

**Lake Alpine Water Company/County of Alpine
Closing Brief
for the SWRCB's July 14, 2008, hearing on
Petitions for Partial Assignment of SFA 5648, Accompanying Application 5648X07, Petition for
Changes to SFA 5648, and Application 31523**

1. Introduction

As discussed during the hearing, these petitions and accompanying applications will play a vital role in the future of the Lake Alpine Water Company (LAWC) and the County of Alpine (County) (collectively the "Applicants"). The water that is being sought will allow LAWC to serve a development that has been planned by the County since 1978, but due to a variety of reasons, has not been possible until now (RT, page 26, lines 1-16). Without this water, the planned community will not be developed, which will necessarily mean a loss of jobs and potential revenue for a County that has very limited similar opportunities (RT, pages 25-27)(Applicants' Exhibit N, page 1, paragraph 5, page 3, paragraphs 17 and 18).

2. Resolution of Hearing Issues

In its May 21, 2008, Notice of Public Hearing, as amended by the June 10, 2008, notice, the SWRCB outlined fifteen (15) hearing issues for the Applicants to address. Although each hearing issue has been addressed by the Applicants' oral and written testimony submitted during the hearing, we will elaborate on each of the hearing issues to ensure they are answered to the SWRCB's satisfaction.

1.a. Does the Applicants' proposed development conflict with a general or coordinated plan for the development of water that would use SFA 5648?

The proposed development does not conflict with any general or coordinated plan for the water. Although ten protests were filed against the project (see Applicants' Exhibit L, page 3), all of these protests were resolved and the project was unopposed at the hearing.¹ In fact, the attorney for SSJID and OID appeared and supported the project (RT, page 6). Ms. Terry Woodrow, a member of the County of Alpine Board of Supervisors, testified that the project does not conflict with any County of

¹ Sometimes throughout the Applicants' testimony references are made to both eight and ten protests. This is due to Oakdale Irrigation District and South San Joaquin Irrigation District as well as Calaveras County Water District and Northern California Power Association filing joint protests. If they are counted together, the number of protests is eight, if separated the number is ten.

Alpine plan (Applicants' Exhibit N, page 3, paragraphs 19 and 20). And Mr. Robert Wagner testified at the hearing that his review of the California Water Plan (Applicants' Exhibit P) revealed no plan for the development of the water (Applicants' Exhibit F, page 7, paragraph 35)(RT, page 14, lines 14-17).

According to pages 31-33 and 125 of D-1635 (Applicants' Exhibit S), the California Water Plan is the principal document to consult when making this determination. Thus, all of the evidence submitted supports the conclusion that the project does not conflict with any general or coordinated plan for the water. There was no evidence submitted to the contrary.

1.b. Does the Applicants' proposed development conflict with water quality objectives established pursuant to law?

According to Mr. John Kramer, the Applicants' environmental specialist, the project will not conflict with water quality standards or waste discharge requirements (Applicants' Exhibit H, page 6, paragraphs 21-22). This project is located high in the Sierra mountains and proposes to divert a very small amount of water relative to what is available (Applicants' Exhibit F, page 6, paragraph 28, and Appendix A, attachments). Due to the location and size of the project, no impact of the project would be expected above New Melones Reservoir. Below New Melones, the Bureau of Reclamation and the Department of Water Resources are required to operate the CVP and SWP in a manner which assures that water quality objectives in the Sacramento-San Joaquin Delta are met (Applicants' Exhibit S, page 125). Thus, no impact would be expected, and no evidence was submitted to the contrary.

1.c. During Applicants' proposed diversion season, will at least 395 afa of water be physically available in the stream under a priority assigned pursuant to SFA 5648? Alternatively, would water be available under a priority pursuant to Application 31523?

