of chapter 1 of part 2 of division 2 of the California Water Code), cannot have been

secured without first obtaining a permit from the State (see California Water Code section 1225 and Crane v. Stevinson, 5 cal. 2d 387, 54 p. 2d 1100). Although one who now uses water without a permit for a sufficient period of time may, under certain circumstances foreclose objection by those who have been adversely affected, such user thereby does not acquire a right to prevent diversions by others which deplete the supply of water available. California courts have not been called upon to determine this precise question. In view of the uncertainty in this respect and because a prescriptive right can be finally determined only by a court of competent jurisdiction, the policy of the SWRCB is to disregard a claim to water subject to the permit procedure which is based only upon use initiated subsequent to 1914 unless such use is supported by a permit.

In PecDle v. Shirokow (1980) 26 cal. 3d 301, the California Supreme Court addressed the question of whether a person who does not hold a water right permit or license may establish a prescriptive water right to divert and use water. The Court held that the water appropriation procedure established by statute constitutes the exclusive method of acquiring a right to appropriate or use water, which is subject to appropriation. Since Shirokow was using water and held no permit or license authorizing an appropriation of water, the Court concluded that such use of water was improper. In addition, the Court held that the State's governmental interest in regulating the use of public water is a public right, which cannot be lost through prescription.

#### **VESTED APPROPRIATIVE AND RIPARIAN RIGHTS NOT AFFECTED BY FILING AN APPLICATION**

An existing valid riparian or appropriative right will be neither strengthened nor impaired by a permit to appropriate water issued to the owner of such right (see Barr v. Branstetter, 42 cal. app. 725, 184 p. 409). An application to appropriate water may be filed by such owner, however, in the following instances: (1) to initiate a right to additional unused water where water is available for further appropriation in excess of that covered by the existing right; and (2) to establish a new right to water already in use by applicant where the validity of the existing right has not been adjudicated or is in doubt. In either event, the priority of the right acquired by beneficial use under the permit will be the date of filing the application--the priority will not relate back to the time of the first use under a former claim.

The California Code of Regulations, title 23~ section 731, requires an applicant for a permit to list all claims to existing rights for the use of all or part of the water sought by the application. A permit, if issued, will limit the water to be appropriated so that existing rights, combined with the permit will not yield a right to use an unreasonable quantity of water. Subsections (c), (d), and (e) of section 731 contain penalties for anyone who transfers an existing right before, or does not claim an existing right until, a permit or license is issued. This provision is in recognition of the fact that a permit should be issued only for unappropriated water, and that water which is being used pursuant to an existing right is not unappropriated, whether the right is being exercised by the applicant or by another person.

#### **DISPUTES OVER THE USE OF WATER**

The right to use water is a property right and may be protected against infringement in the same manner as any other property right; i.e., by appropriate court action. The SWRCB does not have

the authority to determine the validity of vested rights other than appropriative rights initiated December 19, 1914 or later. The SWRCB, however, may assist the courts in such determination as described in the following paragraphs entitled, "Determination of Existing Rights". The SWRCB will investigate and take appropriate action on a written complaint received alleging (1) a violation of the conditions of a permit or license issued by the SWRCB, (2) waste or unreasonable use of water, (3) illegal diversion or use, or (4) unreasonable effects on public trust or public interest uses of the water. (See title 23, chapter 3, subchapter 2, articles 18 and 22 of the California Code of Regulations; California Water Code section 275 et. seq.; and California Water Code section 1050 et. seq.)

When a complaint of an illegal diversion or use is filed, the SWRCB will take action under section 1052 of the California Water Code. Subsection (a) provides that "The diversion or use of water subject to this division other than as authorized in this division is a trespass." Subsection (d) provides, in part, that "Any person or entity committing a trespass as defined in this section may be liable for a sum not to exceed five hundred dollars (\$500) for each day in which the trespass occurs. The Attorney General, upon request of the SWRCB, shall petition the superior court to impose, assess, and recover any sums pursuant to this subdivision. " SWRCB policy is to initiate court action only in a clear instance of unlawful use of water. Where there is a bona fide dispute as to the facts, or where circumstances indicate an adjudication is required, action by the SWRCB under section 1052 generally is not considered appropriate.

## **PUBLIC TRUST**

With its roots in Roman law, the doctrine of public trust holds that certain resources are the property of all. In its modern form, the public trust doctrine holds that a state, as sovereign, takes title to tidelands and the beds of nontidal navigable waters at the time the state is admitted to the Union. Holding these lands and the waters above them in trust, the state's duty is to exercise continued supervision over the trust for the benefit of the people. Entities acquiring rights, for example in navigable streams, lakes, marshlands and tidelands, generally hold those rights subject to the trust and can assert no vested right in a manner harmful to the public trust. In other words, rights acquired in public trust resources cannot be placed entirely beyond the direction and control of the state.

The scope of the public trust doctrine continues to evolve as popular perceptions of the values and uses of waterways change. The public trust was traditionally defined to protect navigation, commerce, and fisheries; but recently it has been held to include the right to fish, hunt, bathe, swim, boat, recreate, navigate, and use the bottom of navigable waters for anchoring, standing, or other purposes.

In this century, the California courts have interpreted the legal term "navigable" very broadly to include recreational rafting and kayaking which can take place in very shallow water. Within the last decade, the California Supreme Court has recognized that uses of public trust resources include the preservation of the land, especially tideland, in its natural state to serve as ecological units for scientific study, as open space, and as habitat for birds and aquatic life. In administering the public trust, the courts have allowed the state to favor one use over another.

In its presently-developed form, the public trust doctrine requires the courts and the SWRCB to perform a balancing test to weigh the potential value to society against the impact on trust resources of a proposed or existing diversion. The action which will feasibly protect public trust values must be implemented.

On February 17, 1983, the California Supreme Court filed its decision in National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 189 Cal. Rptr. 346 (1983). The Court merged the public trust doctrine with the California water rights system. The Court also held that all uses of water, including public trust uses, must conform to the standard of reasonable use. The Court further held that the SWRCB has a duty to consider public trust values before it approves water right applications. Finally, the Court held that the SWRCB has a continuing duty to supervise the taking and use of appropriated water.

## **DETERMINATION OF EXISTING RIGHTS**

Court Reference. When a suit is brought by private parties in any court of competent jurisdiction in this State for determination of water rights, sections 2000 and 2001 of the California Water Code provide that the case, at the discretion of the court, may be referred to the SWRCB, as referee, for investigation. All rights of whatever character may be included under this procedure.

Statutory Adjudication. section 2525 of the California Water Code provides for the initiation of proceedings for the determination of all rights to the water of any stream, lake, or other body of water except percolating underground water. A petition signed by one or more claimants of the right to the use of water from the source involved must be filed with the SWRCB. The procedures outlined in sections 2500 through 2900 of the California Water Code must be followed.

If a determination is undertaken under either the court reference or statutory procedure, the SWRCB thoroughly investigates the stream system and water rights involved. In general, such investigation will include measurements of the water supply and of all diversions from the stream system, a survey of all diversion systems and areas irrigated therefrom, and a determination of the duty of water for irrigation and other uses.

After due notice to all parties, the SWRCB prepares findings which are submitted to the court. The court itself hears those who may be dissatisfied with these findings and enters a decree establishing the various rights involved.

The court also sets forth the relative priority, amount, purpose of use, season of diversion, point of diversion, and place of use of each right. Appeals from such decree may be taken in the same manner and with the same effect as in other civil cases.

By virtue of the above procedures, the SWRCB may supplement with effective and expeditious methods the work of the courts in determining water rights. These procedures lead to a complete and final determination of all the water rights involved, and, should necessity arise, a watermaster may be appointed to administer the stream and insure distribution of the water as decreed.

A copy of the SWRCB's publication, "Regulations and Information Pertaining to Determination of Rights to the Use of Water in California" may be obtained on request.

## **APPROPRIATION OF UNDERGROUND WATER**

The jurisdiction of the SWRCB to issue permits and licenses for appropriation of underground water is limited by section 1200 of the California Water Code to "subterranean streams flowing through known and definite channels".

If use of underground water on nonoverlying land is proposed and the source of the water is a subterranean stream flowing in a known and definite channel, an application pursuant to the California Water Code is required. A Statement of Water Diversion and Use should be filed for use of water from a subterranean stream on overlying land (see Statements of Water Diversion and Use section of this document).

Underground water not flowing in a subterranean stream, such as water percolating through a ground water basin, is not subject to the SWRCB's jurisdiction. Applications to appropriate such water, regardless of use, should not be submitted. Owners of lands overlying a ground water basin or other common source of supply have the first right to withdraw water for reasonable beneficial use on their overlying lands, and the right of each owner is equal and correlative to the right of all other owners similarly situated. In case of insufficient water to supply fully the requirements of all, the available supply must be equitably apportioned. In these respects, overlying rights are closely similar to riparian rights pertaining to surface bodies of water.

Subject to future requirements on overlying lands, surplus water which may be withdrawn without creating an overdraft on the ground water supply may be appropriated for use on nonoverlying lands. Such appropriation is accomplished simply by use--no permit is required. An application filed to appropriate underground water subsequently may be rejected if the water it seeks to appropriate is not flowing through a known and definite channel.

Division 2 of Part 5 of the California Water Code, commencing with section 4999, requires every person who extracts ground water within the counties of Riverside, San Bernardino, Los Angeles, and Ventura in excess of 25 acre-feet per annum (with certain exceptions) to file a notice with the SWRCB on forms provided by the SWRCB. Copies of the SWRCB's rules, together with further information concerning this requirement, may be obtained on request.

Every person who intends to dig, bore, drill, deepen, or re-perforate a water well must file a notice of intent with the California Department of Water Resources. The notice must be filed on forms furnished by the Department and must contain information required by the Department. A report of completion also must be filed with the Department on forms furnished by the Department and containing information required by it (California Water Code sections 13750, 13751). These requirements also apply to any person who converts, for use as a water well, any oil or gas well originally constructed under the jurisdiction of the California Department of Conservation pursuant to the provisions of Article 4, Chapter 1, Division 3 of the California Public Resources Code. Further information or forms may be obtained from the California Department of Water Resources, Division of Planning, Post Office Box 942836, Sacramento, CA 942360001.

