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9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

10 STATE OF CALIFORNIA

11 IN THE MATTER OF: ADMINISTRATIVE)
12 CIVIL LIABILITY AND CEASE AND)
13 DESIST ORDER AGAINST G. SCOTT) MEMORANDUM IN OPPOSITION TO
14 FAHEY AND SUGAR PINE SPRING) MOTION TO DISMISS
15 WATER, LP)
16 _____)

17 **I. INTRODUCTION**

18 The Prosecution Team for the Division of Water Rights (“Prosecution Team”) opposes the
19 request of G. Scott Fahey and Sugar Pine Spring Water LP (collectively “Respondent”) to dismiss the
20 Administrative Civil Liability (“ACL”) Complaint and draft Cease and Desist Order (“CDO”).

21 **II. ARGUMENT**

22 **A. The State Water Board has Authority Under Water Code Section 1052**

23 The Respondent bases the dismissal request on the statement of decision of the Superior Court
24 for the County of Santa Clara, in the *California Water Curtailment Cases*.¹ But a superior court
25 statement of decision is not legal authority the Respondent may rely on.² (Cal. Rules of Court, Rule
26 8.1115.) Regardless, the holding the Respondent relies on to dispute the “jurisdiction” of the State
27 Water Resources Control Board (“State Water Board”) does not apply to the Respondent. The
28 Respondent has committed a trespass and the State Water Board still has authority to order liability
under Water Code section 1052.

Under California Water Code section 1052, “The diversion or use of water subject to [Division
2] other than as authorized in [Division 2] is a trespass.”³ Although the Water Code does not
specifically define water subject to Division 2, “All water flowing in any natural channel... is public

¹ *California Water Curtailment Cases*, Judicial Council Coordination Proceeding No. 4838 (Santa Clara County Superior Court, issued February 21, 2018)

² Although there are exceptions, none presently apply. (Cal. Rules of Court, Rule 8.1115, subd. (b).)

³ All references to the “Water Code” shall refer to the California Water Code. Division 2 encompasses Water Code sections 1000-5976.

1 water of the State and subject to appropriation in accordance with this [Water Code].” (*People v.*
2 *Shirokow* (1980) 26 Cal.3d 301, 306.) There are three exceptions: (1) water that so far as it has been or
3 is applied to useful and beneficial purposes on any natural channel; (2) water insofar as it is or may be
4 reasonably needed for useful and beneficial purposes on riparian land; and (3) water otherwise
5 appropriated. (Water Code §1201.) Water Code section 1202 then defines unappropriated water as
6 water: (1) never appropriated; (2) appropriated before 1914 and no longer put to beneficial use; (3)
7 appropriated pursuant to the Water Commission Act or Water Code and no longer put to beneficial use;
8 and (4) appropriated or used and abandoned. (Water Code §1202.) An “appropriation” is “any taking of
9 water for other than riparian or overlying uses.” (*City of Pasadena v. City of Alhambra* (1949) 33
10 Cal.2d 908, 925.) An appropriator may take water that is surplus to that used by riparians or earlier
11 appropriators. (*U.S. v. St. Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101.)

12 Any use not exempted in Water Code section 1201 is conditioned upon compliance with the
13 appropriation procedures in Division 2. (Water Code § 1225; *People v. Shirokow*, *supra* 26 Cal.3d at
14 309.) Division 2 requires a person to obtain a permit from the State Water Board before diverting or
15 using water for appropriation. (*People v. Shirokow*, *supra* 26 Cal.3d at 304; *State v. Hansen* (1961) 189
16 Cal.App.2d 604, 610.) A permittee may take and use water to the extent and purpose allowed under a
17 permit and subject to terms and conditions expressed in a permit. (Water Code §§ 1381, 1391.) A
18 permittee’s priority to take water is based on the date the permittee filed a proper application. (Water
19 Code § 1450.)

20 The Respondent has two water rights: Permit 20784 and Permit 21289.⁴ (Prosecution Team
21 Exhibit WR-15; WR-16.⁵) Since the Respondent initiated both appropriations after 1914, neither are
22 exempt from Division 2’s appropriation procedures and, therefore, are limited to the extent and purpose
23 under each permit and subject to the terms and conditions in each permit. The Respondent’s right to
24 divert or use water under the permits during the fully appropriated stream (“FAS”) period is subject to
25 maintaining a Water Exchange Agreement (“WEA”) with Modesto Irrigation District (“MID”) and
26 Turlock Irrigation District (“TID”). (WR-15, p. 6; WR-16, pp. 9-10.) The WEA allowed the State
27 Water Board to authorize the Respondent to divert and use water during the FAS period. (WR-81, p.
28 25; WR-9 ¶¶ 11-13; RT (Jan. 25, 2016), p. 45:6-10.) But it does not mean the Respondent diverts “pre-
1914 water.” A “physical solution” does not change water right priorities or alter a prior right holder’s
water right. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal. 4th 1224, 1250.) The priority of

⁴ The Prosecution Team’s Closing Brief, filed June 17, 2016, discusses the Respondent’s permits and permit terms in detail. (*See* Prosecution Team (“PT”) Closing Br., pp. 1-5.) This memorandum incorporates and references portions of the Prosecution Team’s Closing Brief as relevant in the interest of avoiding duplicative, redundant briefing.

