

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

**DIVISION DECISION 99-03**

**LAKE MADRONE WATER DISTRICT**

**LAKE MADRONE/BERRY CREEK**

**BUTTE COUNTY**

**APPLICATION 30657**

**December 27, 1999**

## **DIVISION OF WATER RIGHTS**

### **DIVISION DECISION 99-03**

#### **APPLICATION 30657**

#### **LAKE MADRONE/BERRY CREEK**

### **1.0 INTRODUCTION**

This Division of Water Rights (Division) Decision describes the actions to be taken on the pending application for a water right permit for storage of water in Lake Madrone within the Berry Creek watershed in Butte County. Application 30657 (A30657) was filed in 1997 by Lake Madrone Water District (LMWD). The application requests an appropriative water right to divert 200 acre-feet per annum (afa) of water from Berry Creek into an existing onstream reservoir with a capacity of 200 acre-feet. LMWD seeks a right to store water from March 1 to April 15 of each year for nonconsumptive purposes of recreation, fish and wildlife preservation and/or enhancement, and fire protection. Map 1 shows the location of Lake Madrone and other features in the area.

Written notice of A30657 was provided to interested parties and three parties filed protests against A30657. On March 12, 1999, Division staff conducted a field investigation in accordance with Water Code section 1345 to provide an opportunity for the parties to submit information relating to the issues raised in the protests. Based on a review of available information, the Division concludes that a water right permit should be issued subject to the terms and conditions specified in this order.

### **2.0 BACKGROUND**

The present dam at Lake Madrone was constructed in 1930 or 1931 to replace an earlier structure, known as the Apple Tree Dam that was constructed during the late 1920's and washed out in 1929. The original developers of Lake Madrone were advised of the requirement to obtain an appropriative water right permit for the reservoir in 1931, but never applied for or received a permit. (State Water Resources Control Board (SWRCB) Resolution No. 86-20.) The LMWD was formed in 1975 to operate and maintain the dam and reservoir at Lake Madrone. Water in the reservoir is used by residents of a surrounding subdivision for recreation and fire protection.

The release of accumulated sediment from Lake Madrone into Berry Creek in 1984 led to a complaint by downstream property owners and an investigation by the Regional Water Quality Control Board for the Central Valley (RWQCB). On October 5, 1984, Department of Fish and Game (DFG) reported that pools in Berry Creek were filled with one foot or more of sediment. DFG also reported that the sediment severely damaged the fishery by destroying shelter and food producing areas.

On November 29, 1984, the RWQCB issued a Cleanup and Abatement Order that prohibited the discharge of earthen materials into Berry Creek at a rate greater than the instantaneous rate at which these materials were entering the lake. On October 17, 1985, the SWRCB denied LMWD's petition for review of the RWQCB order and adopted Order WQ 85-10. In addition to limiting the discharge of sediment, Order WQ 85-10 also required LMWD to develop a plan for removing accumulated sediment from Berry Creek. Following the issuance of WQ 85-10, LMWD has removed sediment from Lake Madrone by lowering the lake and excavating the sediment about every four years. In 1989, LMWD modified the outlet from the reservoir to reduce the release of sediment.

The water quality problems that resulted in Order WQ 85-10 led the Division to investigate if LMWD held a valid right to store water at Lake Madrone. Although LMWD contends that it holds pre-1914 appropriative water rights for the reservoir, the SWRCB found that the present dam at Lake Madrone was constructed in 1930 and 1931 to replace an earlier dam constructed during the late 1920's, which washed out in 1929. The SWRCB concluded that storage of water at Lake Madrone was unauthorized and directed the executive director to refer the matter to the Attorney General for appropriate action to prevent further storage of water without a permit.

The SWRCB authorized the executive director to defer referral to the Attorney General if a water right application were filed and thereafter pursued with diligence. (SWRCB Resolution No. 86-20.) Following further correspondence with the Division, LMWD filed Application 28832 on April 3, 1987. However, the Division subsequently cancelled Application 28832 due to the applicant's failure to provide an adequate engineering map as part of the required application materials.

Following various other attempts to resolve the problem without litigation, on March 19, 1997, the Attorney General filed a complaint to enjoin the unauthorized diversion of water at Lake Madrone. (California State Water Resources Control Board and California Department of Water Resources v. Lake Madrone Water District, Butte County, Superior Court No. 120556.) On October 21, 1997, LMWD filed A30657, which is the subject of this decision. An attachment to A30657 states that LMWD reserves its claim that it has a right to maintain Lake Madrone under riparian and pre-1914 appropriative rights, but has filed the water right A30657 as a means of resolving the dispute with the SWRCB. Further action on the water right aspects of the lawsuit has been deferred pending action by the SWRCB on A30657.

