

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2015 –0028-DWR

ORDER FOR ADDITIONAL INFORMATION

In the Matter of Unauthorized Diversion by

G. SCOTT FAHEY AND SUGAR PINE SPRING WATER LP

SOURCES: Unnamed Spring (AKA Cottonwood Spring), tributary to Cottonwood Creek, thence Clavey River, thence Tuolumne River; Deadwood Spring, tributary to an unnamed stream, thence Basin Creek, thence North Fork Tuolumne River, thence Tuolumne River; and two Unnamed Springs (aka Marco Spring and Polo Spring) tributary to an unnamed stream, thence Hull Creek, thence Clavey River, and thence Tuolumne River.

COUNTY: Tuolumne

BACKGROUND

1. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
2. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
3. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
4. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.
5. On October 31, 2014, the State Water Board issued a "Notice of Temporary Opportunity to Divert Water under Previously Curtailed Water Rights for Sacramento and San Joaquin River Watershed." The State Water Board temporarily lifted the curtailment of water rights for post-1914 water rights holders in the Sacramento-San Joaquin watershed and continued the opportunity to divert until 7 AM on November 3, 2014. The temporary lifting of the curtailment was based upon a predicted rain event.

6. On November 19, 2014, the State Water Board temporarily lifted the curtailment of post-1953 water rights in the Sacramento-San Joaquin watershed. The State Water Board did not issue any further notice of water unavailability for 2014.
7. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
8. On March 17, 2015, the State Water Board amended and re-adopted emergency regulations regarding Informational Order authority during drought (California Code of Regulations, title 23, amending section 879, subdivision (c)). The regulations were reviewed by the Office of Administrative Law and went into effect on March 27, 2015. The regulations establish requirements for water right holders to provide information in specific circumstances.
9. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the on-going severe drought conditions present urgent challenges across the state including water shortages for municipal use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions persist. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2014, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect.
10. The Executive Order, at Paragraph 10, provides in part that "[t]he Water Board shall require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water."
11. On April 2, 2015, the State Water Board issued another notice warning that due to drought conditions, there would likely be insufficient water available to serve all water rights.
12. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.
13. On July 15, 2015, the State Water Board issued a clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring water right holders to curtail diversions under affected water rights, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded. However, for purposes of noticing water rights holder of the unavailability of water for their priority of right, the Unavailability Notices remain in effect.

FAHEY WATER RIGHTS

14. G. Scott Fahey holds water right Permit 20784 (Application A029977) and Permit 21289 (Application A031491) to appropriate water from sources that are ultimately tributary to the Tuolumne River upstream of New Don Pedro Reservoir. Mr. Fahey does not hold or claim any other appropriative or riparian water rights on record with the State Water Board.