According to Mr. Robert Wagner, the 395 afa of water requested from SFA 5648 will be available more than 99% of the time at the point of diversion (Applicants' Exhibit F, pages 3-5)(RT page 14, lines 4-7). However, the full amount of water sought would not be available pursuant to Application 31523, especially if the Fully Appropriated Stream finding is applied to this application (Applicants' Exhibit F, pages 7-9, paragraphs 34, 36-39). If the FAS finding is applied, then little, if any, of the

water sought would be available during the limited diversion season due to the reduction of the diversion season and because much of the water would still be frozen during that reduced diversion season.

1.d. Should the State Water Board approve the petition for partial assignment of SFA 5648? If so, what conditions, if any, should be included in the approval to ensure that the diversion is in accordance with applicable law and in the public interest?

Yes, the SWRCB should approve the petition for partial assignment of SFA 5648 for several reasons. One, because the Stanislaus is fully appropriated from April 1 to October 31—and the period of highest runoff (snowmelt) occurs after April 1st—the only way to ensure the water sought will actually be available to the Applicants is if the water reserved by SFA 5648 is made available to the Applicants. This will allow the full range of beneficial uses, including recreation, to be utilized by the Applicants. If the season was curtailed to only November 1 to March 31, the Applicants would need to withdraw from storage during April, May, June and July, which would impair recreational uses due to lower lake levels than would occur if the SFA 5648 assignment is approved (Applicants' Exhibit F, page 7, paragraph 34).

Two, Water Code Section 10504.01 provides "when the board's determination is favorable to the petitioner, it shall assign all or a portion of the application to the petitioner, accept and approve the assigned portion, and issue a permit as in other cases provided by law."

Three, according to the October 29, 2007, letter from Jesse Barton, which is in the SWRCB file for this application (Staff Exhibit 1(b)), the California State Legislature passed the Feigenbaum Act in 1927, which authorized the State to file applications for unappropriated water. As soon as the statute became effective, applications were filed by the State in accordance with its terms. These applications allowed the State to develop a coordinated plan for the development of water in the State. However, in 1929, a report was submitted to the Legislature. This report considered the impact the 1927 legislation may have on the foothill and mountainous areas of the State, and recommended the following:

The foothill sections of northern and central California have furnished much of the basic wealth

of our state and should not be overlooked in the development of the water resources of those parts of the state...Of the waters brought under control of the state the right of use of such part thereof as may be reasonably anticipated as necessary for supplying and caring for all the aforesaid uses should at this time be reserved, and allotted for such uses as required. In supplying areas of deficiency of water from areas of surplus only such water as is not needed to serve vested or other property rights, or necessary for supplying the uses and purposes hereinbefore mentioned should be considered and no water should be diverted from the area of origin which is now or which may ever be required for any beneficial use within such area of origin.

Put differently, the committee was concerned that without protection for smaller, yet undeveloped, areas of origin, it would be possible for the 1927 Act to, in effect, "lock up" most of the currently unappropriated water and leave the areas of origin without any water for future development. As a result of this recommendation and a couple more years of hearings, in 1931 the Legislature adopted an amendment to the 1927 Act, which is now codified as Section 10505 of the Water Code, which provides:

No priority under this part shall be released nor assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any such water necessary for the development of the county.

Thus, with the adoption of Section 10505, the Legislature decided to protect areas of origin and expand the area of origin principle to counties of origin. The plain language of this statute stands for the proposition that a county of origin, such as Alpine County, has preference to a State-filed application, as long as the water is necessary for development of the county. This preserves a state policy that:

It shall be the policy of the state to extend to the areas of surplus water * * * definite and valid assurance that such areas of surplus from which water is or may be taken shall have a right to ample water for their ultimate needs, superior and prior to that of the areas of deficiency to make use of such surplus. (25 Ops.Cal.Atty.Gen.8, 13, 15 (1955).

The California Attorney General has opined that "county of origin" is defined as the county in which the water "falls in the form of precipitation;" or in other words, within the county's watershed.² Mr. Robert Wagner testified that the water covered by SFA 5648 originates in Alpine, Calaveras, and Tuolumne counties. The water originating in Alpine County alone is estimated to be 184,000 afa, of

² 25 Ops.Cal.Atty.Gen.8, 17 (1955).

which the Applicants' request of 395 af is 0.2 percent. (Applicants' Exhibit F, page 3, paragraph 12).