## **SPRING WATER**

Courts have held that water in springs and standing pools which have no natural outlet belong to the owner of the land on which these sources are located (see State v. Hansen, 189 Cal. App. 2d 604). Such water may be used without obtaining a permit.

If a spring contributes to a flowing stream, either by surface or subterranean means, the doctrine of correlative rights applies between the owner of the spring and those riparian to the stream. The right of the owner of a spring likewise is correlative with the right of those using ground water which supplies the spring. A Statement of Water Diversion and Use should be filed for such use.

## **NO ASSISTANCE RENDERED IN SECURING RIGHT OF ACCESS TO POINT OF DIVERSION OR RIGHT-OF-WAY**

The SWRCB will not assist in the matter of securing right of access to the stream or other source of supply, or in securing rights-of-way for ditches and conduit lines. In accepting an application or in issuing a permit, the SWRCB does not affirm that the applicant or permittee has right of access to the source of supply or necessary rights-of-way. The SWRCB will accept an application for filing before right of access has been secured. The SWRCB, however, may refuse to approve the application when the applicant apparently will be unable to secure right of access (see Title 23 of the California Code of Regulations, sections 775, 776, and 777).

## **PATENTS AND HOMESTEADS**

All patents granted or homesteads allowed by the U. S. Bureau of Land Management shall be subject to any vested and accrued water rights as may have been recognized and acknowledged by the local customs, laws, and decisions of courts (30 USCA 278, 287).

## **SUPERVISION OVER DAMS**

Division 3 of the California Water Code, commencing with section 6000 et seq., requires that construction or enlargement of any dam over a certain height and storage capacity shall not be commenced without written approval of the plans and specifications by the California Department of Water Resources. The California Department of Water Resources ordinarily will require a statement that the SWRCB is satisfied as to the adequacy of the water right.

Dams subject to supervision are as follows:

1. Dams which are 25 feet or more in height from downstream toe to spillway level provided they store more than 15 acrefeet of water.
2. Dams which store 50 acre-feet or more of water provided they are more than 6 feet in height from downstream toe to spillway crest.

Further information concerning construction or enlargement of any dam may be obtained from the California Department of Water Resources, Division of Safety of Dams, Post Office Box 942836, Sacramento, CA 94236-0001.

Further information concerning construction or enlargement of any dam may be obtained from the California Department of Water Resources, Division of Safety of Dams, Post Office Box 942836, Sacramento, CA 94236-0001.

## **PROVISIONS OF FISH AND GAME CODE**

The owner of a dam is required to allow sufficient water to pass downstream at all times in order to keep fish below in good condition (section 5937, Article 2, Chapter 3, Part 1, Division 6 of the California Fish and Game Code). For purposes of Article 2, "dam" includes all artificial obstructions. Further information relating to the requirements of the California Department of Fish and Game may be obtained from local game wardens or from the California Department of Fish and Game, 1416 Ninth Street, Sacramento, CA 95814.

## **STATEMENTS OF WATER DIVERSIONS AND USE**

All diverters of surface water, with certain exceptions, are required to file a Statement of Water Diversion and Use with the SWRCB (see Division 2 of Part 5.1 of the California Water Code). The requirement applies to water diverted under claim of riparian right and to appropriations initiated prior to December 19, 1914, the effective date of the California Water Commission Act. Forms may be obtained from the Division of Water Rights, Post Office Box 2000, Sacramento, CA 95812-2000. One purpose of filing Statements of Water Diversion and Use is to make a public record of all surface diversions not already on file with or known to the SWRCB. The following types of diversions are excluded from the requirement:

1. From a spring which does not flow off the property on which it is located.
2. Covered by an application, permit, or license to appropriate water on file with the SWRCB.
3. Included in a notice filed under the recordation of ground water extractions law (Division 2 of Part 5 of the California Water Code) in the counties of Riverside, San Bernardino, Los Angeles, and Ventura.
4. Regulated by a watermaster appointed by the California Department of Water Resources.
5. Reported by the California Department of Water Resources in its hydrologic data bulletins.
6. Included in the consumptive use data for the delta lowlands published by the California Department of Water Resources in its hydrologic data bulletins.
7. Included in annual reports filed with a court or the SWRCB by a watermaster appointed by a court or pursuant to statute to administer a final judgement determining rights to water, which

reports identify the persons who have diverted water and give the general place of use and the quantity of water which has been diverted from each source.

8. For use in compliance with the provisions of Article 2.5 (commencing with section 1226) of Chapter 1 of Part 2 of Division 2 of the California Water Code concerning stockponds.

A statement should be completed for diversions during a calendar year and should be filed before July 1 of the following year. Supplemental statements are required at three-year intervals thereafter.

## **STOCKPOND RIGHTS**

### **The stockpond program was 'sunset' by the Legislature as of December 31, 1997.**

Under certain conditions, the owners of stockponds having a capacity of not more than 10 acre-feet as of January 1, 1975 which were constructed prior to 1969 have a valid water right. Prior to January 1, 1975, a right for seasonal storage of water in a reservoir of any kind could be obtained only by appropriating the water through the application-permit-license procedure, and this is still the only way to obtain a water right for stockponds constructed after January 1, 1969 or which are larger than 10 acre-feet. Claims of rights for such stockponds and applications for this certification should be filed with the SWRCB. The priority of the right will be subject to other stockpond water rights on which certificates have been issued by the SWRCB with an earlier priority, to appropriative water rights with an earlier priority, and to riparian rights. The priority of the right will be the date the claim is filed. Ponds which were the subject of water right litigation between private parties prior to January 1, 1974 are excluded.

Before a certificate of validity of the stockpond right is issued, the SWRCB will verify the location of the pond, its capacity, and that it is used primarily for stockwatering purposes. In some cases, a field investigation is necessary. The original certificate will be filed with the SWRCB and will be available for public inspection. A copy of the certificate will be mailed to the owner of the stockpond. So that the records may be reasonably current, a statement of continued existence of the pond and its use for stockwatering will be solicited from the owner as determined by the SWRCB (currently every 10 years). If the water has ceased to be used primarily for stockwatering, the SWRCB may revoke the certificate after notice and an opportunity for hearing.

A reasonably accurate estimate of the capacity of a stockpond of 10 acre-feet or less can be computed by use of the "onethird rule" as follows:

Stockpond capacity in acre-feet =  $\frac{1}{3}$  height of dam to spillway crest, in feet, multiplied by the surface area of pond when full, in acres.

## **GENERAL INFORMATION PERTAINING TO APPLICATIONS FOR PERMITS TO APPROPRIATE UNAPPROPRIATED WATER**

The following information describes the statutory procedure for acquiring appropriative water rights. It is intended as a guide for persons who propose to take water from a surface or

underground source or who are uncertain as to the validity of their present taking. Those who are not already familiar with the procedure should carefully read this information.

## **WHO SHOULD FILE AN APPLICATION**

Since December 19, 1914, the appropriation of water in surface streams and other surface bodies of water and in subterranean streams flowing through known and definite channels has been governed by the California Water Commission Act (Statutes 1913, Chapter 586) now contained in the provisions of the California Water Code.

New legislation, effective January 1, 1989, modified the California Water Code to provide two methods of appropriating water through the California State Water Resources Control SWRCB. Provisions were added to the law for registering small domestic use appropriations, rather than applying for a water right permit under the existing process.

Small domestic use includes normal domestic use, plus incidental stockwatering of domestic animals and incidental irrigation of one-half acre or less of lawn, garden, and pasture at any single establishment, not exceeding 4,500 gallons per day by direct diversion or 10 acre-feet per annum by storage, the latter including incidental aesthetic, recreational, or fish and wildlife enhancement purposes. Refer to the SWRCB's booklet, "How to File an Application/ Registration to Appropriate Water in California" for specific information on filing for a permit or for registering a small domestic use appropriation.

Anyone who intends to divert water from surface waters or subterranean streams flowing in known and definite channels, either (1) directly to use on land which is not riparian to the source, (2) to storage in a reservoir for later use on either riparian or nonriparian land, or (3) for direct use of water which would not naturally be in the source, should apply with the SWRCB for a permit or small domestic use registration as the first step toward securing an appropriative water right. Persons diverting water under riparian or pre-1914 claims of right, with certain exceptions, are required to file a Statement of Water Diversion and Use with the SWRCB.

## **WHO SHOULD NOT FILE AN APPLICATION**

Underground water is not subject to the permit procedure unless it is the underflow of a surface stream or otherwise is flowing in a subterranean stream with a known and definite channel. One who proposes to pump ground water (with the exceptions noted) should not file an application. Anyone who pumps ground water in the counties of Riverside, San Bernardino, Los Angeles, and Ventura, with certain exceptions is required to file a notice with the SWRCB (see section 4999 of Division 2 of the California Water Code).

A permit is not required for the proper exercise of a riparian right. Diverters of surface water, with certain exceptions, are required to file a Statement of Water Diversion and Use with the SWRCB.

## **PURPOSE OF FILING**

The purpose of filing an application for a permit is to secure a right to the use of unappropriated water; i.e. water that is available and is not already in use under prior and existing rights. The

purpose of filing also is to establish a record of the right sought under the application so that its status in relation to other rights may be determined more readily. One who takes and uses water without possession of a valid right or first obtaining a permit does so at his own risk and is subject to possible court action to enjoin his use.

An application should not be filed in order to adjust a dispute which has arisen over water. Permits issued by the SWRCB cannot serve to ratify or confirm existing rights claimed by the applicant.

