

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2006 – 0001

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

and

Administrative Civil Liability Complaint No. 262.5-40

against the

Lake Arrowhead Community Services District

SOURCES: Little Bear Creek Tributary to Deep Creek thence Mojave River and
Grass Valley Creek Tributary to Mojave River

COUNTY: San Bernardino

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

BY THE BOARD:

1.0 INTRODUCTION

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

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

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

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

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

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

2.0 BACKGROUND

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

2.1 Authority to Issue a CDO

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

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

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

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

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

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

2.2 Authority to Assess Civil Liability

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

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

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

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

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

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

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

Progressive Development of Lake Arrowhead

1890	- 1891 KonBerg Plans (30,000 miners inches under 4" Pressure, 434,394 AFA)
1900	- 1904 Commencement of construction of dam - 1905 Articles of Incorporation, 1905 Supplemental Water Filing (4,000 miners inches under 4" Pressure 57,918 AFA)
1910	- 1911 MillerLux Decision (No out of watershed export) - 1912 AR&P builds fence around lake, Finley reports plans to develop resort - 1913-14 AR&P Co. closes lake and surrounding acreage to public to preserve it for future private resort - 1914 Offer of water supply from system to San Diego is turned down - 1916 Strawberry Flat recreational uses being made - 1917 Cedar Glen Subdivision described - 1918 Division of Engineering Report on development made to date by AR&P Co
1920	- 1922 First Cabin Built at Lake - 1923 Testimony before Board of Health indicates 8000 resident, 2100 transient population - 1924 March 14, 1924 Railroad Commission Decision No. 13267 - 1925 March 24, 1924 Ordinance 228 passed granting franchise to supply water to inhabitants of Arrowhead Woods - 1925 Golf Course Opened to business
1930	- 1933 New Road
1940	- 1946 Turf Club purchases Lake
1950	- 1953 Newspaper Article regarding Mojave water war over Lake
1960	
1970	
1980	
1990	- 1991 Barstow vs Adelman et al. (Mojave Decision)
2000	
2005	- Complaints filed regarding Lake Arrowhead

1920's Decade
of Building

1931-1990 Base Period of Barstow vs Adelman (Mojave Decision)

In 1921, AR&PC sold its properties to Arrowhead Lake Corporation, which pushed forward with development of a resort. The whole property was designated as an exclusive community, which was subdivided. The first cabin on the Lake was completed in May 1922. (LACC 1, p. 21.) Development increased rapidly through the 1920s, which included construction of a clubhouse and golf course. (LACSD A-36; PT 5, pp. 7-8; LACC 1, p. 27 and LACC 10, p. 257.) Development continued as ownership of Arrowhead Reservoir and the properties owned by AR&PC changed ownerships several times eventually leading to the formation of Lake Arrowhead Community Services District in 1978, which took over distribution of Lake Arrowhead water. (PT 36, 36-19-01.)

2.4 Positions of Hearing Participants

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

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

3.0 APPLICABLE LAW

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

3.1 Non-Statutory Appropriations

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

3.2 Civil Code Appropriations

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

recorded, the appropriator can change the point of diversion, the place of use, or the method of diversion if others are not injured by the change. Civil Code section 1416 provides that the claimant of a Civil Code appropriation must commence some activity necessary to appropriating the water within 60 days.

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

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

3.3 Progressive Development

With the exception of non-statutory appropriations for which progressive development is interrupted by a competing Civil Code appropriator, pre-1914 water rights can be developed progressively up to the amount of the intended appropriation. The progressive use and

development doctrine allows an appropriator under a pre-1914 appropriation to increase the amount of water diverted up to the amount of the originally contemplated appropriation, if the development is prosecuted “within a reasonable time by the use of reasonable diligence.” (*Haight v. Costanich* (1920) 184 Cal. 426, 432 [194 P. 26], citing *Senior v. Anderson*, 115 Cal. 496, 504 [47 P. 454, 456]; see also *Inyo Consolidated Water Company v. Jess* (1911) 161 Cal. 516, 519 [119 P. 934]; State Water Board Order WR 95-10.) If the use of water is not pursued as required, the right to the additional water becomes subject to intervening claims. (*Haight, supra.*) Order WR 95-10 refers to the required expression of initial intent as a “plan of development.” This does not, however, imply that a single document express the entire intent, but rather that there is substantial evidence of the initial intent with respect to the use of water appropriated at Lake Arrowhead. In this case, the evidence in the hearing record is sufficient to constitute a plan of development that would reasonably result in the beneficial use of up to 1566 acre-feet per year for consumptive purposes; this evidence is discussed below.

