



Linda S. Adams  
Acting Secretary for  
Environmental Protection

# State Water Resources Control Board

## Division of Water Rights

1001 I Street • Sacramento, California 95814 • (916) 341-5300  
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000  
FAX (916) 341-5400 • <http://www.waterboards.ca.gov/waterrights/>



Edmund G. Brown Jr.  
Governor

July 26, 2011

In Reply Refer to:  
CAR:262.0(18-09-02)

Mr. Jim Chapman, Chairman  
Lassen County Board of Supervisors  
221 S. Roop Street, Suite 4  
Susanville, CA 96130

Dear Mr. Chapman:

### CLASSIFICATION OF WATER EXITING THE BLY TUNNEL AND WATER RIGHTS APPURTENANT THERETO

I have reviewed your letter of May 19, 2011 sent on behalf of the Lassen County Board of Supervisors. You indicate in this letter that the County Board of Supervisors disagrees with the position I have taken as a staff member of the Division of Water Rights (Division) of the State Water Resources Control Board (State Water Board). You also indicate that there is some confusion on the part of the Board of Supervisors regarding the nature of the water currently exiting the Bly Tunnel and request that I clarify my position regarding the Susan River Adjudication and the relation of this proceeding to water coming from the Bly Tunnel.

While Judgment and Decree 4573 of the Superior Court in and for the County of Lassen, commonly referred to as the Susan River Decree (Decree), was undertaken to determine the rights of the Susan River and tributary streams, I'm not aware of any evidence that would suggest that a significant purpose of this proceeding was to deal with the importation of water from Eagle Lake into Willow Creek. Paragraph 45 of the Decree states in part:

*"Subject to all of the foregoing rights and provisions, the various parties hereinafter enumerated in Schedule 3 are entitled to rights in and to the use of the natural flow of Willow Creek and Susan River below its confluence with said Willow Creek, during the seasons hereinbefore stated in paragraph 21, for domestic, stock-watering and irrigation purposes upon their respective lands as shown on said Division of Water Resources Map and as hereinafter described under their respective names in Schedule 1, in accordance with the acreages to be supplied, priorities and quantities of water allocated, and through the diversions from the sources named as set forth in said Schedule 3;"* (emphasis added)

Paragraph 8 of the Decree defines the term "natural flow", as used in paragraph 45, as:

*". . . such flow as will naturally occur at any given point in a stream from the run-off of the watershed which it drains, from springs which naturally contribute to the stream, from seepage, and from waste and return flow from dams, conduits, and irrigated lands; as distinguished from released stored water and from 'foreign water' directly conveyed to a stream from another watershed."* (emphasis added)

Consequently, the rights identified in Schedule 3 do not entitle the right holder to divert foreign water which would include imports of Eagle Lake water. Also, pursuant to California water law

*California Environmental Protection Agency*

percolating groundwater that would **not** reach Willow Creek under natural conditions but is imported into the watershed and abandoned is also considered to be “foreign” water for which diversion is not authorized under the rights listed in Schedule 3.

A later portion of Paragraph 45 of the Decree includes the only mention of water imported from Eagle Lake via the Bly Tunnel. The applicable portion of this paragraph states:

*“ . . . provided however, that diversion into the District By-Pass Canal (designated on said Division of Water Resources Map as Diversion 121 as hereinafter described in Schedule 2), shall be restricted to the excess Eagle Lake waters, if any, flowing in said Willow Creek over and above a combined natural and foreign water flow at that point sufficient to meet the water requirements for uses under Diversions 122 to 148, inclusive, said water requirements not to exceed 24 cubic feet per second; provided further, that diversion in the District Re-Diversion Canal (designated on said Division of Water Resources Map as Diversion 149 as hereinafter described in Schedule 2), shall be restricted to Eagle Lake waters, if any, flowing in said Willow Creek at that point;”*