### **3.0 APPLICABLE LAW**

The California Water Code and implementing regulations set forth the legal requirements governing actions on applications to appropriate water. In addition, the SWRCB must comply with provisions of the California Environmental Quality Act (CEQA). For minor projects with unresolved protests (i.e., storage not in excess of 200 af or direct diversion not in excess of 3 cubic feet per second (cfs)), the Division must conduct a field investigation and prepare a Decision. (See Water Code sections 1345 through 1348 as revised, effective January 1, 1998.)

Pursuant to the provisions of California Code of Regulations, title 23, section 731, water users may file an application for an appropriative water right permit authorizing their diversions even in instances in which they already claim to have an existing right for the project described in A30657. Water Code section 1391 provides that any appropriator of water to whom a permit is issued takes the permit subject to the specified conditions on which the permit is issued. The holder of a water right permit who violates the terms or conditions of the permit is subject to various administrative and judicial remedies under the Water Code. In this instance, LMWD's claim of an existing right to divert water to storage at Lake Madrone does not preclude it from obtaining a water right permit, but acceptance of a permit obligates the permittee to comply with the requirements of the permit. (Water Code section 1391.)

#### **4.0 DESCRIPTION OF PROJECT PROPOSED IN APPLICATION 30657**

Application 30657 seeks an appropriative water right to divert water to storage from March 1 to April 15 of each year for non-consumptive purposes of recreation, fish and wildlife preservation and enhancement, and fire protection. The reservoir is located in Butte County in section 27, T21N, R5E, MDB&M, as shown on a map on file with the SWRCB. The place of use includes the Lake Madrone Unit 1 and 2 subdivisions on file with the California Department of Real Estate.

The project consists of a reservoir and an earth and concrete dam 35 feet high and 350 feet long. The reservoir has a surface area of approximately 25 acres and has a maximum depth of 25 feet, when full. No new construction or site clearing activities will be associated with the project. LMWD states that it diverts water to storage only when the reservoir has been lowered for maintenance and needs to be refilled. The season of diversion specified in A30657 is limited to March 1 to April 15.

#### **5.0 PROTESTS**

The Division provided notice of A30657 on December 12, 1997, in accordance with sections 1300 through 1324 of the Water Code. Protests were submitted by the State Water Project (SWP), Berry Creek Water Users Incorporated (BCWU), and the California Sportfishing Protection Alliance (CSPA). The protests were accepted and are summarized below.

**5.1 State Water Project Protest** The SWP protest was based on potential injury to the prior rights of the SWP if the applicant were allowed to divert water when the SWP is required to release water to meet downstream water quality requirements. The SWP protest stated that it might be dismissed if the Standard Permit Terms 80, 90, and 91 are included in any permit

issued on A30657. Standard Permit Terms 80, 90, and 91 are normally included in a permits for diversion of 1 cfs or more or storage of 100 afa or more for projects within the Sacramento-San Joaquin Delta watershed and LMWD agreed to inclusion of Terms 80, 90, and 91. Consequently, the SWP protest was dismissed. This decision provides that Standard Permit Terms 80, 90, and 91 shall be included in any permit to be issued on A30657.

**5.2 Berry Creek Water Users Protest** The BCWU protest was based on alleged injury to prior rights and concern over sediment discharge from Lake Madrone. Negotiations between the applicant and BCWU led to a draft memorandum of understanding (MOU), which was discussed at the field investigation on March 12, 1999. A final MOU was executed after the field investigation and was forwarded to the SWRCB by letter dated April 13, 1999, from counsel for LMWD. The five provisions of the MOU are summarized as follows:

1. LMWD will notify BCWU in advance of planned changes in lake water level.
2. LMWD will not operate Lake Madrone in a manner which deprives landowners along Canyon Creek of the use of water. During drought years, LMWD will maintain an outflow of water at the dam which is no less than the inflow to Lake Madrone.
3. The water in Lake Madrone is to be used for recreational purposes (swimming, fishing, and boating) and fire protection only.
4. LMWD is responsible for all costs of maintenance or improvements to the dam or Lake Madrone including, but not limited to, silt removal, weed control and valve maintenance.
5. If it comes to the attention of the LMWD Board of Directors that pollution of the water in Lake Madrone or the water flowing into Lake Madrone is occurring, LMWD will attempt to notify the polluter and will report the pollution to the Butte County Health Department.