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

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

Further, LACSD’s theory that the pre-1914 water right for consumptive uses that exists was developed by changing a non-consumptive use to a consumptive use of water is erroneous. In fact, the pre-1914 water right for consumptive uses identified in this order stems from the 1905 Civil Code filings. Nevertheless, it is important to discuss the law regarding changes from a non-consumptive to a consumptive use of water under a pre-1914 water right because LACSD has increased its consumptive use of water above the amount that can be attributed to the Civil

Code filing, and may erroneously assert in the future that it can change non-consumptive pre-1914 uses to consumptive uses to increase its consumptive uses of water.

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

PT, on the assumption that the only pre-1914 appropriative water right for Lake Arrowhead had originated as a right for non-consumptive uses, argues that LACSD could not make the change it claims to have made from non-consumptive to consumptive uses of water because doing so would cause LACSD to exceed the amount of LACSD's appropriation. The State Water Board agrees with PT that it is well-settled law that the measure of an appropriator's water right is the amount of water that is actually used. PT cites numerous cases supporting this principle.

(*Ortman v. Dixon* (1859) 13 Cal. 33, 38-39; *City of San Bernardino v. City of Riverside* (1921) 186 Cal. 7, 31 [198 P. 784]; *Trimble v. Heller* (1913) 23 Cal.App. 436, 443-444 [138 P. 376, 379]; *Natural Soda Products Co. v. City of Los Angeles* (1943) 132 P.2d 553, 560.)

PT goes on to argue, however, that the appropriator cannot change a perfected non-consumptive use to a consumptive use because that would increase the amount of water used by the appropriator, even if the amount used for non-consumptive use was far in excess of the consumptive use. PT further argues that changing a non-consumptive use under a pre-1914

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

right to a consumptive use initiates a new right. (The Prosecution cited *Santa Paula Water Works v. Peralta* (1896) 113 Cal. 38, 45 [45 P. 168] and *City of San Bernardino v. City of Riverside, supra*, 186 Cal. at pp. 28-29 for limits on increases in the diversion of natural flow, but cited only Montana and Oregon cases to argue that increased consumptive use means the initiation of a new right.) The idea that changing a non-consumptive use to a consumptive use initiates a new right apparently reflects a common presumption that a change from a non-consumptive use to a consumptive use usually will cause injury to other legal users of water and consequently that a new water right is needed to effectuate the new use. (See, e.g. State Water Board Decision 1635, p. 91 (Oct. 2, 1996).) There are instances, however, where there is no injury. For example, if water that is not consumptively used is permanently or seasonally removed from the natural watercourse, making it unavailable for other uses, a change to a consumptive use would cause no injury, since it already has been removed from the natural stream.²

In California, Water Code section 1706 says that the limit on changes in purpose of use of a pre-1914 right is injury to other legal users of water. Section 1706 precludes a change in a pre-1914 water right if it will injure others. This limitation is not confined to avoiding injury to senior water right holders; because of the priority system, a water right holder cannot in any event injure a more senior water right holder. Section 1706 goes farther, and prohibits injury to *any* water right holder. Therefore, after uses have built up based on the availability of water under subsequent water rights, and no water remains for appropriation, a holder of a pre-1914 water right for a non-consumptive use cannot change its water right to a consumptive use because doing so would result in injury to others. PT argues that if non-consumptive pre-1914 rights can

² If the pre-1914 appropriator had a right to take the water and store it for later use or take it to another watershed, the appropriator would not diminish the natural stream flow when it converted the appropriated water to another use, and therefore would not injure another legal user of water by making the change, because the other legal user's right does not allow it to require that an upstream appropriator continue to abandon increments of water that it has stored from a previous season. (*Stevens v. Oakdale Irrigation Dist.* (1939) 13 Cal.2d 343 [90 P.2d 58]; *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450 [173 P. 994, 997].)