⁵ Further references to Prosecution Team exhibits will be “WR-[Exhibit Number].” References to page numbers in exhibits will be to the page of the pdf document.

[Footnote continued on next page.]

1 right for the Respondent’s permits, even with the WEA, remains the same.⁶ Thus, the Respondent still
2 must cease diverting and using water under each permit when water is unavailable for a permit’s
3 priority of right.

4 By its terms, the WEA was intended to become a part of any permit the State Water Board
5 issued the Respondent. (WR-19, p. 2.) The State Water Board incorporated the WEA into the
6 Respondent’s permit terms, specifically Permit 20784’s Term 19 and Permit 21289’s Term 34. (WR-
7 19, p. 2; WR-15, p. 6; WR-16, pp. 9-10.) Thus, irrespective of the nature of rights involved in the
8 WEA, during the FAS period the Respondent may only divert or use water under Permit 20784 subject
9 to Term 19, and under Permit 21289 subject to Term 34.

10 Maintaining the WEA and replacing water pursuant to the WEA’s terms are conditions
11 precedent for the Respondent to divert or use water under Permit 20784 and 21289 during the FAS
12 period. (PT Closing Br., pp. 15-18; WR-15, p. 6; WR-16, pp. 9-10.) Failure to fulfill a condition
13 precedent for diverting or using water means the Respondent may not divert or use water as authorized
14 in Division 2. The Respondent must replace all water diverted during the FAS period and cannot
15 carryover or otherwise “credit” water purchased one year for water diverted in a subsequent year. (PT
16 Closing, Br., pp. 4, 12-13; WR-19, p. 2.) Yet from 1997 through 2015, the Respondent only purchased
17 replacement water in two years –2009 and 2010. (*see* PT Closing Br., p. 15.) In the remaining 16 years,
18 including 2014 and 2015, the Respondent failed to purchase replacement water, failing to fulfill a
19 condition precedent for diverting or using water during the FAS period.⁷ But the Respondent diverted
20 and used water anyway, violating Water Code section 1052’s prohibition of the unauthorized diversion
21 or use of water.

22 **B. The Respondent Has Additional Liability Under Water Code section 1052**
23 **Irrespective of the Water Exchange Agreement**

24 The Respondent has additional liability for unauthorized diversion or use of water under Water
25 Code section 1052, separate and apart from liability associated with the WEA, because the Respondent
26 failed to fulfill conditions precedent for diverting or using water under the permits.

27 First, the WEA only applies to the Respondent’s diversion during the FAS period. It has no
28 relevance to liability under Water Code section 1052 for any violation occurring outside the FAS
period. The Sacramento-San Joaquin Delta and the Tuolumne River upstream of New Don Pedro,
including all tributaries where hydraulic continuity exists, is fully appropriated from June 16 through

⁶ Katherine Mrowka, in oral testimony, reiterated an exchange agreement necessary for the State Water Board to issue permits to appropriate water during fully appropriated stream periods, “does not change the priority of the parties involved. First in time remains first in right. In times of shortage a junior right with an exchange agreement still gets cut off based on the priority of the water right.” (Reporter Transcript (“RT”) (Jan. 25, 2016), p. 46:19-23.)

⁷ Even assuming, *arguendo*, that the Respondent’s diversion of “pre-1914 water” under the WEA precludes State Water Board “jurisdiction,” this would only apply insofar as the Respondent actually replaced water pursuant to the WEA.

1 October 31 of each year. (*see* PT Closing Br., p. 3.) Yet in 2014, the Respondent diverted water for all
2 but four days from May 27 through November 18, a period that extends beyond the FAS period, despite
3 deficient water for either permit’s priority. (*see* PT Closing Br., p. 21.)

4 Furthermore, the WEA is but one consideration in determining the Respondent’s replacement
5 water obligations. (WR-15, pp. 6-7.) Permit 20784, Term 20, and Permit 21289, Term 34, require the
6 Respondent to replace *all* water diverted adverse to the prior rights of the City and County of San
7 Francisco, MID, and TID. (WR-15, p. 6; WR-16, p. 9.) Even if the Respondent replaces all water
8 required under the WEA, the Respondent’s permits may still require additional replacement water.