The Division concludes that the above conditions are in the public interest and should be included in any permit issued on A30657 in accordance with the MOU between LMWD and BCWU. As set forth in the order at the end of this decision, the water right permit to be issued to LMWD will include a term requiring compliance with provisions derived from the MOU. In addition to the terms specified in the MOU, BCWU requested in a telephone conversation on March 26, 1999, that any permit issued on A30657 be conditioned to require LMWD to comply with the provisions of the judgement recorded on July 7, 1933, in Cameron et al. v. Feather River Forest Homes, Butte County, Superior Court No. 14014. LMWD has agreed to inclusion of the requested condition and this decision requires it to be included in any permit issued on A30657. Inclusion of the specified conditions resolves the concerns raised by BCWU.

**5.3 California Sportfishing Protection Alliance Protest** The CSPA protest was based on concerns about the effect of the project on public trust resources. The protest focuses on the following subjects:

1. Water quality,
2. Fishery resources,
3. Wildlife habitat,

4. Minimum flow releases, and
5. Public access for fishing.

The CSPA protest requests that any permit issued on A30657 be conditioned to protect water quality, fishery resources, and wildlife habitat. CSPA also requests that SWRCB staff prepare an initial study pursuant to CEQA and that any permit that may be issued include a requirement to provide public access for fishing.

By letter dated January 29, 1998, LMWD responded to CSPA's protest with a proposed stipulation for dismissal of the protest. The stipulation proposed that the permit be conditioned to include the following requirements:

1. The use of water under the permit be conditioned upon and subject to the "reasonable orders" of the RWQCB or any successor organization in regard to water quality impacts arising from sediment discharged from the dam.
2. "LMWD shall provide sufficient bypass through the gate valve to pass water through the dam for fishery needs downstream. LMWD shall set the gate valve during the filling process so as to bypass the greater of one (1) cfs of the natural inflow, or approximately twenty percent (20%) of the inflow, utilizing the area capacity curve and changes of storage in the lake in order to estimate that inflow, whichever amount is greater."
3. LMWD shall install two signs at specified locations stating there is public fishing access at locations near the dam and in the ponds formed below the dam.

CSPA responded in a letter dated November 18, 1998, which states that CSPA would withdraw its protest if LMWD agrees to the following conditions:

1. The LMWD allow public access for fishing pursuant to Title 23, California Code of Regulations, section 781.
2. The LMWD provide "reasonable public parking for the purpose of fishing" at Lake Madrone, including "parking for the handicapped."
3. The LMWD provide a handicapped accessible restroom facility for members of the public fishing at Lake Madrone.
4. The LMWD allow "public foot access for the purpose of fishing the state's water flowing into Lake Madrone."
5. The LMWD post signs at agreed upon locations advising the public that fishing is allowed at Lake Madrone pursuant to Title 23, California Code of Regulations, section 781.

The unresolved issues raised by the CSPA protest were discussed at an on-site meeting on January 8, 1999, and at the field investigation on March 12, 1999, as discussed below.

## **6.0 ON-SITE MEETING**

On January 8, 1999, Division staff held an informal on-site meeting with the applicant and protestants in an effort to develop terms that would resolve the issues raised in the unresolved protests. The parties were unable to reach agreement on terms that would resolve the issues raised by the CSPA protest and CSPA requested a field investigation pursuant to Water Code section 1345. CSPA later submitted a letter dated January 11, 1999, that provided comments relating to the January 8 informal field investigation meeting and additional information on CSPA's concerns.

## 7.0 FIELD INVESTIGATION

On January 27, 1999, the Division distributed a Notice of Field Investigation to the applicant, protestants, and other interested parties. The notice described the procedures for conducting the field investigation and the unresolved issues to be discussed. Division staff conducted the field investigation on March 12, 1999, in accordance with sections 1345 through 1348 of the Water Code. Division staff and other participants met at the Lake Madrone Inn parking lot at approximately 10 a.m. The field investigation lasted about three hours. The participants at the field investigation and whom they represented are as follows:

<b>PARTICIPANT</b>	<b>PARTY REPRESENTED</b>
Tom Van Gelder	CSPA
Ron Severson	CSPA
Zane Butterfield	BCWU
Bob Cameron	BCWU
Pat Brunagel	BCWU
Paul Minasian	LMWD
Lon Tennant	LMWD
Jeff Gonzales	CA Department of Forestry (CDF)
Stacer Hartshorn	CDF
Doug Straw	RWQCB-Redding
Terry Snyder	SWRCB Division of Water Rights

The following issues were discussed during the field investigation:

1. Public access for fishing at Lake Madrone.
2. Availability of public parking facilities.
3. Construction of public restroom facilities.
4. Water pollution at the lake or from upstream sources.
5. Sediment transport and removal.