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

be changed to consumptive rights, there will be adverse policy implications to existing uses of water because this would allow millions of acre-feet of non-consumptive hydropower rights to become senior consumptive water rights. Section 1706 precludes this scenario, however, if others will be injured by the change. Considering that most of the major natural watercourses in California are fully appropriated or nearly so, it is unlikely that a situation will arise in which a large non-consumptive use of water under a pre-1914 water right can be changed to a consumptive use without injuring a junior appropriator. It also is unlikely that such a change would injure only instream beneficial uses of water without injuring junior appropriators, since recent appropriators usually have instream bypass and release terms in their water right permits or licenses to protect the instream uses. As a result, there are no adverse policy implications of construing section 1706 to mean what it says; what precludes changes from non-consumptive uses to consumptive uses is the prohibition of injury to others.

4.0 CEASE AND DESIST ORDER

4.1 Plans for Development and Resulting Pre-1914 Right

4.1.1 Plans of Development of Pre-1914 Right

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

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

An amended notice of appropriation was filed in 1905 seeking 4,000 miners inches under a 4” pressure (equivalent to 57,918 AFA). (PT 17.) As required under Civil Code section 1416, commencement of construction had occurred prior to 60 days after the May 1905 filing, because construction of the foundation had begun in 1904. (LACC 1, p. 5; LACC 17, p. 10.) The Arrowhead Reservoir Company posted several notices or amended notices of appropriation of water for storage in Lake Arrowhead on May 22, 1905, and filed these notices in the County Recorder’s Office on May 24, 1905. (LACSD 12-21.) Each of the notices includes domestic use of water. They also specify the place of use as San Bernardino Valley; however, as discussed above, Civil Code section 1415 allows an appropriator under that section to change the place of

use after having filed a copy of the original notice for record, if others are not injured by the change. As discussed below, it became impractical for the appropriator to deliver water to the San Bernardino Valley, which is outside the Mojave River watershed, and so the appropriators instead planned to serve water in the area around Lake Arrowhead, effectively changing the place of use of the consumptive uses of water under the appropriation notices.

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

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

In 1921, AR&PC sold its properties to Arrowhead Lake Corporation, which pushed forward with development of a resort on the 6,000 acres previously held by AR&PC. The whole property was designated as an exclusive community, which was subdivided. The first cabin on the Lake was completed in May 1922. (LACC 1, p. 21.) Development increased rapidly through the 1920s,

which included construction of a clubhouse and golf course. (LACC 1, p. 27 and LACC 10, p. 257.) The fact that the reservoir was completed despite the infeasibility of earlier plans to deliver the water to San Bernardino Valley, together with the rapid development of the community as soon as the reservoir project was completed, is further evidence that the service of water to the community was the result of a change in place of use of the reservoir's water, to serve the resort community instead of the San Bernardino Valley.

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

Development continued as ownership of Arrowhead Reservoir and the properties owned by AR&PC changed ownerships several times eventually leading to the formation of Lake Arrowhead Community Services District in 1978, which took over distribution of Lake Arrowhead water. (PT 36, 36-19-01.) Although the course of development took place over about seventy-six years, the rate of increase in water use reflected development in southern California generally, accelerating in economically vigorous periods and slowing during the depression and recession periods. Considering that the consumptive uses of water at Lake Arrowhead are primarily municipal or domestic in nature, and considering the preferences for municipal uses of water and the extended periods over which statutory policy allows municipal uses to be developed, it is not unreasonable for the consumptive use of water at Lake Arrowhead to have been developed over this period. (See *Meridian, Ltd.*, supra.; Wat. Code, §§ 106, 106.5, 1203, 1460-1464.) Municipal uses of water cannot and should not be developed immediately, unlike irrigation uses or other uses for which the entire amount can be used immediately.

4.1.2 Resulting Pre-1914 Right

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

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

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

Combining the demands determined above results in a total of 1,566 AFA for the planned development of the resort at Lake Arrowhead. The pre-1914 water right for consumptive use is therefore limited to 1,566 AFA.³ This right is based on the progressive use and development of a Civil Code appropriation for consumptive uses filed in 1905. Since the water rights in the Mojave basin generally are more recent than the Lake Arrowhead water rights, water users in the Mojave basin cannot be injured by LACSD’s having fully developed the senior pre-1914

³ LACSD operates the water delivery facilities. This order does not determine the ownership of the pre-1914 water right that is the subject of this proceeding.

consumptive use right stemming from the Civil Code filings, up to the limit of 1,566 AFA. The increases above this amount since 1981, however, were prohibited by section 1706 if they were based on changing a non-consumptive right to a consumptive right.