In sum, these three points show that the Applicants are entitled to the protection provided by Water Code Section 10505 and are also entitled to a portion of the water reserved under SFA 5648. If it refused to assign a portion of SFA 5648 to the Applicants, the SWRCB would be defeating the very purpose of the Feigenbaum Act and the subsequent hearings and legislation passed and adopted by the State of California.

As discussed previously, due to the location and size of the proposed diversion, no special permit terms are necessary for this project, and there was no evidence submitted to support a contrary finding.

With regard to the public interest, Water Code Section 106 specifically provides that "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water...." In addition, Water Code Section 106.5 provides that "It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses...." Since the water sought for appropriation will be used for municipal purposes—which necessarily includes domestic uses—then approval of the petition for partial assignment is absolutely in the public interest. In addition, both Mr. Charles Toeniskoetter and Ms. Terry Woodrow testified that the assignment would provide water and jobs to a community with limited opportunities (Applicants' Exhibit L, page 4, paragraphs 20 and 21; Exhibit N, page 1, paragraph 5, page 3, paragraphs 17 and 18; respectively)(RT pages 25-27, 32).

The SWRCB should not specifically add Permit Terms 91 or 93 to any permit issued by the Board due to practical and legal reasons. Practically speaking, Term 91 applies only to permits greater than 1 cfs or 100 afa of storage when hydrologic continuity with the delta exists. The Applicants are only seeking 0.78 cfs and 220 afa of storage. Thus, Term 91 would not apply to the direct diversion. While the storage limit of 100 afa is met, this project would not be expected to have

hydrologic continuity with the delta when Term 91 is imposed. Term 93 should not be imposed because, by its own terms, it should only be imposed when a curtailment would be effective in lowering TDS at Vernalis. In this case, the total amount of 395 acre-feet of water sought to be diverted under this petition would not be expected to have any impact on water quality in Vernalis since the LAWC diversion point is approximately 58 miles from New Melones Reservoir. In addition, since releases from New Melones are responsible in large part for delta water quality, the Applicants would have no control over these releases.

Legally speaking, in light of the decision in *El Dorado Irrigation District v. State Water Resources Control Board*, and the SWRCB's subsequent Order WR 2007-0013, we do not believe the SWRCB can legally impose either Term 91 or 93 on a State-filed application.

Lastly, the only special condition the Applicants believe necessary to include in any water right permit would be an extended period to put the water to beneficial use. As was discussed during the hearing, this project will take several years to develop full beneficial use, which will almost certainly require a petition for extension of time (RT pages 15-17). Projects like the applications will require time to develop the infrastructure to put the water to use. Rather than issue a permit for an amount of time both the Applicants and the SWRCB know will not be adequate, we would prefer that any permit issued allow for 25 years to fully put the water to beneficial use. This will prevent the need to go back before the SWRCB and save both the Applicants and the SWRCB time and money. The request for 25 years is not unreasonable, as municipalities³ are typically provided some latitude in putting water to beneficial use. (See, e.g. Board Order WR 2000-13, at p. 14; Board Order WR 2006-0017; WC §§ 106.5, 1203.)

1.e. Should the State Water Board release the priority of SFA 5648 in favor of application 31523? If so, what conditions, if any, should be included in the approval to ensure that the diversion is in accordance with applicable law and in the public interest?

No, the SWRCB should not release the priority of SFA 5648 in favor of application 31523. As discussed above, releasing the priority would defeat the very purpose of the State-filed application

³ Although the Applicants are not municipalities, the water sought is for municipal purposes, so there is no reason why they should not be treated in the same manner in this situation.

legislation. This legislation was passed to ensure small rural communities would have the ability to develop as their needs arose and put them on equal footing with other water right holders. By releasing from priority, the Applicants would lose the priority of 5648 and would come in last place in any water shortage situation. There was no evidence submitted that would support such action.