## **WHEN TO FILE**

An application should be filed well in advance of construction of diversion works. An application, however, should not be filed until a definite plan has been formulated for construction of a project for use of water within a reasonable time in the future. What is reasonable depends on the size of the project and the circumstances of each case. In every case, the applicant should be prepared to commence construction work within the time ordered by the SWRCB and thereafter to complete construction and use of water with diligence. For most privately-owned projects designed to serve the individual needs of the applicant, the SWRCB will require actual construction to commence within a few months after issuance of permit. The filing of an application cannot serve to reserve water for an indefinite future use. Requests for undue delay in final disposition of an application will be denied.

## **UNAPPROPRIATED WATER AND RESPONSIBILITIES OF PERMITTEES**

All applications are for permits to appropriate unappropriated water, and all permits are issued subject to vested rights. In order for the SWRCB to approve an application, unappropriated water must be available to supply the applicant. Water in many streams already has been fully appropriated during the dry seasons of the year. If there is doubt whether unappropriated water is available, the SWRCB's staff should be consulted before an application is filed.

The flow of water in most streams is variable and cannot be predicted with accuracy. Approval of an application and issuance of a permit thus does not guarantee that unappropriated water will be available at all times in the full amount specified in the permit. In some cases, there may be times during the authorized diversion season when no unappropriated water will be available. The holder of a permit should be prepared to accept responsibility for diverting only to the extent and at such times as will not

Impair the prior rights of others, regardless of the amount or season named in the permit. The holder of the permit likewise must defend the right if it is attacked by others. A water right is a property right, and the owner has the same obligation to defend it against encroachment as in the case of any other kind of property.

## **OUTLINE OF ESSENTIAL STEPS**

The California Water Code and the regulations adopted pursuant thereto prescribe a definite procedure for the initiation and consummation of rights to appropriate water by permit. The essential steps are as follows:

### Appropriation by Permit:

1. An application is filed with SWRCB on forms provided. If the application is not complete, failure to complete it within the time allowed by the SWRCB will result in cancellation.
2. Notice of application is issued by the SWRCB and is posted or published by the applicant, depending on the size of the project.
3. If protests are received which cannot otherwise be adjusted, a hearing or an investigation under a proceeding in lieu of hearing is held. At the discretion of the SWRCB, a hearing also may be held on an unprotested application.
4. The application is reviewed and analyzed for possible environmental impacts as required by the California Environmental Quality Act of 1970.
5. If an application is approved and permit fees paid, a permit is issued. A reasonable time is allowed within which to begin construction of the diversion works, complete the construction, and make full beneficial use of the water. These times may be extended upon request if there are good reasons for doing so. Failure to comply with the time requirements or other-permit terms will be investigated by the SWRCB, and findings against the permittee may result in revocation of the permit.

All permits are issued **SUBJECT TO PRIOR RIGHTS**, and the permittee is required to respect all prior rights when diverting under the permit.

6. When construction and use of water are complete to the full extent contemplated, an inspection is made for possible issuance of a license. To the extent that beneficial use of the water has been made, as to both amount and season as specified in the terms and conditions of permit, a license may be issued.

A license has no time limit and continues as long as proper use is made for the water and required reports are submitted.

Statutes provide that, under certain conditions, a license may be lost through a five-year period of nonuse.

### Appropriation by Registration:

1. Forms to file for appropriation of water by registration are provided by the SWRCB.
2. The Environmental Services Supervisor for the California Department of Fish and Game region in which the diversion will be located (map, address, and telephone number are included on the form) is contacted to discuss the proposed project and to obtain answers to the questions contained on the Fish and Game Information form.
3. Registration forms are filed with both the State Water Resources Control SWRCB and the regional office of the California Department of Fish and Game.
4. If the registration is complete, fees have been paid, and written approval has been received from both the SWRCB and the California Department of Fish and Game, construction of the project may begin and diversion of water made.
5. If the forms are not complete, failure to complete them within the time allowed by the SWRCB will result in the return of all materials and fees.

## **PREPARATION OF APPLICATIONS**

The SWRCB publishes a pamphlet entitled, "How to File an Application/Registration to Appropriate Water in Californians which will be of assistance in completing the blanks of an application form. When an application fails to comply with provisions of the California Water Code, the application will not be accepted for filing.

## **CHANGES IN OWNERSHIP**

The SWRCB must be able to communicate with a registrant, applicant, permittee, or licensee. Any changes in ownership or address therefore should be submitted promptly to the SWRCB.

The SWRCB will not settle contests as to ownership but will accept any ownership claim, which is asserted unless the owner of record or an asserted successor objects. In case of contest the SWRCB's record will not be changed until the matter is settled by agreement or by a court decision.

## **APPENDIX - TABLE OF EQUIVALENTS**

1 CUBIC FOOT PER SECOND (cfs) is a rate of flow passing any point equal to a volume of one cubic foot of water every second (sometimes referred to as second-foot) and is equivalent to:

- = 7.48 U.S. gallons per second (gps)
- = 448.8 U.S. gallons per minute (gpm)
- = 646,317 U.S. gallons per day (gpd)
- = 1.98 acre-feet per day
- = 40 standard (statute) miners' inches
- = 28.32 liters per second

1 ACRE-FOOT (af) is the amount (volume) of water which will cover one acre to a depth of one foot and is equivalent to:

- = 43,560 cubic feet
- = 325,851 U.S. gallons
- = 1,233.45 cubic meters

1,000,000 U. S. GALLONS PER DAY is equivalent to:

- = 1.55 cubic feet per second
- = 43.81 liters per second
- = 3.07 acre-feet per day
- = 3,786 cubic meters per day

THEORETICAL HORSEPOWER is calculated by multiplying the vertical fall of water in feet by the rate of waterflow in cubic feet per second and dividing the product by 8.8. One horsepower is equivalent to:

- = 550 foot-pounds per second
- = 746 watts

## Appendix B

---

United States Bureau of Land Management, California Water Rights Fact  
Sheet

# California

## WATER RIGHTS FACT SHEET

August 15, 2001

### **Water Rights System:**

California's system of water rights is referred to as a "dual system" in which both the riparian doctrine and the prior appropriation doctrine apply to water rights. There is also a separate doctrinal basis for ground water, as well as pueblo rights, so a more accurate classification of California's system would be a "plural system". Water rights in California are use rights. All waters are the property of the state. A water right in California is a property right allowing the use of water, but it does not involve ownership of the water. California's water law is contained in the California Code of Regulations, Title 23, and can be found at: <http://www.calregs.com/>.

Riparian rights result from the ownership of land bordering a surface water source (a stream, lake, or pond). As a class, these rights are senior to most appropriative rights, and riparian landowners may use natural flows directly for beneficial purposes on riparian lands without applying for a permit (see Appendix One for Attributes of Riparian Rights).

Appropriative rights are acquired by putting surface water to beneficial use. Prior to 1914, appropriative rights could be claimed by simply diverting and using the water, posting a notice of appropriation at the point of diversion, and recording a copy of the notice with the County Recorder. Since 1914, the acquisition of appropriative rights has required an application through the State Water Board.

In addition to riparian and appropriative rights, California recognizes pueblo rights. These rights are derived from Spanish law whereby Spanish or Mexican pueblos could claim water rights. As a result, pueblo rights are paramount to the beneficial use of all needed, naturally occurring surface and subsurface water from the entire watershed of the stream flowing through the original pueblo. Water use under a pueblo right must occur within the modern city limits, and excess water may not be sold outside the city. The quantity of water available for use under a pueblo right increases with population and with extensions of city limits. In general pueblo rights are limited to use of water for ordinary municipal purposes.

### *Responsible agency:*

Responsibility for water in California is shared among several agencies. The State Water Resources Control Board (State Water Board) is responsible for the water rights and water quality functions of the state. They have the jurisdiction to issue permits and licenses for appropriation from surface and underground streams. The board also has the authority to declare watercourses fully appropriated. The California courts have jurisdiction over the use of percolating ground water, riparian use of surface waters, and the appropriate use of surface waters initiated prior to 1914. The Department of Water Resources is responsible for planning the use of state water supplies, and develops, in consultation with the California Water Commission, rules and regulations for this purpose.

## **Application Process:**

Any entity intending to appropriate water is required to file an application for a water right permit (or a use registration for small scale domestic use) with the State Water Board. A list of available applications can be seen in Appendix Two. **A permit is not required from riparian right holders, ground water users, users of purchased waters, or those who use water from a spring or standing pool lacking a natural outlet on the land they are located.** Once the application or registration has been accepted, a priority is established in relation to other appropriators. For domestic registration, the State Water Board provides a Certificate of Registration which establishes general conditions under which the diversion may be made. When an application for a water right permit is filed, public notice is given to interested parties. This indicates an opportunity to file protests against the proposed application. If differences cannot be resolved, either a field investigation (for small applications requesting 3cf or 200 acre-feet per year) or a State Water Board hearing is conducted.

An application for a new water appropriation is approved if it is determined to be for a useful or beneficial purpose and if water is available for appropriation. In evaluating an application, the Board considers the relative benefits derived from the beneficial uses, possible water pollution, and water quality. If a permit is approved, it may be approved in full or it may be subject to specified conditions. A decision or order from the State Water Board is reviewable by the Superior Court. Once the State Water Board issues a permit, the use and diversion of water is authorized (see Appendix Three for a summary of the steps to obtain a permit).

Once the permittee completes the necessary works, the water is put to full beneficial use, and all terms and conditions are met, a license is issued. The license is the final confirmation of an appropriative right and it remains in effect as long as the license conditions are met and the water is put to beneficial use.

The time frame involved in obtaining a license in California is highly variable. Permit decisions are required to be reached within six months on accepted applications for non-protested projects which do not require extensive environmental review. Applications with unique requirements for environmental review and/or require protest resolution, may extend the time frame by months and even years.