I believe that this language was included in the Decree in order to ensure that the Tule and Baxter Irrigation Districts (Districts) did not divert the “natural” flow of water in the Willow Creek watershed to the detriment of local landowners who had prior vested rights (e.g., riparian and/or pre-1914 appropriative rights). Water diverted from Eagle Lake via the Bly Tunnel between 1924 and 1935 flowed within the Willow Creek system for over 22 miles before being recaptured into the Eagle Lake Ditch. The first provision in paragraph 45 guaranteed that the entitlements for Diversions 122 through 148 (inclusive), up to 24 cfs, would be met before the Districts took any water from the system at Diversion 121. The second provision specifically restricted the District’s diversion from Willow Creek at Diversion 149 to only Eagle Lake water, which the Districts imported under post-1914 appropriative water right permits issued by the State Water Board’s predecessor. While some parties may have expressed an opinion that the first provision above appears to allocate Eagle Lake water to the water users at Diversions 122 through 148, the provision is merely a condition placed upon the diversion of water at Diversion 121 and is not a guarantee of flows from the Bly Tunnel for use by others.

The landowners along Willow Creek whose rights are identified in Schedule 3 of the Decree have no entitlements that would authorize them to demand that “**foreign**” water be allowed to continue to flow through the tunnel plug as their rights only relate to “**natural**” flows. The Decree does not list the tunnel exit as a point of diversion nor does the Decree identify any basis of right associated with flow from the tunnel other than the excerpt from paragraph 45 discussed above that describes the restrictions on the Districts regarding diversion into the Eagle Lake Ditch from Willow Creek.

Eagle Lake water diverted into the mouth of the Bly Tunnel is “foreign” water that would never have reached Willow Creek in the absence of the tunnel. The only way a diverter within the Willow Creek watershed could lay claim to a right to the water discharging from the tunnel portal, as defined by the Decree, is if the flow comes from a **natural spring** that had previously

discharged into the Willow Creek watershed prior to the construction of the tunnel. I'm not aware of any evidence of natural springs at or in the immediate vicinity of the Bly Tunnel portal. I have made several inspections of the lower end of the tunnel coupled with flow measurements just below the plug and just below the tunnel portal. In late June of this year, I walked the entire length of the tunnel between the plug and the tunnel portal. I found no evidence that would support an argument that the tunnel intercepts natural flow that would have ended up in Willow Creek in the absence of the tunnel. This past year has also been extremely wet. If there is no evidence of inflow to the tunnel below the plug this year, I doubt that such evidence will be forthcoming in the foreseeable future.

The water surface elevation in Eagle Lake is so low at this time that surface water is not seeping into the tunnel mouth. Based on information contained in a report prepared by a U.S. Bureau of Land Management (BLM) geologist who inspected the entire tunnel before the plug was installed, all water flowing from the tunnel at this time appears to be percolating groundwater that enters the tunnel upstream of a fault zone located about 6,700 feet up-gradient from the tunnel portal. Consequently, all of the water discharging from the tunnel appears to be coming from the Eagle Lake basin. A good portion (if not all) of this water probably originates in Eagle Lake itself. Given the geologic makeup of the Eagle Lake basin, any water diverted from the groundwater underneath the lake will probably result in a commensurate reduction in Eagle Lake water after the groundwater moves into the tunnel. However, if the valve in the tunnel plug were to be closed, I doubt that any of this water would make its way to the Willow Creek watershed as the fault zone appears to provide a relatively impermeable barrier to the movement of water from Eagle Lake to the east.

The Bly Tunnel currently acts as a "**horizontal well**" that taps the groundwater either under or in the immediate vicinity of Eagle Lake. The tunnel outlet is owned by the BLM (Assessors Parcel No. 077-120-04-11). Under California water law, the owner of a percolating groundwater well is not required to obtain a permit from the State Water Board and is free to choose how to use the water that discharges from the well. The BLM is currently choosing to abandon all flow from the tunnel as it exits BLM property. Percolating groundwater that has been abandoned into a surface watercourse is considered to be "**foreign**" in nature. Diversion of such water cannot be justified pursuant to rights identified in Schedule 3 as specified in paragraphs 8 and 45 of the Decree.