15. Permit 20784 has a priority date of July 12, 1991, and authorizes the direct diversion and use of water from: (1) an Unnamed Spring (a.k.a. Cottonwood Spring) for a rate of diversion not to exceed 0.031 cubic foot per second (cfs) and; (2) Deadwood Spring for a rate of diversion not to exceed 0.031 cfs. The water appropriated under Permit 20784 is limited to a total combined of 0.062 cfs to be diverted from January 1 to December 31 of each year for Industrial Use at bottled water plant(s) located off the premises. The maximum amount diverted under Permit 20784 shall not exceed 44.82 acre-feet per year. Fahey's annual Reports of Licensee indicate that he diverted an average of 42.9 acre-feet per year under Permit 20784 for the years 2009 through 2014.
16. Permit 21289 has a priority date of January 28, 1994, and authorizes the direct diversion and use of water from: (1) Unnamed Spring (a.k.a. Marco Spring) for a rate of diversion not to exceed 0.045 cfs and; (2) Unnamed Spring (a.k.a. Polo Spring) for a rate of diversion not to exceed 0.045 cfs. The water appropriated under Permit 21289 is limited to a total combined diversion rate of 0.089 cfs to be diverted from January 1 to December 31 of each year for Industrial Use at bottled water plants located off the premises. The maximum amount diverted under Permit 21289 shall not exceed 64.5 acre-feet per year. Fahey's annual Reports of Permittee indicate that he diverted an average of 26.2 acre-feet per year under Permit 21289 for the years 2012 through 2014.
17. Diversions from all four springs subject to Permits 20784 and 21289 are conveyed via separate pipes from each spring that combine into a common pipe system. The pipeline connects to two 35,000 gallon tanks and an overhead bulk water truck filling station (collectively referred to as the transfer station) located on Tuolumne County Assessor Parcel Number (APN) 052-060-48-00, owned by Sugar Pine Spring Water, LP. Fahey operates the transfer station, and bulk water hauler trucks access the property through a locked gate to remove the water for delivery off-premises.
18. Term 11 in Permit 20784 and Term C in Permit 21289 state that the Permittee shall allow representatives of the State Water Resources Control Board reasonable access to project works to determine compliance with the terms of the permits.
19. Term 17 in Permit 20784 and Term 9 in Permit 21289 state that the permits are subject to prior rights and that in some years, water will not be available for diversion during parts or all of the authorized season.
20. Term 19 in Permit 20784 requires Fahey to provide exchange water to New Don Pedro Reservoir for all water diverted under the permit during the period from June 16 through October 31 of each year. This term was included as a condition for accepting Application A029977 because State Water Board Orders WR 89-25 and WR 91-07 identify the Sacramento-San Joaquin Delta watershed upstream of the Delta, and the Tuolumne River upstream from Don Pedro Reservoir, as fully appropriated between June 16 and October 31 (Decisions 995 and 1594). Fahey's points of diversion are within the Fully Appropriated Stream systems identified in the Board orders; however, Order WR 91-07 sets guidance for acceptance of an application on a fully appropriated stream when replacement water is made available under an Exchange Agreement. Fahey entered into an Exchange Agreement with the Turlock Irrigation District and Modesto Irrigation District (Districts) on December 12, 1992.
21. Term 20 in Permit 20784 and Term 34 in Permit 21289 require Fahey to provide replacement water to New Don Pedro Reservoir for water diverted adverse to the prior rights of the City and County of San Francisco (San Francisco) and the Districts. These terms describe certain provisions of a December 19, 1994 letter agreement under which San Francisco would withdraw its protest of Fahey's water right applications, including the method by which Fahey would compensate San Francisco and the Districts, upon a finding of injury, with replacement water. These terms do not modify, amend or enhance the seniority of either or both Permits. Fahey's

compliance with these terms does not prevent or preclude the State Water Board from finding that there is insufficient water for diversion under the priorities of Permits 20784 and 21289.