### *Point of Diversion and Change of Use Procedures:*

In 1928, the California Constitution was amended to require reasonable diversion and use in the exercise of all water rights. The only exception to the point of diversion requirement is for instream flow rights. The State Water Board and the courts have concurrent jurisdiction to apply and enforce diversion and use requirements. The holder of an appropriative right may change the point of diversion, place of use, or purpose of use, so long as other rights are not injured by the change. In order to change an attribute of a water right in California, a change application must be filed with and approved by the State Water Board. Change applications follow the application process described above.

### *State Recognized Beneficial Uses:*

Beneficial uses in California include the following:

- \* Aquaculture - Raising fish or other aquatic organisms not for release to other waters.
- \* Domestic - Water used by homes, resorts, or campgrounds, including water for household animals, lawns, and shrubs.
- \* Fire Protection - Water to extinguish fires.
- \* Fish and Wildlife - Enhancement of fish and wildlife resources, including raising fish or other organisms for scientific study or release to other waters of the state.
- \* Frost Protection - Sprinkling to protect crops from frost damage.

- \* Heat Control - Sprinkling to protect crops from heat.
- \* Industrial Use - Water needs of commerce, trade, or industry.
- \* Irrigation - Agricultural water needs.
- \* Mining - Hydraulicking, drilling, and concentrator table use.
- \* Municipal - City and town water supplies.
- \* Power - Generating hydroelectric and hydromechanical power.
- \* Recreation - Boating, swimming, and fishing.
- \* Stockwatering - Commercial livestock water needs.
- \* Water Quality Control - Protecting and improving waters which are put to beneficial use.

### **Groundwater:**

The vast majority of California's groundwater is unregulated. The state does not have a comprehensive groundwater permit process to regulate ground water withdrawal. There are three legally recognized classifications of groundwater in California: subterranean streams, underflow of surface waters, and percolating groundwater. Subterranean streams and underflow of surface waters are subject to the laws of surface waters and are regulated by the State Water Board. Percolating groundwater, on the other hand, has few regulation requirements.

Percolating groundwater has two subclassifications: overlying land use, and surplus groundwater. Land owners overlying percolating groundwater may use it on an equal and correlative basis. This means that all property owners above a common aquifer possess a shared right to reasonable use of the groundwater aquifer. These rights are similar to riparian rights and since they are correlative, a user cannot take unlimited quantities without regard to the needs of other users. Surplus groundwater may be appropriated for use on non-overlying lands, provided such use will not create overdraft conditions. A permit is not required to use percolating groundwater of either classification, but the appropriation of surplus groundwater is subordinate to the correlative rights of overlying users.

### **Water Rights:**

Water rights in California can be held by any legal entity. There are no restrictions on who can hold water rights, thus the owner can be an individual, related individuals, non-related individuals, trusts, corporations, government agencies, etc.. Water rights are considered real property (they can be owned separately from the land on which the water is used or diverted) and can be transferred from one owner to another, both temporarily or permanently. Any transfer (sale, lease, or exchange) is subject to approval by the State Water Board through the application process discussed above. Approval is granted upon finding that the transfer would not result in injury to any other water right and would not unreasonably affect fish, wildlife, or other instream beneficial use.

An appropriative water right in California can be maintained only by continuous beneficial use, and can be lost by five or more continuous years of non-use. Riparian rights, on the other hand, cannot be lost through non-use. Appropriative rights can also be lost through abandonment, but to constitute abandonment of an appropriative right, there must be the intent not to resume the beneficial use of the water right. As a result, abandonment is always voluntary. The rights to waters lost through abandonment or non-use revert to the public, but only after notice has been given and a public hearing is held.

### **Adjudications:**

In California, adjudication can be initiated through the court or through statutory procedures. Court initiated adjudication occurs when a water right lawsuit is filed in court (all surface and ground water rights may be included in this procedure). In the case of a court initiated adjudication, the court often asks the State Water Board to act a referee and to conduct an investigation and report back. Statutory adjudications result when one or more entities claim a

right from a specific source and file a petition with the State Water Board. The statutory procedure can be used to determine all rights to any body of water including percolating groundwater. The result of a statutory adjudication is a decree that integrates all rights on the water source and sets quantity, season, priority, etc..

#### *Ongoing Adjudications:*

As of 2000, sixteen basins in California had been adjudicated.

#### **Instream flows:**

In 1991, California adopted changes to its water laws which permitted the transfer of existing consumptive water rights to the purpose of instream flow. These transfers can be made for the purposes of enhancing wetlands habitats, enhancing fish and wildlife resources, or increasing recreation on the water. California law allows transfers to be either permanent or temporary changes in use; therefore instream flow rights can be both purchased and leased. New instream flow rights retain the priority date of the original right.

California state law does not permit new appropriations of water for instream flow. The State Water Board may attach conditions requiring bypass flows to new consumptive use appropriations, but these conditions do not constitute newly appropriated instream flow rights. When a new water use permit application is submitted, the State Water Board must notify the Department of Game and Fish, which has the authority to recommend amounts of water necessary to preserve fish, wildlife, and recreation in the affected stream. The board then considers these recommendations and may set instream flow requirements as conditions for the new permit. In this way, current flows can be protected even though new appropriations for instream flow rights are prohibited.

#### *Recognized Beneficial Uses for Instream Flow:*

Recognized beneficial uses of instream flow in California include enhancing wetlands habitat, enhancing fish and wildlife resources, increasing recreation on the water, and protecting water quality.

#### *Holdership of Instream Flow Water Rights:*

Under California law, any "person" (public or private) may hold an instream flow right, as long as that right was established through a legal transfer.

#### **BLM Specific Information:**

The application process in California has proven to be expensive for the BLM. For the appropriation process, the BLM pays \$1050 which includes the following: \$100 application fee, \$850 environmental filing fee, and \$100 upon issuance of the permit. Since 1991, water right applicants have been required to pay an \$850 environmental filing fee to the California Department of Fish and Game (CDFG) with each application. This is a concern for the BLM because the CDFG's review is redundant to the BLM's NEPA process. The 1991 memo introducing the fee states that "these fees are not intended to reimburse costs specifically identifiable to individual projects, but rather to offset a relative portion of the cumulative effect of all projects". Therefore the BLM cannot request a waiver of this fee. In terms of other water rights applicants, the BLM is required to approve the necessary right-of-ways prior to the approval of the application by the state.

The BLM is not currently involved in any of California's adjudications. In the past, however, the BLM has been involved in the Eagle Lake and Alturas adjudications.

Regarding federal reserved water rights, the BLM California holds a number of PWRs. In order to assert a PWR 107 or other PWR, the BLM provides notice to the State of California. In the past 15 years, there have been relatively few PWR assertions in California and the extent of unasserted PWRs is unknown. There are a number of PWRs that are included in the Master Title Plans on BLM lands, and these probably originated from assertions made before the early 1980's. The BLM does not have any federal reserved water rights on Wild and Scenic Rivers or on wilderness areas in California.

The relationship between the BLM and the State of California is very close and cooperative. The staff of the Division of Water Rights have been especially helpful to the BLM in interpreting the details involved in each particular water right decision. The staff has a practical mind set and helps the BLM achieve their goals. The BLM also commonly assists the state in their capacity surveys for the BLM reservoirs which are moving from permit to licence. This has expedited the process. The state has also been quite receptive to suggestions from the BLM for streamlining some of the water right reporting requirements.

**Official Contact:**

State Water Resources Control Board  
Division of Water Rights  
1001 I Street  
Sacramento, CA 95814  
916-341-5300  
<http://www.waterrights.ca.gov/>

---

### **Appendix One: Attributes of Riparian Rights:**

- \* Riparian rights are of equal priority.
- \* Unless adjudicated, the right is not quantified, rather it extends to the amount of water which can be reasonably and beneficially used on the riparian parcel.
- \* Riparian rights are correlative. During times of water shortage, the riparian proprietors share the shortage.
- \* Water may be used only upon that portion of the riparian parcel which is within the watershed of the water source.
- \* The riparian right does not extend to seasonal storage of water.
- \* The riparian right is part of the riparian land and cannot be transferred for use on other lands.
- \* The riparian rights remains with the land when riparian lands are sold.
- \* When riparian lands are subdivided, parcels which are severed from the adjacent water source lose their riparian rights, unless the rights are reserved.
- \* A riparian right is not lost by non-use.

### **Appendix Two: Types of Applications**

- \* Water Right Application Form
- \* Environmental Information Form
- \* Notice of Assignment Form
- \* Agent Assignment Request Form
- \* Application Protest Form
- \* Cancellation of Application Form
- \* Registration Form
- \* Notice of Assignment Form
- \* Complaint Form
- \* Answer to Complaint Form
- \* Petition for Extension of Time Form
- \* Petition for Correction Form
- \* Petition for Change Form
- \* Petition for Change in Distribution of Storage Form
- \* Petition for Protest Form
- \* Notice of Assignment Form
- \* Request for Revocation Form
- \* Petition for Temporary Permit Form
- \* Petition for Temporary Urgency Change Form
- \* Temporary Transfer
- \* Long term Transfer
- \* Wastewater Change Petition Form

### Appendix Three: Steps to Obtain a Permit

<b>Step</b>	<b>Board's Role</b>	<b>Applicant's Role</b>
<b>File Application</b>	If you need assistance Board engineers will help you prepare application forms, small project maps, and other documents. Incomplete applications won't be accepted.	You prepare an application which meets specific requirements, including a filing fee.
<b>Acceptance of Application</b>	Board notifies you within 30 days that either your application is incomplete or that it has been accepted. Acceptance of your application establishes your priority as the date of filing.	Unless you are granted an extension, you must provide any additional information requested by the Board within 60 days of notification. If not, your application may be canceled.
<b>Environmental Review</b>	Your proposed project is assessed to determine to what extent it could alter the environment.	You assume cost for preparation of any required environmental studies.
<b>Public Notice</b>	The Board will send you a public notice describing your proposed project. Copies of the notice are also sent to known interested parties and to post offices in the area of your project for posting.	For small projects, you must post the notice for 40 consecutive days in two conspicuous places near your project site. For large projects, you must publish the notice in a newspaper at least once a week for three consecutive weeks.
<b>Protests</b>	During the noticing period, the Board may receive protests against your proposed project from interested individuals or groups.	If protests are filed against your application, you must respond to them in writing and attempt to reach agreements so that protests can be withdrawn.
<b>Hearings</b>	If protests cannot otherwise be resolved, you and the protestant present your cases at a field investigation or during a hearing conducted by the Board. The Board issues a decision on protested applications based on information gathered at the field investigation or on evidence presented during the hearing.	You prepare testimony and exhibits for presentation at the hearing and cooperate with the Board and protestant toward reaching a satisfactory resolution.
<b>Permit Issuance</b>	A water right permit is issued when protests, if any, are resolved or dismissed, or when the Board approves the application by decision following a hearing. In addition, a permit fee must be paid. During this phase, the Board determines whether water conservation measures are needed.	Prior to issuance of a permit, you must submit a permit fee as directed by the Board. If water conservation measures are required, they will be included as a condition of your permit