As I stated in my previous letter to the BLM, "**foreign water**" discharging from the tunnel should only be available for use by appropriators, on a "first come – first serve" basis after the water is abandoned into the Willow Creek channel. The Division has records for the following five (5) appropriative rights that could be utilized to authorize diversion of percolating groundwater discharging from the tunnel once it has been abandoned. None of these rights, however, authorizes diversion of water during the summer irrigation season.

Record ID	Permit ID	License ID	Holder Name	Priority Date	Face Amt (afa)	Authorized Diversion Season
A012142	7886	6390	California Department of Fish and Game	10/31/1947	601.5	Nov 1 to Apr 1
A012312	7887	6391	California Department of Fish and Game	2/9/1948	810.9	Nov 1 to Apr 1
A013617A	9734	006910A	Nanette Barron Martin	3/6/1950	70	Nov 1 to Apr 1
A013617B	9734	006910B	California Department of Fish and Game	3/6/1950	39	Nov 1 to Apr 1
A025917	18257		B J Deis, California Corporation	2/6/1979	60.7	Dec 1 to Mar 31

While these rights may be capable of authorizing a diversion of “*foreign waters*” that have been abandoned, they do not allow the right holder to demand that such abandonment continue. That is strictly a decision for BLM to make<sup>1</sup>.

I have no doubt that water discharging from the tunnel has been utilized by Willow Creek water users since water was last diverted from Eagle Lake and subsequently re-diverted from Willow Creek by the Districts in 1935. A good portion of this water probably consisted of Eagle Lake water except during those periods when the lake level receded below the tunnel entrance or until the mouth of the tunnel was substantially blocked in the mid-1980’s. Formal decisions by the State Water Boards’ predecessor, R D-29 and D-1073, indicate that diversions of water directly from Eagle Lake into the tunnel are now without a basis of right.

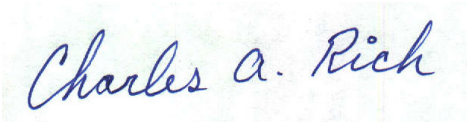
A portion of the tunnel discharge since 1924 and, all of the tunnel discharge probably since the mid-1980’s, would be classified as percolating groundwater coming from the groundwater aquifer underneath and/or adjacent to Eagle Lake. Both the surface water inadvertently diverted from Eagle Lake and the percolating groundwater that found its way into the tunnel have been continuously abandoned for a period of at least 75 years. However, the mere diversion and use of such water, even for such an extensive period of time, does not by itself create a valid basis of right. Abandoned water reverts to the public and is considered to be unappropriated public water. If a diverter does not already possess a valid appropriative right that would authorize the diversion of this water, an application can be filed with the State Water Board seeking a right to divert such water. California water law as prescribed by the California Supreme Court does not allow a prescriptive claim to ripen against the State Water Board’s permitting authority.

---

<sup>1</sup> - If, however, evidence becomes available that the abandonment of percolating groundwater from the tunnel is causing an unreasonable, adverse impact to Eagle Lake resources even though some beneficial use is occurring in the Willow Creek watershed, either the State Water Board or the courts could require the modification or termination of such abandonment pursuant to the reasonableness doctrine contained in California water law.

I hope this information helps to clarify the situation and the Board of Supervisors understanding of the current situation. If there are any questions, I can be reached via e-mail at [CRICH@waterboards.ca.gov](mailto:CRICH@waterboards.ca.gov) or via telephone at (916) 341-5377.

Sincerely,

A handwritten signature in blue ink that reads "Charles A. Rich". The signature is written in a cursive style and is positioned above a light blue rectangular background.

Charles A. Rich, Chief  
Enforcement Unit #3

cc: **via e-mail**

Tom C. Stone  
Lassen County Administrator

Jennifer Mata  
Supervisory Resource Management Specialist  
Bureau of Land Management  
Eagle Lake Field Office  
(with copy of 5/19/2011 letter from Mr. Chapman)

Ruddy Whitmer  
(with copy of 5/19/2011 letter from Mr. Chapman)

Dr. Owen Bateson  
(with copy of 5/19/2011 letter from Mr. Chapman)