4.2 Passage of Time Does Not Confer a Water Right

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

The reason for the current proceeding is that LACSD cannot use as much water as it currently is using for consumptive purposes without having either a water right permit issued by the State Water Board or obtaining water from another water right holder. In other words, for the part of the water supply it withdraws in excess of the pre-1914 water right for consumptive uses, it is an ongoing illegal diverter and user of water. Since 1914, a new appropriative water right can be obtained only through the process set forth in Division 2, Part 2, of the Water Code, and prescription cannot be obtained against the state. (*People v. Shirokow* (1980) 26 Cal.3d 301 [162 Cal.Rptr. 30, 605 P.2d 859].) Further, a claim of laches⁴ does not protect an illegal water user. (*Id.*, at 311-312, fn. 14.) Since LACSD has no water right to divert and use the excess water, it cannot argue that it has acquired the right to continue its use of water in excess of its right.

4.3 Contents of Cease and Desist Order

One of the key issues in this hearing is whether a cease and desist order should be issued and if so, what modifications, if any, should be made to the measures required in the draft CDO. The draft CDO was a result of investigation into allegations in complaints by Ted

⁴ Laches is an undue delay in asserting a legal right.

Heyck and ALA. Justification for issuance of the CDO includes the continuation of unauthorized diversions and issuance of new “will serve” agreements by LACSD while the complaint was pending. (PT 24, pp. 2, 3.) The PT asserted that any withdrawal from Lake Arrowhead to serve consumptive uses is unauthorized. As discussed elsewhere in this order, the State Water Board finds a right to withdraw up to 1,566 AFA from Lake Arrowhead for consumptive use. There exists a continued threat, however, that LACSD will exceed the consumptive use right to withdraw up to 1,566 AF per year despite efforts by LACSD to reduce these withdrawals. (PT 24, pp. 1,2; CUWCC 1 pp. 2, 3.)

The purpose in issuing the draft CDO was twofold:

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

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

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

appears to have implemented some of the identified projects. It is anticipated that further implementation of projects by LACSD could accomplish the goal of eliminating unauthorized withdrawals from Lake Arrowhead in less than 2 years from the issuance of this order.

5.0 ASSESSMENT OF CIVIL LIABILITY

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

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

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

CUWCC 1; PT 24, p. 5.) The ACL complaint estimates that LACSD's total avoided cost by taking water from Lake Arrowhead instead of buying it was \$12.5 million for 2002-2004. Considering that part of the water LACSD withdrew from the lake during that period was within the pre-1914 water right, the total avoided cost is closer to \$5.05 million, which is still substantial.

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

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

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

6.0 CONCLUSIONS

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

ORDER

IT IS HEREBY ORDERED,

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

1. LACSC shall within 60 days of the date of this order, submit a plan to initially reduce and subsequently cease the unauthorized diversion and consumptive use of stored water from Lake Arrowhead above the allowable diversion and use amount of 1,566 AF per calendar year. The plan must specify deadlines for implementation of corrective actions that will reduce unauthorized diversions as quickly as practicable. Under the plan, LACSD shall not exceed an annual withdrawal of 1,566 AF from Lake Arrowhead during 2008 and during all subsequent years. LACSD shall consider all practical measures to reduce demand or increase supplies, including a moratorium on new water service commitments. LACSD shall modify the plan in accordance with directions from the Chief of the Division of Water Rights (Division Chief) and shall implement the final plan after the Division Chief approves it.

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

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

3. LACSD shall immediately cease any increase in its withdrawal of water from Lake Arrowhead above its total withdrawal for consumptive uses in 2005.

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

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

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

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 13, 2006.

AYE: Tam M. Doduc
Arthur G. Baggett, Jr.
Richard Katz

NO: None

ABSENT: None

ABSTAIN: Gerald D. Secundy



Selica Potter
Acting Clerk to the Board