## Appendix C

---

A Summary of California Law of Surface Water and Groundwater Rights

## **BARTKIEWICZ, KRONICK & SHANAHAN**

PAUL M. BARTKIEWICZ  
STEPHEN A. KRONICK  
RICHARD P. SHANAHAN  
ALAN B. LILLY  
RYAN S. BEZERRA  
JOSHUA M. HOROWITZ  
YVONNE M. WEST

A PROFESSIONAL CORPORATION  
1011 TWENTY-SECOND STREET  
SACRAMENTO, CALIFORNIA 95816-4907  
TEL (916) 446-4254  
FAX (916) 446-4018  
EMAIL [bks@bkslawfirm.com](mailto:bks@bkslawfirm.com)

JAMES M. BOYD, JR., Of Counsel

### **A SUMMARY OF THE CALIFORNIA LAW OF SURFACE WATER AND GROUNDWATER RIGHTS**

Set forth below is a brief discussion of the California law of surface water and groundwater rights, including provisions for transfer of different types of water rights and entitlements. These are general provisions. Please consult an attorney regarding specific water right issues. The State Water Resources Control Board's ("State Board") website (<http://www.waterrights.ca.gov/WRINFO/>) includes publications that provide additional information on California water rights.

#### **1. Reasonable and Beneficial Use Doctrine**

Article 10, section 2 of the California Constitution (enacted in 1928) prohibits the waste of water, and requires reasonable use, method of use and method of diversion for all surface and groundwater rights. The doctrine of reasonable and beneficial use is the basic principle defining California water rights: that no one can have a perpetual interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially. (See also Water Code section 275: "The department [of water resources] and [state water resources control] board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.")

#### **2. Riparian Rights**

Riparian water rights are rights that an owner of land contiguous to a natural stream possesses to divert the naturally-available supply directly to use, without artificial storage, for reasonable, beneficial purposes on that riparian land. Riparian land is the smallest parcel of such contiguous land, in a single chain of title from the original private owner, that is within the watershed of the stream. The right arises by virtue of ownership of the riparian land, and is not gained by use nor lost by nonuse. Generally, the riparian right is superior to the other types of surface water rights, but the riparian right does not apply to water that is stored for later use. The riparian right may be junior to an appropriative water right that was perfected before a patent on

See the disclaimer at the end of this document.

the riparian land was issued by the United States. The riparian rights of owners of land that are riparian to the same source are “correlative,” in that, if there is insufficient water under the riparian right for all riparians, each is entitled to a fair share of the available supply based upon the amount of their land and their reasonable water supply needs.

Where interests in the riparian parcel are conveyed or the riparian parcel is subdivided, the riparian right as to any subparcel that is no longer contiguous to the source of water may be severed, absent the intent to retain the riparian nature of the severed parcel.

### **3. Appropriative Rights**

Appropriative rights to surface water are rights to use unappropriated water, that is, water that is surplus to the needs of riparian owners and prior appropriators and prescriptors. Appropriative rights are based not on land ownership, but on actual diversion and use of water. They are rights of priority, in that, if the available surface water supply is insufficient to meet the needs of all appropriators, the one with the earliest priority date is entitled to satisfy his or her needs fully before those with later priority are entitled to any water. An appropriative right may be established to use water for any reasonable, beneficial purpose on any land no matter where located, and to store water from one season for use in a later season, or from one year for use in subsequent years. Just as appropriative rights are gained by use, conversely, once acquired, they may be lost wholly or in part by five years’ nonuse during a time when the water was physically available for use.

Prior to 1914, appropriative rights could be acquired simply by posting or filing a notice, and then diverting and using the water for reasonable, beneficial purposes (referred to as “pre-1914 water rights”). Since 1914, California statutory law has required that an application be filed and a permit obtained from a State agency, now the State Water Resources Control Board. The State Board has the discretion to decide whether unappropriated water exists, and whether the proposed use under the application is reasonable, beneficial and in the public interest. If the State Board finds affirmatively on these issues, it can issue a permit, and then, after the diversion and use facilities have been constructed and the water appropriated has been fully put to beneficial use within the time allowed, the State Board can issue a license confirming that the water right has been perfected by use for the amount used.

Under Water Code sections 5100 through 5108, the holder of an appropriative water right is required to file periodic statements with the State Board of diversion and use of water under the water right. Under section 5108, these statements are for informational purposes only, and neither the failure to file a statement nor any error in information filed will have any legal consequence. From time to time, the State Board has proposed amendments to these provisions that would require filing the statements of diversion and use as a condition to retaining the water

right.

#### **4. Prescriptive Rights to Surface Water**

Prescriptive water rights are created by five years' open and notorious use of water under a claim of right that is adverse to one or more existing prior rights: riparian, appropriative or prescriptive. (But see, *People v. Shirokow* (1980) 26 Cal.3d 301, which held that prescriptive rights could not be obtained against the State's interest in allocating water in the public interest.) The use must be reasonable and beneficial. As in the case of appropriative rights, a prescriptive water right can be established for use on any land, and water can be diverted directly to use or stored for later use. Prescriptive rights, however, cannot be acquired against public agencies or public utilities. Prescriptive rights, like appropriative rights, can be lost by five years' nonuse.

#### **5. The Public Trust Doctrine**

In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the California Supreme Court held that the State, in accordance with Article 10, section 2 of the State Constitution, as trustee of the "public trust," retains supervisory control over all the State's waters to protect navigation, fishing, recreation, ecology and aesthetics. No person has a vested right to appropriate water in a manner harmful to the interest protected by the public trust. "Once the State has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the State is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The State accordingly has the power to reconsider allocation decisions. . . . No vested rights bar such reconsideration."

#### **6. The County of Origin Law (State Filings)**

In the 1920's and 1930's, the State legislature adopted legislation authorizing massive applications by the State for future water development projects. In order to attempt to allay the fears of areas from which water projects might transfer water, the legislature passed certain "area of origin" laws. Specifically, in 1931 the legislature passed the County of Origin Law (Water Code section 1055), and in 1933 the legislature adopted the Watershed Protection Law (Water Code sections 11460 – 11463), which is discussed in the next section of this document.

The State, acting through the Department of Water Resources ("DWR," and previously the Department of Finance), is authorized to appropriate water (and has done so) for future water projects (known as "State filings"). (See Water Code sections 10500 - 10507.) The State Board is authorized to release from priority or assign these State filings to other agencies or entities when the release or assignment is for the purpose of development not in conflict with the State water plan. (Water Code section 10504.) Under the County of Origin Law, the State Board is

expressly prohibited from assigning or releasing the priority when, in its judgment, the effect could be to deprive the county in which the water originates of water necessary for its development. (Water Code section 10505.)

The legislative intent and effect of section 10505 was to provide protection for the future interest of the counties of origin by placing restrictions on the authority of the State to transfer or dispose of the priorities vested in the State by filing applications to appropriate unappropriated water. (25 Ops.Cal.Atty.Gen. 8, 15 (1955).) Section 10505 applies only to applications filed by the State. The county of origin provisions do not apply to water rights that are not based on assignment or release of a State filing.

## **7. The Watershed of Origin Protection Act (“Area of Origin Act”)**

The “Watershed of Origin Protection Act” (Water Code sections 11460 – 11465, sometimes referred to as the “area of origin law”) operates to protect the priority of water rights within the watershed against State export rights in two major ways: (a) by giving protected areas a preferential right to contract for State-developed water, and (b) by allowing later upstream developments within the watershed to obtain priority as against the State’s projects. Water Code section 11460 states: “In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.”

The area of origin law does not entitle protected areas to State-developed water free of charge, nor does it allow the protected areas to gain any priority against entities other than the State who may export water out of the watershed. Area of origin rights are not transferable to an area outside the area of origin. The area of origin law does not create any hierarchy of preference between areas included within the same watershed. The Central Valley Basin contains two watersheds: one comprising the Sacramento River and its tributaries down to and through the Delta, and another comprising the San Joaquin River and its tributaries. (29 Ops.Cal.Atty.Gen. 136 (1957).)

The United States must comply with the area of origin law when it seeks a priority established under a state filing (Water Code section 10500). (See 25 Ops.Cal.Atty.Gen. 8, 28 - 29 and Water Code section 10505.5: “Every application heretofore or hereafter made and filed pursuant to section 10500 . . . shall provide that the application, permit or license shall not authorize the use of any water outside the county of origin which is necessary for the development of the county.” Under Water Code section 11128, the area of origin law applies to

the operation of the federal Central Valley Project. (See also, *California v. United States* (1978) 438 U.S. 645.)

## **8. The Delta Protection Act**

Article 4.5 of Division 6 of the Water Code (commencing with section 12200) sets forth the Delta Protection Act, which provides a first priority to provision of salinity control and maintenance of an adequate water supply in the Sacramento-San Joaquin Delta (“Delta”) Delta for reasonable and beneficial uses of water, and relegates to lesser priority all exports of water from the Delta to other areas for any purpose.