Division staff explained that the purpose of the field investigation was to address unresolved protest issues and resolve them if possible. Division staff also explained that LMWD was lead agency for preparation of the CEQA document. The protestants were asked to provide information to establish that approval of the project would cause the specific problems alleged in their protests.

As discussed in section 5.2 above, the subject of water pollution in Lake Madrone or from upstream sources is addressed in the MOU agreed to by BCWU and LMWD following the field investigation. Any permit to be issued on A30657 will be conditioned in accordance with the provisions of the MOU, including the requirement for LMWD to report pollution to the Butte County Health Department and to notify the party causing the pollution. The other unresolved issues discussed during the field investigation or raised by the protests are addressed below.

## **8.0 ANALYSIS OF UNRESOLVED ISSUES**

The unresolved issues concerning A30657 include public access for fishing at Lake Madrone, availability of public parking and restroom facilities as requested by CSPA, operating restrictions to prevent release of sediment harmful to downstream uses and minimum bypass flows for protection of downstream uses. These issues are addressed in sections 8.1 through 8.5 below.

**8.1 Public Access to Lake Madrone for Fishing** CSPA asks that LMWD be required to provide public access for fishing around the entire lakeshore and on the streams that flow into Lake Madrone. CSPA maintains that the public has acquired a prescriptive right of access to the roads serving the subdivision and objects to the recently installed gates on the roads serving the subdivision. Some public fishing currently occurs at Lake Madrone, but the extent is not known.

LMWD owns or holds an interest in the property on which the dam is located and in the land adjoining the stream below the dam. LMWD is willing to provide public access for fishing to the portions of LMWD/Butte County property that are located: (1) along the crest of the dam; (2) adjacent to the dam along the county roadway; and (3) the area below the dam as shown on the attached parcel map (labeled Map No. 2). Prior to the formation of LMWD, the subdivision developer granted a Declaration of Trust in favor of the purchasers of subdivision lots. The Declaration of Trust granted an exclusive right of access to the lake bottom and two beach areas.



(Lake Madrone Water District v. Reichert, Butte County, Superior Court, No. 64282, Judgment dated September 24, 1981.) Private property abuts LMWD property near the dam and most of the land adjoining the lake is privately owned.

A "No Trespassing" sign is posted on the western boundary of a privately held parcel (Parcel 1 on attached Map No. 2), which abuts the shoulder of the dam. LMWD is willing to post a sign at the eastern boundary of the adjoining parcel on which the dam is located that says "Public Fishing Access." CSPA agreed that this language would be sufficient. LMWD is also willing to post a "Public Fishing Access" sign on the side of the roadway near the spillway for fishing in the pool at the toe of the dam. These areas were identified during the field investigation and inspection of proposed access points.

LMWD stated that the gates to the private roads through the subdivision were installed to protect homeowners following a recent increase in vandalism and theft. Although CSPA wants access over the roads through the subdivision, representatives of LMWD and CSPA agreed that access to the streams that flow into Lake Madrone is available by way of an abandoned road.

Public access for fishing is addressed by Fish and Game Code sections 5943 and 5944 and California Code of Regulations, title 23, section 781. Fish and Game Code section 5943 reads as follows:

"(a) The owner of a dam shall accord to the public for the purpose of fishing, the right of access to the waters impounded by the dam during the open season for the taking of fish in the stream or river, subject to the regulations of the commission."

"(b) Subdivision (a) does not apply to any impoundment of water by a dam that is wholly located on privately owned land that is primarily agricultural or residential in nature if the impounded waters are from a stream or river that is not naturally frequented by fish and if the dam does not prevent the free passage of fish over or around the dam. The Legislature finds and declares that this subdivision is intended to be declaratory of existing law."

Fish and Game Code section 5944 provides:

"The owner of a dam is not liable in damages to any person exercising the right to fish, who suffers any injury through coming in contact with, or tampering with, any of the property of the owner of the dam."

Section 781 of title 23 of the California Code of Regulations states:

"In compliance with Fish and Game Code section 5943, all permits for storage of water on a stream naturally frequented by fish shall require the permittee to accord to the public, for the purpose of fishing, reasonable right of access to the waters impounded by the dam under the permit during the open season for the taking of fish, subject to the regulations of the Fish and Game Commission and,

for domestic water supply reservoirs, subject to applicable public health requirements contained in title 17 of the California Administrative Code."