9 Finally, Permit 21289, Term 20, requires the Respondent to bypass at least 5 gallons per minute
10 from each point of diversion to protect riparian habitat and mitigate potential water temperature
11 increases. (WR-16, pp. 1-2, 6; PT Closing Br., p. 5.) Yet the Respondent bypassed insufficient flow in
12 August 2015 and likely in additional months in 2014 and 2015 as well. (PT Closing Br., pp. 5, 18-19.)

13 **C. The Respondent Has Been Afforded Legally Required Due Process**

14 Key Issue 1 in the Notice of Public Hearing (“Hearing Notice”) was whether the Respondent
15 had violated, or was threatening to violate, Water Code section 1052’s prohibition against the
16 unauthorized diversion or use of water. (WR-6⁸, p. 3.) This included, but was not limited to,
17 considering whether the Respondent diverted water under Permits 20784 and 21289 when water was
18 unavailable under either permit’s priority of right. (*Ibid.*)

19 Whether the Respondent violated a Notice of Unavailability (“Unavailability Notice”) was not
20 specifically a Key Issue. (WR-6, p. 3.) The ACL Complaint alleged that the Respondent diverted or
21 used water when water was unavailable for the priority of the permits. (WR-1, p. 7 para. 44.) The
22 Unavailability Notices merely advised the Respondent of the lack of available water under the priority
23 of either permit. (WR-1, p. 7 para. 44.) Evidence that the Respondent had notice that water would be
24 unavailable for either permit’s priority is a relevant circumstance for considering the nature and
25 persistence of the violation under Water Code section 1055.3.

26 The use of inclusive language further notified the Respondent that Key Issue 1 could include
27 consideration of whether permit noncompliance resulted in an unauthorized diversion or use of water.
28 (WR-6, p. 3.) The ACL Complaint alleges that the WEA does not alter the Respondent’s priority of
right and, additionally, that nothing in the Respondent’s annual reports documented replacing water.⁹

⁸ Available at

https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/notice_fahey.pdf

⁹ Permit 20789, Term 20, requires that “The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the State Water Resources Control Board with the annual Progress Report by Permittee.” (WR-15, p. 7.) Permit 21289, Term 34, similarly requires that “The source, amount and location at [New Don Pedro Reservoir] of replacement water discharged into [New Don Pedro Reservoir] shall be [Footnote continued on next page.]”

1 (WR-1, p. 5.) The Hearing Officer ruled that evidence of whether the Respondent's permit compliance
2 allowed for continued diversion or use of water even if none was available for the priority of either
3 permit was relevant to Key Issue 1. (Hrg. Officer Ruling of Post-Hearing Evidence Objections (May
4 23, 2016)¹⁰, p. 3.) The Hearing Officer further concluded that evidence of the Respondent's
5 understanding of his permits and efforts to comply with their terms was relevant to the nature and
6 persistence of the alleged violation. (*Ibid.*)

7 The Respondent had ample opportunity at the hearing on January 25 and 26, 2016, to present
8 evidence, testimony, and argument on each of the key issues, including whether the Respondent
9 diverted or used water when water was unavailable for the priority of right for either permit, whether
10 the Respondent's permit terms could have permitted diversion when water was unavailable for a
11 permit's priority of right, and whether the Respondent complied with those permit terms. In addition,
12 the Respondent had ample opportunity to cross-examine each of the Prosecution Team's witnesses and,
13 after the hearing, submit written argument and thoroughly address evidentiary objections raised at the
14 hearing. The Respondent was afforded the due process required by law. His request to dismiss based on
15 lack of due process should be denied.

13 **III. CONCLUSION**

14 The Respondent's request to dismiss for lack of jurisdiction has no basis in governing law. The
15 Respondent may only divert and use water subject to the priority of right for each permit regardless of
16 the WEA. Furthermore, the WEA is incorporated into the terms and conditions in the Respondent's
17 permits. Replacing all water during the FAS period, consistent with the WEA, is a condition precedent
18 for the Respondent to divert or use water during the FAS period under the permits. The State Water
19 Board has the authority to enforce the Respondent's permit terms and, since the Respondent has failed
20 to fulfill permit terms that are conditions precedent for diverting water under the permits, may impose
21 liability under Water Code section 1052. The Respondent's request to dismiss should be denied.

21 Respectfully submitted,

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28 mutually agreed upon by the permittee, the Districts, and San Francisco, and shall be reported to the State Water Board
with the annual Progress Report by Permittee." (WR-16, p. 9.)

¹⁰ Available at

[https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_horuling_evidencemoti
on052316.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_horuling_evidencemoti
on052316.pdf)

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