1.f. In which county or counties does the water covered by SFA 5648 originate? Will the State Water Board's partial assignment deprive the county or counties in which the water covered by the application originates of any such water necessary for the development of the county or counties?

The water covered by SFA 5648 originates in Alpine, Calaveras, and Tuolumne counties (Applicants' Exhibit F, page 3, paragraph 12). Since Alpine County is a county of origin itself, assignment will not deprive a county covered by the application water necessary for the development of the county.

1.g. What terms and conditions, if any, should be included in any permit issued by the State Water Board? Will approval of the application result in adverse environmental impacts, including water quality impacts, or harm to public trust resources? What conditions, if any, should the State Water Board adopt to avoid or mitigate any adverse impacts on fish, wildlife, or other public trust resources that may occur as a result of the approval of the petition?

The only special terms and conditions that should be included in any permit issued by the SWRCB (other than the request for an extended diligence period, 1.d. above) are limited to the special settlement terms reached between the Applicants and the protestants. Those special terms and conditions are set forth in Applicants' Exhibit O.

According to both of the Applicants' environmental consultants, approval of the application will not result in adverse environmental impacts, water quality impacts, or harm to public trust resources, such that would require special conditions or mitigation (Applicants' Exhibit H, page 9, paragraph 36; Exhibit J, page 2, paragraph 5)(RT page 20, lines 10-15; pages 22-23). No evidence was submitted to support a contrary finding.

2.a. Do the Applicants' petition and application for partial assignment of SFA 5648 propose the development of water within the place of use designated by SFA 5648, particularly insofar as it pertains to the Stanislaus River watershed?

The project is located outside of the boundaries set forth in SFA 5648 (Applicants' Exhibit F, Attachment A, Plate 1). However, the place of use is within the NFSR basin and water used by the

project will remain in the NFSR basin (Applicants' Exhibit F, page 3, paragraph 13).

2.b. Would approval of the Applicants' petition to change the point of diversion, place of use, and purposes of use for SFA 5648 result in injury to any legal users of water, unreasonably affect fish, wildlife, or instream beneficial uses, and serve the public interest?

Approval of the petitions to change will not injure any legal users of water because the water that was reserved by SFA 5648 for the North Fork is not now being diverted, so no injury would occur from changing it from a theoretical use to an actual use. Put differently, since the water is not now being diverted, we are not asking to change an *existing* point of diversion, place of use, or purpose of use; the petitions to change will merely allow the diversion to *begin* in a location not described in SFA 5648. Thus, no one can be injured by the change, because no one can be relying on water that is not yet being diverted. Even if we do assume a change is occurring, the impacts from putting some of the reserved water to use are the same as the impacts discussed at 1.c. and 1.d. above. With specific reference to legal users of water, the SWRCB publicly noticed the petitions and application on December 10, 2004. The SWRCB received ten protests from interested parties and legal users of water. After consultation with these parties, the Applicants have resolved all ten of the protests based upon the insignificant nature of the proposed diversion (Applicants' Exhibit F, page 5, paragraph 26; page 6, paragraphs 28-31)(RT page 14, lines 8-13). This provides ample proof that the petition for partial assignment, the petition for change, and the application will not result in injury to legal users of water.

With respect to environmental impacts, since no change of an existing point of diversion is really occurring—the project is really only putting reserved water to use—the findings are the same as 1.g. above. With regard to the public interest, see the findings of 1.d. above.

2.c. Should the State Water Board approve the Applicants' change petition for SFA 5648? If so, what conditions, if any, should be included in the State Water Board order approving the change petition?

Yes, the change petition should be approved. There are no outstanding protests and there is no evidence that the so-called *change* will result in any injury to legal users of water or cause unreasonable impacts to fish, wildlife, or instream uses.