The California Supreme Court has ruled that under appropriate conditions, a reservoir operator may be required to organize and fund an extensive public fishing program. (*State of California v. San Luis Obispo Sportsman's Association* (1978) 22 Cal. 3d 440 [149 Cal. Rptr. 482].) However, there must be substantial evidence in the record to support imposition of a water right permit condition requiring greater public access than is otherwise required by law. (See *Bank of America v. State Water Resources Control Board* (1974) 42 Cal. App. 3d 291 [116 Cal. Rptr. 770, 780].)

In this instance, determination of a "reasonable right of access" meeting the requirements of section 781 of the regulations involves consideration of: (1) CSPA's expressed interest in access to the lake for fishing; (2) the relatively small size of Lake Madrone; (3) the residential use of the surrounding subdivision and LMWD's concern about public safety issues; (4) the exclusive easement held by subdivision lot owners to the lake bottom and beach areas; (5) the availability of extensive public recreational and boating facilities nearby at Lake Oroville; and (6) LMWD's stated willingness to provide public access for fishing at specified locations. Based on consideration of those factors, the Division concludes that the public access areas identified by LMWD will provide a reasonable right of public access for fishing at the reservoir and immediately below the dam, and that the proposed signs will provide reasonable notice of that right. The Division further concludes that it would be reasonable to allow LMWD to limit public access for fishing to pedestrian use at the locations LMWD proposes and fishing from small, non-motorized craft that can be safely launched from those locations. Resolution of CSPA's claim to a prescriptive right for public use of privately constructed roads in the subdivision adjoining Lake Madrone is outside the jurisdiction of the SWRCB and need not be resolved in order for the SWRCB to act upon A30657.

**8.2 Availability of Parking Facilities** In addition to requesting that Lake Madrone be open for public fishing as required by statute, CSPA asked that LMWD be required to provide public parking near the lake which is accessible to the disabled. CSPA requested that signs be posted declaring six parking spaces at the Lake Madrone Inn are available for use by the fishing public. LMWD responded that the spaces belong to the owner of the Inn property and LMWD's easement extends into the parking lot for dam maintenance only.

During the field investigation, Division staff pointed out that an additional four or five paved parking spaces may be available along the dam's eastern road shoulder, which is up to 15 feet wide. Following the field investigation, LMWD provided the SWRCB a copy of a parcel map verifying that the county has right of way easements in the vicinity of the dam of sufficient width to allow for parking in that area. (Map recorded at pages 2 through 6 of Book 48, Butte County Official Records.) Parking along the county's eastern road shoulder would be accessible to the disabled. Division staff also directed the parties' attention to 12 more unpaved parking spaces next to the roadway within three tenths of a mile from the dam.

As discussed in section 8.1 above, the law requires that water right permits for storage of water on streams "naturally frequented by fish" shall require the permittee to provide public access for

fishing to the waters impounded by the dam. (See Fish and Game Code section 5943 and title 23, California Code of Regulations, section 781.) Neither Fish and Game Code section 5943 nor the SWRCB regulations, however, require the owner of a dam to provide public parking for people fishing at a reservoir.

Water Code section 1253 authorizes the SWRCB to allow for appropriation of unappropriated water under such terms and conditions as will best develop, conserve, and utilize in the public interest the water sought to be appropriated. In the case of a large reservoir intended to be used for public fishing or other recreation, it might be reasonable to require a reservoir operator to provide sufficient parking to meet the expected demand from recreational users. In the present case, however, the project is a small reservoir developed for the recreational and aesthetic use of residents of the surrounding private subdivision. Although the owner of the dam must provide public access for fishing in accordance with the Fish and Game Code, there is no evidence that the available parking near Lake Madrone is insufficient to meet the anticipated demand. In this instance, the Division concludes there is insufficient cause to require the permittee to provide additional parking. If a parking problem develops in the future, it can be addressed at that time.

**8.3 Public Restroom Facilities** CSPA requested that public restroom facilities be provided and expressed concern about potential water quality problems in Lake Madrone if restroom facilities are not available to members of the public who utilize the lake for fishing. CSPA stated that it intends to work for accessible restroom facilities at all fishing locations.