## **9. Groundwater Rights**

Groundwater rights attach to percolating groundwater, which includes all groundwater that does not comprise a subsurface stream or the underflow of a surface stream. An underground stream is a stream or river flowing in a definite channel in an underground watercourse. The underflow of a surface stream is the water in the soil, sand and gravel comprising the bed of a stream in its natural state and essential to its existence. Water in a stream’s underflow or an underground stream is treated like surface water for legal purposes, including State Board permitting. It usually is in contact with the surface flow, and flows in the same direction. Courts have classified water rights in percolating groundwater as overlying, appropriative or prescriptive. No water right permit is required to pump percolating groundwater.

Overlying groundwater rights are analogous to riparian rights to surface water. Each owner of land that overlies a common groundwater supply has a right to reasonable, beneficial use of the water of that supply on or in connection with the overlying land. The use of each overlying landowner is “correlative” with the rights of all other owners of land overlying the same groundwater supply. In the event of insufficiency of the supply for the requirements of the overlying landowners, the water may be apportioned among them all by a court decree. There is no priority in time among overlying pumpers.

Similar to riparian rights, the transfer of title to an overlying groundwater right, separate from the land, can result in a permanent severance of the right from the land. Once the overlying water right has been severed, the parcel ceases to be an overlying parcel and it loses its overlying groundwater right. One acknowledged way to transfer the right to exercise an overlying right, without causing a severance of the right, is the transfer of the overlying right to a mutual water company, which acts as an agent or trustee of the owners of the overlying right. At least one case has suggested that the right to exercise an overlying right could also be transferred to a public agency or an agent or trustee without resulting in a severance of the right. (See *Orange County Water District v. City of Colton* (1964) 226 Cal.App. 642.)

Water users that do not use groundwater on their overlying land are not barred from using groundwater. Such water users include public agencies and owners of non-overlying land. They may extract groundwater, but their rights are analogous to appropriative rights to surface water. Unless there has been an adjudication of the groundwater basin rights, their use is limited to surplus water, which is defined as water in excess of the safe annual yield that is not needed for reasonable, beneficial use by the overlying owners. If the basin is in overdraft, use may be restricted to the overlying owners. As between groundwater appropriators, the one first in time is the first in right, and a prior appropriator is entitled to all the water he or she needs, up to the amount he or she has taken in the past, before a subsequent appropriator may take any groundwater.

Prescriptive groundwater rights are not acquired by taking surplus or excess water. An appropriative taking of groundwater that is not surplus is wrongful, and may ripen into a prescriptive right when the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under a claim of right. (See, generally, *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.) Prescriptive groundwater rights are most often obtained when someone pumps groundwater during an obvious overdraft condition.

## **10. Groundwater Adjudication**

Groundwater rights generally are not quantified unless the groundwater basin is adjudicated. The authority to adjudicate a groundwater basin exists in State courts, and in limited circumstances, with the State Board. In an adjudication, junior groundwater right holders generally try to prove that they have obtained higher priority pumping rights by pumping for at least five years during an overdraft of which the senior groundwater right holders had notice. If the junior right holders prove such a case, then, under the doctrine of “self-help,” the senior right holders retain their priority to only as much water as they actually pumped during the relevant period. In such a situation: (1) an overlying landowner’s “correlative” right to a reasonable share of a basin’s safe yield effectively may be replaced with a right based on its past water usage; and (2) a public agency with only a junior appropriative right may be able to obtain a higher priority. The California Supreme Court has held that Civil Code section 1007 prevents prescription against public agencies’ groundwater rights or such rights that a public utility has dedicated to public use. (See *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224; *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723.)

## **11. Conjunctive Use of Surface Water and Groundwater**

DWR Bulletin 160-98, *The California Water Plan Update* (November 1998, Volume 2,

See the disclaimer at the end of this document.

Copyright 2006

Bartkiewicz, Kronick & Shanahan

All rights reserved

page G-2), defines “conjunctive use” as “the operation of a groundwater basin in combination with a surface water storage and conveyance system. Water is stored in the groundwater basin for use by intentionally recharging the basin during years of above-average water supply.” Conjunctive use can involve direct recharge or “in lieu” recharge. “In lieu” recharge occurs when someone uses surface water in lieu of pumping groundwater. The storage aspects of the conjunctive operation of a groundwater basin may contemplate both storage of surface water in available basin storage space and increasing pumping from the basin to create additional storage space.

The conjunctive use of surface water and groundwater is favored under California law and policy. (See *Los Angeles v. Glendale* (1943) 23 Cal.2d 68, and *Los Angeles v. San Fernando*, referred to in the previous section.) Water Code section 1242 states that storing water underground, including necessary diversion and spreading operations, is a beneficial use of water if the water stored is later put to beneficial use. Under Water Code section 1005.1, the reduction in the extraction of groundwater by the owner of a right to extract, as result of the use of an alternative supply of water, is deemed to be equivalent to establishing and maintaining a right to extract the groundwater. In other words, a person who reduces his groundwater extraction due to the development of a surface water supply does not diminish, as a result, his groundwater rights.

## **12. Groundwater Management**

Although California does not have centralized groundwater regulation, the Legislature has adopted special legislation for the formation of groundwater management districts in various parts of the State, and authorized other local agencies to exercise groundwater management authority. (See, e.g., Water Code sections 10750 through 10755.)

## **13. Water Transfers**

### **a. General**

The State Board’s website (<http://www.waterrights.ca.gov/watertransfer/>) includes publications that provide additional information on water transfers.

Several sections of the Water Code contain declarations of state policy favoring voluntary water transfers. For example, Water Code section 109 contains a declaration of state policy favoring voluntary water transfers, and directs DWR, the State Board and all other state agencies to encourage voluntary transfers. Water Code section 475 contains legislative findings and declarations favoring voluntary water transfers, states that the coordinated assistance of state agencies is required for voluntary transfers, and directs DWR to establish an ongoing program to facilitate voluntary water transfers.

Several statutory provisions declare that the act of transferring water will not, by itself,

result in a forfeiture of the underlying water right. For example, Water Code section 1244 states that a water transfer, in itself, will not constitute evidence of waste or unreasonable use, and will not affect any determination of forfeiture of an appropriative right. Water Code section 1745.07 states that no transfer of water pursuant to any provision of law will cause a forfeiture, diminution or impairment of any water right, and that a transfer approved under any provision of law is deemed to be a beneficial use of water by the transferor. (See also, Water Code sections 1010, 1011, 1011.5, 1014 - 1017, 1440, 1731 and 1737.)

The transferability of water depends on the source of the water right being transferred. The following provisions of the Water Code provide authority to carry out water transfers: Water Code sections 1011(b) (“Transfer of Conserved Water”), 1020 through 1031 (“Water Leases”), 1435 through 1442 (“Temporary Urgency Change”), 1700 through 1705 (“Permanent Changes”), 1707 (“Transfers for Instream Uses”), 1706 (“Transfer of Pre-1914 Rights”), 1725 through 1732 (“Temporary Transfers”), 1735 through 1737 (“Long-Term Transfers”), 1740 (“Transfer of Decreed Rights”) and 1745 through 1745.11 (“Transfers by Water Suppliers”). In addition, the enabling legislation for a number of different types of water districts includes authorization to transfer surplus water. See, for example, Water Code sections 22228 (“Irrigation Districts”) and 35425 (“California Water Districts”).

#### **b. Transfers Under a Riparian Water Right**

It is well-settled under California law that a riparian water right is not transferable for use on nonriparian land. (See, e.g., *People v. Shirokow* (1980) 26 Cal 3<sup>rd</sup> 301, 307.) A riparian owner may, however, enter into a contract under which he or she agrees not to exercise the riparian right for his or her property, so as to increase the downstream water supply. Such an agreement could not prevent a downstream riparian owner from exercising his riparian right. DWR has entered into “water transfer” agreements with riparian landowners in the Delta under which the riparian owner agreed for compensation not to exercise his or her riparian right. Water that was left in the river was pumped from the Delta as part of DWR’s Water Bank operations. Under Water Code section 1707, however, riparian rights are among the water rights that may be included within a change petition to the State Board for the purpose of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in or on the water. An adjudicated riparian right can be transferred under Water Code section 1740.

#### **c. Transfers Under an Appropriative Water Right**

An appropriative water right can be sold or transferred off the land by changing the place of use under the right. Under Water Code section 1706, the point of diversion, place of use or purpose of use of a pre-1914 appropriate right can be changed if others are not injured by that change. The transfer or other change involving the exercise of a post-1914 appropriate right

requires the approval of the State Board under Water Code sections 1020, 1435, 1700, 1707 (for instream uses), 1725 or 1735, and State Board findings that the proposed transfer would not injure legal users or unreasonably effect fish, wildlife or other instream beneficial uses. Under Water Code section 1729, a water transfer under section 1725 for not longer than one year is exempt from the provisions of the California Environmental Quality Act.

**d. Transfers of Groundwater**

There are no general statutory procedures for the transfer of groundwater. Under Water Code section 1220, groundwater may not be pumped for export from the combined Sacramento and Delta-Central Sierra Basins (as defined in DWR Bulletin 160-74), unless the pumping is in compliance with a groundwater management plan that was adopted by ordinance of the county board of supervisors and approved by the voters of the county that overlies the affected groundwater basin. No such plans currently exist. Therefore, groundwater may not be pumped for export from the Delta at the present time. DWR contends that the transfer of groundwater for Delta outflow rather than export purposes would not violate Water Code section 1220.

A number of counties within the Sacramento Valley have adopted ordinances that regulate the direct export of groundwater. One such ordinance has been upheld as a valid exercise of the police power that was not preempted by general state legislation. (See *Baldwin v. County of Tehama* (1994) 31Cal.App.4th 166.)

In groundwater basins that have been adjudicated by a court, the court's judgment often establishes unique conditions concerning the transfer of groundwater rights in the basin.