INVESTIGATION

22. The Unavailability Notices of May 27, 2014, and April 23, 2015, and the related notices, apply to Permits 20784 and 21289 because both Permits are post-1914 appropriative water rights within the covered geographic areas. In each year, the Unavailability Notices for Permits 20784 and 21289 were sent addressed to G Fahey, 2787 Stony Fork Way, Boise, Idaho, 83706.
23. On June 6, 2014, Fahey submitted a hard copy of the Curtailment Certification Form for each of his water rights in response to the 2014 Unavailability Notice. On each of the forms, Fahey checked the box indicating that he had information explaining why his diversion and use of water was legally authorized, notwithstanding the limited amounts of water available during the drought. Fahey included a letter, dated June 3, 2014, claiming the right to continue diverting because of a purchase of replacement water stored in New Don Pedro Reservoir. In the letter, Fahey indicated that the reason for the purchase of replacement water was to ensure that any potential or actual reduction to the District's or to San Francisco's water supply could be offset within one year of notice.
24. The Exchange Agreement between Fahey and the Districts and the letter agreement between Fahey and San Francisco do not modify, amend or enhance the seniority of Fahey's permits. Compliance with the replacement water terms does not prevent or preclude the State Water Board from finding that there is insufficient water for diversion under the priorities of Permits 20784 and 21289 as related to all other downstream rights. Fahey cannot divert water during periods when water is not available to serve water rights at the priority of the Permits. Additionally, State Water Board files show that Fahey has not submitted annual reports documenting the replacement water provided to New Don Pedro Reservoir, as required under Terms 19 and 20 of Permit 20784 and Term 34 of Permit 21289.
25. The 2014 Notice of Unavailability put Fahey on notice that there was not enough water to fulfill his water rights under Permits 20784 and 21289 from May 27, 2014 through October 30, 2014, and from November 4 through 18, 2014.
26. On March 3, 2015, Fahey submitted to the State Water Board, via the online Progress Report by Permittee for 2014, water diversion and use information for Permits 20784 and 21289. Each progress report indicates that Fahey diverted water in 2014 during each period in which water was unavailable for his priority of right.
27. On April 29, 2015, in lieu of submitting an online Certification Form in response to the April 23 Unavailability Notice, Fahey submitted a copy of the June 3, 2014, letter submitted in response to the 2014 Unavailability Notice.
28. Following the April 23 Unavailability Notice, State Water Board staff attempted to contact Fahey to schedule an inspection of Permits 20784 and 21289. Staff left multiple telephone messages over the course of two weeks before Fahey responded by telephone on June 12, 2015. Fahey indicated that he was unavailable to meet with staff to conduct an inspection of his facilities and that, if an inspection was required, he would not be available before the end of the summer.
29. The overhead bulk water truck filling station is a secure area, protected by a locked gate on the access road from U.S. Forest Route 1N04 (Cottonwood Road). Based on a prior inspection (conducted on October 23, 2007) associated with issuance of Permit 21289, State Water Board staff is not aware of any water sources or diversion facilities located beyond the gate, other than Fahey's permitted spring diversions and transfer station, that can be used to fill tanker trucks with water.

30. On July 12, 2015, State Water Board staff deployed surveillance equipment in the publically accessible road easement along Cottonwood Road near the entrance to APN 052-060-48-00. The surveillance equipment was deployed to capture images of vehicles accessing the property. State Water Board staff limited their observations and deployment of surveillance equipment to the publically accessible road side and did not access the Sugar Pine Spring Water, LP, property.
31. On July 23, 2015, State Water Board staff returned to the site to collect surveillance data from equipment deployed on July 12, 2015. During this visit, within a period of 90 minutes, staff observed four tanker trucks (approximate 6,600 gallon capacity each) at or just down the road from the property that is the site of the transfer station. Staff observed a tanker truck enter the property at approximately 12:15 PM and leave at approximately 12:54. Staff also observed a tanker truck enter the property at approximately 1:06 PM, just prior to staff's departure from the site. The data collected on July 23, 2015, includes surveillance data collected from July 12 through July 23.
32. On August 12, 2015, State Water Board staff contacted Mr. Fahey via telephone in an attempt to schedule an inspection of the facilities. Staff informed Mr. Fahey that he was still subject to the April 23 Unavailability Notice. Mr. Fahey indicated that he would not be able to meet. During the conversation, Mr. Fahey indicated that he has not ceased diversions during 2015 and that he continues to sell water to commercial water bottling companies.

LEGAL AUTHORITY

33. Water Code section 183 authorizes the State Water Board, among other things, to conduct any investigations in any part of the state necessary to carry out the Board's powers.
34. Water Code section 1051 authorizes the State Water Board, among other things, to investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water to determine whether water is being appropriated in accordance with the laws of the State.
35. Pursuant to California Code of Regulations, title 23, section 879, subdivision (c):
 - (1) *The Deputy Director may issue an informational order, as provided in paragraph (2), in any of the following circumstances:*
 - (A) *Upon receipt of a complaint that staff determines to merit investigation alleging interference with a water right by a water right holder, diverter or user;*
 - (B) *Where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment, and no Statement of Water Diversion and Use for such right was on file with the Board as of January 17, 2014;*
 - (C) *Where a water right holder, diverter or user responds to an investigation, curtailment order or any notice of curtailment by asserting a right to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record had been previously filed with the Board; or*
 - (D) *Upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversions of water by any water right holder, diverter or user.*
 - (2) *The Deputy Director may issue an order under this article requiring a water right holder, diverter or user to provide additional information related to a diversion or use described in (c)(1), including the claim of right; property patent date; the date of initial appropriation; diversions made or anticipated during the current drought year; basis of right and amount of a water transfer not subject to approval of the Board or Department of Water Resources; or any other information relevant to authenticating the right or forecasting use and supplies in the current drought year.*
 - (3) *Any party receiving an order under this subdivision shall provide the requested information within thirty (30) days. The Deputy Director may grant additional time for*

submission of information supporting the claim of right upon substantial compliance with the 30-day deadline and a showing of good cause.