The statutory requirement to provide access for fishing does not mandate that the owner of a dam provide public restroom facilities. In some cases, it may be an appropriate exercise of the SWRCB's authority under Water Code section 1253 to condition a water right permit upon requiring the permittee to provide public restroom facilities at a heavily used recreational reservoir. In this instance, however, there is no evidence that the nature or intensity of the use of Lake Madrone for fishing has caused, or is expected to cause, water quality problems in the absence of public restroom facilities. The RWQCB staff in attendance at the field investigation could not recall any enforcement actions being taken due to problems caused by fishermen's lack of access to public restrooms. The Division concludes that there is insufficient evidence in the record to justify requiring LMWD to provide public restrooms as a condition of receiving a water right permit.

**8.4 Restrictions on Release of Sediment** The problems concerning release of sediment from the dam at Lake Madrone are addressed in section 2.0 above. The 1984 Cleanup and Abatement Order discussed above restricts LMWD from discharging sediment from the dam at a greater rate than the instantaneous rate of flow of sediment into the lake unless authorized otherwise by the Regional Board Executive Officer. The order also requires LMWD to get approval from RWQCB and DFG before opening the gate valve at the dam to discharge sediment. The Cleanup and Abatement Order established that discharge of silt from Lake Madrone is considered a waste discharge and that LMWD is subject to regulation as a discharger of waste. RWQCB staff stated that the RWQCB could examine the merits of rescinding the Cleanup and Abatement Order and issuing a waste discharge requirement for release of sediment from the dam.

CSPA wants assurance that LMWD will not flush silt or other sediment from the lake by opening the outlet valve at the bottom of the dam. CSPA stated they believed LMWD has made efforts to improve disposal of sediment, but is concerned that LMWD may have no more space to deposit sediment.

LMWD's Board of Directors decides how water is released from Lake Madrone to Berry Creek. Water may be released through one or more siphons, a spillway, or a gate valve. The normal method of release is through the siphons, which take water near the lake surface. Extremely high lake levels can cause flows over the spillway, where sediment transport is uncontrollable. The gate valve, located near the bottom of the dam, may be operated to drain water from the lake. The gate valve is the only means of releasing water when the water level falls below the siphon inlets. Every several years, the gate valve is used to draw down the lake so that accumulated sediments can be removed from the bottom by heavy equipment.

LMWD stated that it has no control over the amount of sediment coming into the lake and that the existing Cleanup and Abatement Order seems to have provided a workable solution to the sediment issue. In response to the draft stipulation for protest dismissal, LMWD stated that the applicant is in compliance with the Cleanup and Abatement Order and it operates the lake to cause less sediment to leave Lake Madrone than enters. LMWD also stated it is willing to consider applying for a waste discharge requirement from the RWQCB if requested to do so.

SWRCB Order No. WQ 85-10 affirmed that the release of sediment from the dam at Lake Madrone is a discharge of waste for which LMWD is responsible. The record in this proceeding establishes that LMWD can ordinarily maintain bypass flows below the dam by releasing water through the spillway or the siphons. Downstream water quality problems in the past have been associated with the release of water and sediment from the gate valve at the bottom of the dam. Therefore, the Division concludes that any water right permit issued on A30657 should be conditioned to require that, prior to releasing any water from the gate valve at the bottom of the dam in the future, LMWD must file a Report of Waste Discharge with the RWQCB pursuant to section 13260 of the Water Code. LMWD should be prohibited from releasing water from the gate valve at the bottom of the dam unless waste discharge requirements are issued by the RWQCB or the SWRCB and any release of water from the gate valve is made in compliance with such requirements.

**8.5 Instream Flows for Protection of Fish** The CSPA protest expresses concern about the maintenance of flow downstream of the dam for protection of fish. As indicated in Map 1, the stream reach below Lake Madrone and upstream of Lake Oroville is approximately 1.5 miles long. LMWD proposed that its diversion of water be subject to the following requirement when (1) the lake is not full and (2) LMWD is not utilizing the dam's siphon bypass facility:

"When appropriating water for the purposes of filling the lake behind the dam, LMWD shall provide sufficient bypass through the gate valve to pass water through the dam for fishery needs downstream in compliance with the existing Cleanup and Abatement Order. Since there are no stream monitoring gauges upstream of the dam usable for this purpose, LMWD shall set the gate valve during the filling process so as to bypass the greater of one (1) cfs of the natural

inflow, or approximately twenty percent (20%) of the inflow, utilizing the area capacity curve and changes of storage in the lake in order to estimate that inflow, whichever amount is greater."

CSPA requested that gauges be installed to monitor inflows and bypasses. However, the Division concludes that the bypass methodology proposed by LMWD would provide a sufficient means of regulating bypass flows if: (1) the gate valve is properly (hydraulically) rated for bypassing flows to protect downstream fishery resources; and (2) a reservoir staff gage is operated for use with the area capacity curves.