**e. Transfers of Water Under a Contractual Entitlement**

Under California law, the right to water under a contract or as result of owning land within a water district is not transferable in whole or in part without the consent of the water right holder and the water supplier. (E.g., see Water Code sections 382-383 and 1745.04.) Under section 3405(a) of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575), the Secretary of the Interior is authorized to approve an application of an individual water user to transfer his or her federal CVP water entitlement without the consent of the water district that holds the CVP contract under which the water is supplied. However, transfers involving more than twenty percent of the CVP water subject to a long-term contract within a contracting district or agency is also subject to review by the district or agency under the provisions specified in Section 3405(a)(1) of the CVP Improvement Act.

**f. Transfers by Public Agencies**

In addition to the provisions discussed above that deal with the ability to transfer water under different types of water rights, there are numerous statutory provisions that deal with the

authority of public agencies to transfer water. Before a public agency undertakes a water transfer, it must determine that it has authority in its enabling legislation, or elsewhere, to transfer water for use outside its boundaries. Water Code sections 382 and 1745 - 1745.11 provide alternative sources of authority for a public agency to transfer surplus water for use outside of its boundaries. Under Water Code section 1745.10, surface water that is transferred under these provisions may not be replaced with groundwater unless such groundwater use is consistent with a groundwater management plan adopted pursuant to State law for the affected area, or the substitution of groundwater was approved by the transferring agency after it determined that the transfer would not create or contribute to conditions of long-term overdraft in the affected groundwater basin. The transfer would also have to be carried out in compliance with applicable procedural requirements, such as under Water Code sections 1706 or 1725.

**g. Determining What Water Is Transferable - The “No Injury” Rule**

An important element of any water transfer is determining what quantity, if any, of the water is “transferable,” as a result of the application of provisions of the Water Code that are intended to protect other legal users of water and fish and wildlife from the possible adverse effects of a water transfer. The “no injury” rule originates in the common law, and also is reflected in Water Code provisions intended to protect legal users of water from injury from a water transfer. (See, e.g., Water Code sections 1702, 1706 and 1725.) Under the no injury rule, a water transfer would not be authorized to the extent that it reduced the availability of water for downstream users, regardless of the water priority of those users. Under the no injury rule, only “new water” is transferable, i.e., water that is added to the downstream water supply as a result of the transfer. The rationale for the “no injury” rule is as follows: “. . . California water law protects senior water users (those with the oldest water rights) from junior diverters while protecting junior water right holders from the expansion of senior water rights. Junior water right holders would be harmed if seniors could increase the amount of water they divert under their senior priority. Likewise, juniors could be hurt if seniors could change their point of diversion, place of use or purpose of use in a manner that reduces the quantity or quality of water relied upon by juniors for their diversion. The ‘no injury’ rule protects junior right holders against this kind of harm from senior right holders.” (See *A Guide to Water Transfers*, July 1999, pages 3-7 and 3-8, published by the State Board.) Under section 3405(a)(1)(M) of the CVP Improvement Act, however, one CVP contractor can transfer unused entitlement under its CVP water supply contract to another CVP contractor for use within the watersheds of origin.

**h. Transfers of Conserved Water**

Under Water Code section 1011, the right to the use of water that has been reduced as a result of water conservation efforts may be transferred pursuant to any provision of law relating to the transfer of water. For purposes of this section, “water conservation” means the use of less

water to accomplish the same purpose of use allowed under the existing appropriative water right. In order to obtain the benefits of this section, the water right holder must file periodic reports with the State Board that describe the extent and amount of the reduction in water use due to the water conservation efforts.

On December 28, 1999, the State Board issued Order WR 99-012, which involved a proposed transfer of conserved water under Water Codes sections 1725 and 1011 involving licensed water rights of Natomas Central Mutual Water Company. The State Board determined that Natomas could transfer the right to use of the amount of water that Natomas would have consumptively used but for Natomas' water conservation efforts, but that a reduction in diversions that did not reduce consumptive use could not be transferred under Water Code section 1725. For example, the State Board said that conservation efforts that reduced diversions from the stream and return flows to the stream by equal amounts would not result in consumptive use savings that could be transferred.

State Board Order WR 99-012 describes the purpose of Water Code section 1011 as follows: "Section 1011 preserves an appropriative water right when less water is used under the right due to water conservation efforts. Essentially, section 1011 requires water to be treated as though it were used, when in actuality the water is conserved. Any reduction or cessation in the use due to conservation efforts is 'deemed equivalent to a reasonable beneficial use....' Thus, the right to use the amount of water conserved is not subject to forfeiture for nonuse. The right thereby protected from forfeiture may be used later if needed. The right to use the water conserved may also be transferred pursuant to other provisions of law authorizing transfers."

The State Board order also points out that, since 1980, the State Board has required licensees to document their conservation efforts in the Report of Licensee form that must be filed with the State Board every three years under 23 California Code of Regulations, sections 847 and 848, and that the failure to fill out the section of the form regarding water conservation would deprive the licensee of the benefits of section 1011. The State Board order also states: "It also merits note that Natomas' failure to report conservation efforts in a timely manner called into question the credibility of its claim to have conserved water. Late reporting raises the question whether the nonuse of water was in fact due to conservation efforts, or if the water user is attempting to characterize nonuse that occurred for some other reason as water conservation in order to obtain the protections of section 1011. Conversely, reporting water conservation in a timely manner, while insufficient in itself to prove water conservation, would tend to support a claim that the nonuse of water was the result of water conservation efforts. For this reason, it is in every water user's best interest to report water conservation efforts in a timely manner."

#### **i. Use of Conveyance Facilities for a Water Transfer**

As a practical matter, State Water Project and federal Central Valley Project facilities are often needed to convey transfer water to the place of use of the transferee, such as for through-

Delta transfers. Water Code sections 1810-1814 authorize joint use of unused capacity in water conveyance facilities, requiring the state, regional and local public agencies that own water conveyance facilities to make available up to seventy percent of their unused capacity for a bona fide water transfer upon payment of fair compensation, and so long as: (1) no legal user of water would be injured; (2) there would be no unreasonable effect on fish, wildlife or other instream beneficial uses; and (3) there would be no unreasonable effect on the overall economy or the environment of the county from which the water is being transferred. Use of CVP facilities to convey non-CVP water would require a Warren Act contract with the United States (43 U.S. Code sections 523-525 and 2212), which would include provisions to compensate for use of federal facilities and to ensure that the transfer does not interfere with the operation of federal facilities.

#### **j. Third-Party Impacts from a Water Transfer**

There has been confusion from time to time regarding the terms used to refer to potential impacts to others resulting from a proposed water transfer. There generally are three types of potential impacts: (1) injury to legal users of water; (2) unreasonable effects on fish, wildlife or other instream beneficial uses; and (3) unreasonable effects on the overall economy of the area from which the water would be transferred.

The requirement to avoid impacts to "legal users" (discussed above) is set forth in various provisions of existing law. For example, see Water Code section 386 (as to State Board approval of certain water transfers), section 1706 (as to a transfer under a pre-1914 water right), section 1707 (as to a transfer for instream uses), section 1727 (as to a temporary transfer under a water right permit), section 1736 (as to a long-term transfer under a water right permit) and section 1810 (as to determinations of DWR concerning use of surplus conveyance capacity).

The requirement to avoid unreasonable effects on fish, wildlife or other instream beneficial uses is also set forth in various provisions of existing law. For example, see Water Code section 386, section 1707, section 1727, section 1736 and section 1810.

The requirement to avoid unreasonable effects on the overall economy of the area from which the water would be transferred (what is commonly referred to as "third-party economic impacts") is provided for in more limited situations. Water Code section 386 has such a provision, but it is in a chapter on State Board approval of water transfers that is rarely used. Water Code Sections 1725 through 1732 are in the chapter that is generally relied on for State Board approval of a temporary water transfer (i.e., for a term of less than one year), and section 1727 requires the State Board to consider only impacts to legal users and instream uses (i.e., the State Board is not authorized to consider third-party economic impacts). The same section 1727 requirements are also contained in section 1736 for approval of a long-term water transfer.

See the disclaimer at the end of this document.

Water Code Section 1810(d) requires DWR, however, to consider all three types of impacts (i.e., to legal users, to instream uses and to the economy of the area from which the water would be transferred) in determining whether to allow use of its surplus water system conveyance capacity for a water transfer.

Generally, transfer water is developed through four methods: (1) surplus water released from storage facilities; (2) substituting groundwater for transferred surface water; (3) fallowing agricultural land to make water available for transfer; and (4) undertaking conservation activities that develop surplus water (e.g., under Water Code section 1011). Transfers from storage and transfers resulting from conservation activities have little or no likelihood to cause third-party economic impacts because these types of transfers do not affect crop production or groundwater pumping. Therefore, it would not seem necessary or appropriate to require an analysis of potential third-party impacts from these two types of transfers.

There are other provisions of existing law that have the effect of limiting the extent to which water transfers that involve land fallowing or groundwater substitution would cause third-party economic impacts. For example, Water Code section 1745.05 (which authorizes water suppliers to transfer surplus water) puts a limit on the amount of land that may be fallowed in connection with a water transfer. Subdivision (b) of this section states: "The amount of water made available by land fallowing may not exceed 20 percent of the water that would have been applied or stored by the water supplier in the absence of any contract entered into pursuant to this article in any given hydrological year, unless the agency approves, following reasonable notice and a public hearing, a larger percentage."

Water Code section 1732 states that a petition for State Board approval of a temporary water transfer that involves the increased use of groundwater to replace transferred surface water must be in compliance with Water Code sections 1745.10 and 1745.11. Sections 1745.10 and 1745.11 generally require a water supplier that increases the use of groundwater to replace transferred surface water to determine that the groundwater use: (1) would be consistent with a groundwater management plan adopted pursuant to State law for the affected area; or (2) would not create or contribute to conditions of long-term overdraft in the affected groundwater basin.