- (4) *The failure to provide the information requested within 30 days or any additional time extension granted is a violation subject to civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.*
 - (5) *Orders issued under previous versions of this subdivision shall remain in effect and shall be enforceable as if adopted under this version. The provisions of Article 12 of this Chapter (commencing with section 768) shall govern petitions for reconsideration of orders issued under this subdivision.*
36. Section 879, subdivision (c), and the Executive Order supplement the State Water Board's general investigatory authority under Water Code sections 183 and 1051.
 37. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The Unavailability Notices reflect the State Water Board's determination that the existing water available in the San Joaquin River watershed is insufficient to meet the demands of diverters with appropriate water right permits or licenses with the effected priority dates. Continued diversion when there is no water available under the priority of the water right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Water Code §§ 1052, 1831.).
 38. Section 879, subdivision (c)(1)(D) authorizes the Deputy Director to issue orders requiring additional information in various circumstances, including upon receipt of information that indicates actual or threatened unlawful diversions of water by any water right holder.
 39. The circumstances described above indicate that Fahey is diverting, or is threatening to divert, water in excess of that available to serve Permits 20784 and 21289, without a valid basis of right.
 40. To determine whether unauthorized diversions have occurred or are threatening to occur, the State Water Board needs additional information described below.
 41. Recipients of information orders issued pursuant to Section 879(c) may petition the State Water Board for reconsideration. (Water Code § 1122; 23 CCR §§ 768 et seq., 879(c)(5).)

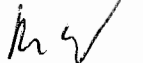
IT IS HEREBY ORDERED:

1. This Order is issued to G. Scott Fahey and Sugar Pine Spring Water LP (collectively Fahey). This Order is effective on the date shown below. All submittal requirements are based on the effective date of this Order.
2. Fahey shall provide the following information for water diversions that are conducted under any basis of right at facilities covered by Permits 20784 and 21289:
 - (A) The monthly amounts of water diverted and the basis of right allowing for the diversions for each month from May 2014 through October 2014 and April 2015 through date of this order. The diversion information shall include the total amount of water diverted in the month and the maximum rate of diversion for each month. This information shall be filed electronically at: http://water24a/waterrights/water_issues/programs/ewrims/curtailment/wateruseinfo.shtml.
 - (B) (1) Documentation of compliance with bypass amounts as required by Permit 21289; (2) Documentation of purchases and use of replacement water required by Permits 20784 and 21289; (3) a copy of the most recent Exchange Agreement between Fahey and the Turlock and Modesto Irrigation Districts and/or City and County of San Francisco; and (4) copies of all

invoices for water sold from the diversions covered by Permits 20784 and 21289 beginning May 2014 through date of this order. This information is an attachment to the report filed in (A) and must be filed electronically and mailed to: SWRCB-2014informational-order@waterboards.ca.govmailto:SWRCB-2014informational-order@waterboards.ca.gov.

- (C) The daily diversion amount for each day starting with August 1, 2015, and the invoices for all water sold from the diversions covered by Permits 20784 and 21289, shall be submitted by the fifth (5th) day of each succeeding month until the drought proclamations and orders described above are rescinded. This information shall be submitted as an electronic spreadsheet via email to SWRCB-2014informational-order@waterboards.ca.gov
3. Fahey is required to submit the information requested. Failure to comply with this Order subjects the party to enforcement action including, but not limited to, civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.
4. Reservation of Enforcement Authority and Discretion: Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including, but not limited to, the authority to bring enforcement against diverters for unauthorized diversion or use in violation of Water Code section 1052.

STATE WATER RESOURCES CONTROL BOARD



*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated:

SEP 01 2015