The limited season of diversion from March 1 to April 15 of each year specified in A30657 effectively requires that the applicant bypass all inflow during the remainder of the year. The applicant has proposed to bypass a minimum of twenty percent or 1 cfs of the natural inflow, whichever is greater, during the authorized season of diversion. CSPA did not submit specific information regarding the downstream flow regime needed for protection of fishery resources. In view of the limited season of diversion, the small proportion of annual runoff to be diverted, the infrequency with which the reservoir is expected to be drained and refilled, and the absence of evidence from DFG or elsewhere supporting a higher bypass flow requirement, the Division concludes that there is insufficient evidence in the record to establish a higher bypass flow requirement than proposed by the District.

Fish and Game Code section 5937 provides in relevant part:

"The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam..."

In addition to the requirement of section 5937, any permit issued on A30657 will include Standard Permit Term 12 relating to the continuing authority of the SWRCB. The SWRCB's continuing authority to protect public trust resources under Term 12 may be exercised to modify the bypass flow requirements specified in a permit in the event that future information establishes that such action is appropriate.

## **9.0 AVAILABILITY OF WATER FOR APPROPRIATION**

The approximate runoff of the watershed tributary to Lake Madrone can be calculated using the Rational Runoff Equation as follows:

$$Q = c i a$$

where  $Q$  = total annual runoff (afa)

$c$  = runoff coefficient

$i$  = annual precipitation (inches/year)

$a$  = area tributary to Lake Madrone (acres)

The Berry Creek Watershed encompasses approximately 15.3 square miles or 9,787 acres. The watershed has two major tributaries, Galen and Martin Creeks. The tributary area above the reservoir has a mean annual rainfall of 57.6 inches. Using a conservative runoff coefficient of 0.3, the calculated average annual runoff into Lake Madrone would be 14,093 afa. Information in Division records indicates that other water diversions in the Berry Creek Watershed are as follows:

<b>DIVERSION TYPE</b>	<b>DIVERSION/ STORAGE AMOUNT</b>	<b>TOTAL ANNUAL USE</b>
<b>A=APPLICATION</b> <b>S=STATEMENT</b>		
A 11753 (License 5086)	1,500 gpd	< 1.5 afa
A 23853 (License 10203)	500 gpd	< 1 afa
A 26904 (Permit 18878)	49 afa	22 afa
S 5285	< 500 gpd	1 afa
S 10594	171 miners inches	2,300 afa
	<b>TOTAL</b>	<b>2,325 afa</b>

Subtracting total annual diversions of 2,325 afa from unimpaired average annual runoff of 14,093 afa leaves 11,968 afa as the average annual impaired runoff after accounting for estimated use under rights on file with the SWRCB. Of this amount, LMWD is requesting 200 afa. Therefore, there should be adequate runoff in the Berry Creek watershed to provide the water requested in A30657. As discussed in section 5.1, LMWD has agreed to inclusion of Standard Permit Terms 80, 90, and 91 to protect the prior downstream rights of the SWP.

## **10.0 COMPLIANCE WITH CEQA**

LMWD is the lead agency for purposes of compliance with the California Environmental Quality Act. LMWD prepared an Initial Study and Proposed Negative Declaration (IS/ND) dated January 24, 1998, which was circulated by the State Clearinghouse from March 6 to April 6, 1998 (SCH # 98032010). On March 30, 1998, Division staff sent a letter of comment to LMWD that identified deficiencies in the IS/ND. However, the IS/ND was adopted by LMWD as presented and the Notice of Determination was filed with the Butte County Clerk on February 17, 1999. The 35 day period for filing suit to challenge LMWD's compliance with CEQA has passed. The requirements established in this decision to protect the environmental and public trust resources in the Lake Madrone and Berry Creek area are based upon the SWRCB's independent authority under the Water Code. The Notice of Determination filed by the SWRCB states that the water right permit will include terms and conditions to protect environmental and public trust resources in addition to what is stated in the LMWD Notice of Determination.

## **11.0 CONCLUSION**

Based on the evidence and findings discussed above, the Division of Water Rights concludes that there is water available for appropriation under A30657, that the use specified in A30657 is beneficial, and that issuance of a permit subject to the conditions specified in this decision is in the public interest.