3.a. Are the Applicants entitled to priority for any of the following reasons:

(1) under the watershed protection statutes (WC §§ 11128, 11460): Yes. When the original petition for partial assignment was filed in 1996, the petition was protested by DWR and BOR. When the amended petition for partial assignment and Application 31523 were filed in 2003, we anticipated being protested by DWR and BOR a second time. These code provisions make clear that neither entity can deny the prior right of a watershed of origin to the water needed to satisfy the beneficial needs of the watershed. Thus, neither DWR nor BOR would have any basis of protest against Application 31523 filed by Alpine County, a county of origin, nor can any decision issued by the SWRCB subordinate Application 31523 to DWR or BOR water rights. DWR or BOR cannot be prior in right to Application 31523.

(2) under the county of origin statutes (WC § 10505): Yes. Application 31523 is entitled to special consideration similar to that provided by Section 10505 because it was filed under area-of-origin principles (see the Applicants' October 24, 2003, submittal letter, Staff Exhibit 1.b and c.). Both WRO 89-25 and WRO 98-08 provide for the acceptance of new applications on streams systems that have been determined to be fully appropriated that propose appropriations entitled to the benefit of area-of-origin principles. See WRO 89-25 at Section 9.0, page 52; WRO 98-08 at Section 4.6, page 20 (Staff Exhibit 1.g). The special consideration should be in the form of an exemption from the fully appropriated streams index. See also California Code of Regulations, Title 23, Section 873(e).

(3) over holders of post-1914 appropriative water rights in the counties of origin whose rights are junior to SFA 5648, but senior to Application 31523:

In this case, the Applicants would be entitled to priority, but only with respect to the fully appropriated streams index. The Applicants would not be subject to the FAS, while other, non-area-of-origin water rights would be.

3.b. Is water available for appropriation? If so, when and under what circumstances is water available?

Mr. Robert Wagner testified that with the requested diversion season (October 1 – July 31) water is typically available for the appropriation (Applicants' Exhibit F, page 8, paragraph 36). However, if the

diversion season were to be reduced, for whatever reason, the amount of requested water would not satisfy the county of origin needs or the needs of the Bear Valley Community. (Applicants' Exhibit F, page 8, paragraph 39)(RT page 15, lines 1-6).

3.c. Is the proposed appropriation for a beneficial use and in the public interest? If the State Water Board approves the application, what conditions, if any, should be included in the permit to ensure that the diversion is in accordance with applicable law and in the public interest?

Since Application 31523 is for the same purpose of use as the petition for partial assignment of SFA 5648, the answers to this question are the same as those presented in 1.d. above.

3.d. Will the proposed appropriation cause injury to the prior rights of other legal users of water, cause environmental impacts or harm to public trust resources, or cause degradation of water quality on a project-specific or cumulative basis?

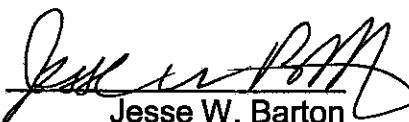
This project will not injure the prior rights of other legal users of water (Applicants' Exhibit F, page 8, paragraph 35), nor will it cause environmental impacts or harm to public trust resources (Applicants' Exhibit H, page 9, paragraph 36; Exhibit J, page 2, paragraph 5), or cause degradation of water quality on a project specific or cumulative basis (Applicants' Exhibit H, page 6, paragraphs 21-22; page 8, paragraph 30)(Applicants' Exhibit C, page 34). There was no evidence submitted to support a contrary finding.

3.e. If issues 3.a. through 3.d. are answered affirmatively, what terms or conditions should be included in the approval to mitigate for such impacts or harm that may occur as a result of approval of the application?

This question is unclear. Only question 3.d addresses "impacts or harm that may occur as a result of approval of the application," so it is unclear what "such impacts or harm" to which this question refers to in questions 3.a through 3.c. With regard to question 3.d, to which this question more appropriately refers, there are no impacts or harm anticipated, so no special terms or conditions are warranted.

Dated: 8/26/08

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