Section 3405 of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575) includes provisions that would limit the amount of federal water that a water district could transfer. For example, subsection (a)(1) states in part: "Transfers involving more than 20 percent of the Central Valley Project water subject to long-term contract within any contracting district or agency shall also be subject to review and approval by such district or agency under the conditions specified in this subsection ... [including a determination by the Secretary of Interior that the transfer would have no significant long-term adverse impact on groundwater conditions]."

#### **k. Environmental Review of Water Transfers**

See the disclaimer at the end of this document.

Copyright 2006

Bartkiewicz, Kronick & Shanahan

All rights reserved

In general, water transfers are subject to compliance with the requirements of the California Environmental Quality Act and the National Environmental Policy Act, to the extent applicable. Water Code section 1729 provides an exemption from compliance with CEQA for temporary water transfers under Water Code sections 1725 through 1732.

---

### **DISCLAIMER**

This summary was prepared by Bartkiewicz, Kronick & Shanahan for general informational purposes only, and does not constitute legal advice. Because the law is constantly evolving, the information provided in the above summary may not reflect the most current legal developments. Furthermore, such general information cannot, and is not intended to, address the specific factual circumstances of any person or entity's situation. As a result, you should consult with your own attorney about your specific situation, and not rely on any general information contained in the above summary. Our attorneys are licensed to practice law only in the State of California, and we do not seek nor are we authorized to give advice or represent clients in other jurisdictions.

The publication or use of the information provided is not intended to create an attorney-client relationship. Please be advised that the act of using this summary or communicating in any manner with Bartkiewicz, Kronick & Shanahan or a specific attorney in the firm does not create an attorney-client relationship, which can be created only after we agree in writing that we will be able to represent you. Absent a prior written agreement between you and us to form an attorney-client relationship, you should not send us any confidential and privileged information, and we will immediately return any such communication to you without examination.

### **END OF DISCLAIMER**

## Appendix D

---

Application for License for Diversion and Use of Water



STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

**DIVISION OF WATER RIGHTS**

**License for Diversion and Use of Water**

APPLICATION XXXXX  
Page 1 of 4

PERMIT XXXXX

LICENSE **XXXXX**

**THIS IS TO CERTIFY, That**

Name  
Address  
City, State, Zip

have made proof as of **November 3, 1994** (the date of inspection) to the satisfaction of the State Water Resources Control Board (SWRCB) of a right to the use of the waters of **two Unnamed Streams in Shasta County**

tributary to **Montgomery Creek thence Pit River thence Shasta Lake**

for the purpose of **Irrigation, Stockwatering, Recreational, Wildlife Enhancement, and Fire Protection uses**

under Permit **17974** of the SWRCB; that the right to the use of this water has been perfected in accordance with the laws of California, the Regulations of the SWRCB, and the permit terms; that the priority of this right dates from **October 17, 1979**; and that the amount of water to which this right is entitled and hereby confirmed is limited to the amount actually beneficially used for the stated purposes and shall not exceed **a total of twenty (20) acre-feet per annum to be collected from January 1 to March 31 of each year as follows: (1) 12 acre-feet per annum in Reservoir No. 1, and (2) 8 acre-feet per annum in reservoir No. 2. The maximum withdrawal in any one year from Reservoir No. 1 shall not exceed 3 acre-feet.**

The capacities of Reservoir No. 1 and Reservoir No. 2 covered by this license shall not exceed 12 acre-feet and 8 acre-feet, respectively.

After the initial filling of Reservoir No. 2, licensee's right under this license extends only to water necessary to keep the storage reservoir full by replacing water beneficially used and water lost by evaporation and seepage, and to refill if emptied for necessary maintenance or repair.

(0000041)

This license does not authorize collection of water to storage outside of the specified season to offset evaporation and seepage losses or for any other purpose.

**THE POINTS OF DIVERSION OF SUCH WATER ARE LOCATED:**

- (1) Reservoir No. 1 – North 1,200 feet and West 1,800 feet from SE corner of Section 32, T35N, R1E, MDB&M, being within SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of said Section 32; and
- (2) Reservoir No. 2 – North 600 feet and West 1,600 feet from SE corner of Section 32, T35N, R1E, MDB&M, being within SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of said Section 32.

**A DESCRIPTION OF THE LANDS OR THE PLACE WHERE SUCH WATER IS PUT TO BENEFICIAL USE IS AS FOLLOWS:**

Stockwatering, Recreational, Wildlife Enhancement and Fire Protection uses at Reservoir No. 1 and Reservoir No. 2, both within SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 32, T35N, R1E, MDB&M, and Irrigation use from Reservoir No. 1 as follows:

20 acres within SW $\frac{1}{4}$  of SE $\frac{1}{4}$  of Section 32, T35N, R1E, MDB&M  
10 acres within SE $\frac{1}{4}$  of SW $\frac{1}{4}$  of Section 32, T35N, R1E, MDB&M

30 acres total, as shown on map on file with the SWRCB.

This license is subject to prior rights. Licensee is put on notice that during some years water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the Sacramento River Basin are such that in any year of water scarcity the season of diversion authorized herein may be reduced or completely eliminated on order of the SWRCB made after notice to interested parties and opportunity for hearing.

(0000090)

---

*The right hereby confirmed to the diversion and use of water is restricted to the point or points of diversion herein specified and to the lands or place of use herein described.*

*Reports shall be filed promptly by the licensee on the appropriate forms which will be provided for the purpose from time to time by the SWRCB.*

*Licensee shall allow representatives of the SWRCB and other parties, as may be authorized from time to time by the SWRCB, reasonable access to project works to determine compliance with the terms of this license.*

*Pursuant to Water Code sections 100 and 275 and the common law public trust doctrine, all rights and privileges under this license, including method of diversion, method of use, and quantity of water diverted, are subject to the continuing authority of the SWRCB in accordance with law and in the interest of the public welfare to protect public trust uses and to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.*

*The continuing authority of the SWRCB may be exercised by imposing specific requirements over and above those contained in this license with a view to eliminating waste of water and to meeting the reasonable water requirements of licensee without unreasonable draft on the source. Licensee may be required to implement a water conservation plan, features of which may include but not necessarily be limited to: (1) reusing or reclaiming the water allocated; (2) using water reclaimed by another entity instead of all or part of the water allocated; (3) restricting diversions so as to eliminate agricultural tailwater or to reduce return flow; (4) suppressing evaporation losses from water surfaces; (5) controlling phreatophytic growth; and (6) installing, maintaining, and operating efficient water measuring devices to assure compliance with the quantity limitations of this license and to determine accurately water use as against reasonable water requirement for the authorized project. No action will be taken pursuant to this paragraph unless the SWRCB determines, after notice to affected parties and opportunity for hearing, that such specific requirements are physically and financially feasible and are appropriate to the particular situation.*

*The continuing authority of the SWRCB also may be exercised by imposing further limitations on the diversion and use of water by the licensee in order to protect public trust uses. No action will be taken pursuant to this paragraph unless the SWRCB determines, after notice to affected parties and opportunity for hearing, that such action is consistent with California Constitution article X, section 2; is consistent with the public interest and is necessary to preserve or restore the uses protected by the public trust.*

*The quantity of water diverted under this license is subject to modification by the SWRCB if, after notice to the licensee and an opportunity for hearing, the SWRCB finds that such modification is necessary to meet water quality objectives in water quality control plans which have been or hereafter may be established or modified pursuant to division 7 of the Water Code. No action will be taken pursuant to this paragraph unless the SWRCB finds that: (1) adequate waste discharge requirements have been prescribed and are in effect with respect to all waste discharges which have any substantial effect upon water quality in the area involved, and (2) the water quality objectives cannot be achieved solely through the control of waste discharges.*

*This license does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right, the licensee shall obtain authorization for an incidental take prior to construction or operation of the project. Licensee shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this license.*

*If construction or rehabilitation work is required for the diversion works covered by this license within the bed, channel, or bank of the affected water body, the licensee shall enter into a streambed or lake alteration agreement with the State Department of Fish and Game. Licensee shall submit a copy of the agreement, or waiver thereof, to the Division of Water Rights prior to commencement of work. Compliance with the terms and conditions of the agreement is the responsibility of the licensee.*

*This license is granted and the licensee accepts all rights herein confirmed subject to the following provisions of the Water Code:*

Section 1625. Each license shall be in such form and contain such terms as may be prescribed by the SWRCB.

Section 1626. All licenses shall be under the terms and conditions of this division (of the Water Code).

Section 1627. A license shall be effective for such time as the water actually appropriated under it is used for a useful and beneficial purpose in conformity with this division (of the Water Code) but no longer.

Section 1628. Every license shall include the enumeration of conditions therein which in substance shall include all of the provisions of this article (of the Water Code) and the statement that any appropriator of water to whom a license is issued takes the license subject to the conditions therein expressed.

Section 1629. Every licensee, if he accepts a license, does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any license granted or issued under the provisions of this division (of the Water Code), or for any rights granted or acquired under the provisions of this division (of the Water Code), in respect to the regulation by any competent public authority of the services or the price of the services to be rendered by any licensee or by the holder of any rights granted or acquired under the provisions of this division (of the Water Code) or in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings or otherwise, by the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State, of the rights and property of any licensee, or the possessor of any rights granted, issued, or acquired under the provisions of this division (of the Water Code).

Section 1630. At any time after the expiration of twenty years after the granting of a license, the State or any city, city and county, municipal water district, irrigation district, lighting district, or any political subdivision of the State shall have the right to purchase the works and property occupied and used under the license and the works built or constructed for the enjoyment of the rights granted under the license.

Section 1631. In the event that the State, or any city, city and county, municipal water district, irrigation district, lighting district, or political subdivision of the State so desiring to purchase and the owner of the works and property cannot agree upon the purchase price, the price shall be determined in such manner as is now or may hereafter be provided by law for determining the value of property taken in eminent domain proceedings.

#### STATE WATER RESOURCES CONTROL BOARD

*Victoria A. Whitney, Chief  
Division of Water Rights*

Dated: XXX XX, XXXX