## ORDER

**IT IS HEREBY ORDERED** that Application 30657 is approved and that a permit be issued subject to the terms established in this order. The permit shall contain Standard Permit Terms 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 80, 90 and 91 and the following additional terms:

1. *Permittee shall comply with the following provisions derived from the agreement between permittee and Berry Creek Water Users Incorporated (BCWU) executed on March 27, 1999, and filed with the State Water Resources Control Board (SWRCB):*

*(a) Permittee will notify BCWU in advance of planned changes in lake water level.*

*(b) Permittee will not operate Lake Madrone in a manner that deprives downstream landowners along Canyon Creek of the use of water. During drought years, permittee will maintain an outflow of water at the dam which is no less than the inflow to Lake Madrone.*

*(c) The water in Lake Madrone is to be used for recreational purposes (swimming, fishing, and boating) and fire protection only.*

*(d) Permittee is responsible for all costs of maintenance or improvements to the dam or Lake Madrone, including, but not limited to, silt removal, weed control, and valve maintenance.*

*(e) If it comes to the attention of the Permittee's Board of Directors that pollution of the water in Lake Madrone or the water flowing into Lake Madrone is occurring, permittee will attempt to notify the polluter that pollution is occurring and will report the pollution to the Butte County Health Department.*

*Inclusion in this permit of certain provisions of the referenced agreement shall not be construed as disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this permit. (Modified version of Standard Permit Term 24.)*

2. *Permittee must comply with the conditions imposed upon Feather River Forest Homes in the judgment entered by the Superior Court for Butte County on July 7, 1933 in Cameron et al. v. Feather River Forest Homes, et al. (Superior Court No. 14014).*
3. *Lake Madrone shall be kept open to the public for recreational use subject to a reasonable charge for any services or facilities that are provided by permittee. Failure to allow public access may result in revocation of the permit or reduction in the amount of water that may be stored. (Modified version of Standard Permit Term 45.)*



4. *Permittee shall post signs at the eastern boundary of the parcel of property on which the dam is located and near the entrance to the spillway stating "Public Fishing Access." Permittee shall allow reasonable public access to the surface of Lake Madrone for fishing from the banks of the parcel on which the dam is located and shall provide access for fishing from small non-motorized craft which can be safely launched from that location.*
5. *Permittee shall provide sufficient bypass through the siphons or gate valve to pass water through the dam for fishery needs downstream in compliance with the existing Cleanup and Abatement Order. Permittee shall bypass the greater of one (1) cubic-foot per second (cfs) or approximately twenty percent (20%) of the inflow. The inflow shall be calculated and recorded daily by utilizing the area capacity curve, staff gage measurements, outflow measurements and reasonable estimates of evaporation. This will result in a one-day delay in setting flow releases.*
  6. *Bypass flow ordinarily shall occur only through the surface siphon valve and the overflow spillway when necessary. If, at any time, Permittee intends to discharge water through the gate valve, then Permittee must first file a Report of Waste Discharge with the California Regional Water Quality Control Board (RWQCB) pursuant to California Water Code section 13260. Thereafter, water may be diverted only during such times as all requirements prescribed by the RWQCB or SWRCB are being met. No point source discharges of waste to surface water shall be made unless Waste Discharge Requirements are issued by the RWQCB or the SWRCB. (Amended Standard Permit Term 101.)*
  7. *Permittee shall comply with Cleanup and Abatement Order issued on November 29, 1984, by the RWQCB for the Central Valley Region until the first Report of Waste Discharge is filed and Waste Discharge Requirements are issued.*
  8. *Permittee shall install and properly maintain in the reservoir a staff gage, satisfactory to the Chief of the Division of Water Rights, for the purpose of determining water levels in the reservoir. Permittee shall record the staff gage reading on or about October 1 of each year. Such readings shall be supplied to the SWRCB with the next progress report submitted to the SWRCB by permittee. (Modified version of Standard Permit Term 47)*
  9. *Permittee shall allow Berry Creek Water Users Incorporated and all successors in interest, or a designated representative, reasonable access to the reservoir for the purpose of verifying staff gage readings and determining water levels in the reservoir.*
  10. *Permittee shall comply with all requirements of the Department of Water Resources Division of Safety of Dams.*
  11. *Permittee shall maintain a staff gage at a location satisfactory to the Chief of the Division of Water Rights, and an outflow measuring devise which is*

*suitable for determining bypass flows required by the conditions of this permit.  
(Modified version of Standard Permit Term 62.)*

*12. The capacity of the reservoir covered by this permit shall not exceed 200  
af. (Standard Storage Permit Term.)*

*13. The SWRCB may require the release of water, which cannot be verified as having been  
collected to storage consistent with the terms of this permit.*

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Date Harry M. Schueller, Chief

Division of Water Rights

State Water Resources Control Board