

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

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Unauthorized Diversion and Violation of Terms and Conditions of
Licenses 3697, 4216, 4729A, and 5559 (Applications 10795, 14178, 13684A, 13384)

by

GALLO GLASS COMPANY

SOURCE: Russian River Underflow

COUNTY: Sonoma

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Gallo Glass Company (Gallo) is alleged to have violated Water Code section 1052, subdivision (a), which states:

 "The diversion or use of water subject to [division 2 of the Water Code (commencing with section 1000)] other than as authorized in [division 2] is a trespass."
2. Water Code section 1052, subdivision (b), provides that the State Water Resources Control Board (State Water Board) may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom administrative civil liability (ACL) may be imposed. On May 17, 1999, the Executive Director delegated to the Deputy Director for Water Rights the authority to issue a complaint to impose an ACL under Water Code section 1055, subdivision (a). This authority may be and has been redelegated to the Assistant Deputy Director for Water Rights.

ALLEGATIONS

1. The following facts provide the basis for the alleged trespass:
 - a) Records of the Sonoma County Assessor's Office show that Gallo is the current owner of Sonoma County Assessor Parcel numbers 110-200-002, 110-200-004, and 110-230-008 and has owned the properties since May 31, 1996. Aerial photographs show that a pit reservoir is located on parcel 110-200-002. The reservoir has been in existence since at least 1997.

- b) By letter dated July 5, 2005, the Division of Water Rights (Division) notified property owners within the Russian River watershed in Sonoma County whose property contained reservoirs that, according to Division records, they did not have a water right authorizing the storage of water. The letter included a questionnaire seeking information about the existing reservoir, source of water, current water usage, and any existing basis of water right, when applicable. Each party receiving the questionnaire was requested to complete and return the form to the Division. The Division's letter also informed recipients of the State Water Board's discretionary authority to initiate enforcement action for any unauthorized diversion without further notice. Gallo is one of the contacted property owners.
- c) Gallo responded to the July 5, 2005 letter and on April 9, 2008, Division staff conducted an inspection of the Gallo property, located at 8900 and 9015 Westside Road, near Healdsburg. Division staff observed the pit reservoir constructed near the top of the watershed. The 8.2 surface-acre reservoir was estimated to have a capacity of 250 acre-feet and a reported depth of 45 feet. During the inspection Division staff was informed that water was diverted from the Russian River, approximately one mile away, and pumped to fill the reservoir. Division staff identified Licenses 3697, 4216, 4729A, and 5559 associated with the project and determined that these summer irrigation rights (May 1 to December 1) did not include collection to storage or a diversion season that allowed diversion for frost protection usage from March 15 through April 30. A second inspection was conducted on November 6, 2008 to review compliance with the associated water right licenses. The reservoir was storing water during each of the two inspections and Gallo's representatives confirmed that the reservoir was used for frost protection, in addition to vineyard irrigation and heat control. Additionally, Division staff noted that the point of diversion has been relocated from a diversion pump on the bank of the Russian River to an off-set well drawing Russian River subflow approximately 100-200 feet north of the river. Division staff also found that the current 395 acre place of use exceeds the places of use defined within the licenses by 195 acres.
- d) The water being directly diverted and/or diverted to storage in the reservoir is subject to the State Water Board's permitting authority. The Division has no record of a water right authorizing direct diversion of water from the Russian River for frost protection use or to storage in the reservoir [outside of the licensed diversion season] and Gallo did not provide evidence supporting an existing basis of right. Gallo has directly diverted water and/or has diverted to storage and used stored water without a basis of right constituting an unauthorized diversion and use of water.
- e) Additionally, the point of diversion and place of use are not in compliance with the existing water right licenses and constitute a violation of the terms and conditions of those licenses.
- f) On October 27, 2008, Wagner & Bonsignore, a consulting engineer, contacted and informed Division staff that Gallo intended to file a new Water Right Application for direct diversion and storage in the existing offstream reservoir for frost protection and possibly irrigation use on the vineyard. They also indicated they would be filing petitions to address the point of diversion and place of use issues. Division staff granted the consultant until January 1, 2009 to file the application, petitions, etc., and advised that Gallo was not immune from enforcement at the discretion of the State Water Board. On January 30, 2009, Application 31743 and Petitions for changes in Licenses 3697, 4216, 4729A, and 5559 were filed.

PROPOSED CIVIL LIABILITY

1. The basis of this complaint is Gallo's unauthorized diversion and consumptive use of the water from Russian River underflow since 1997 in excess of its existing rights. This unauthorized diversion and use of water constitutes a trespass within the meaning of Water Code section 1052, subdivision (a).
2. The maximum civil liability that can be imposed by the State Water Board in this matter is \$500 for each day in which the trespass occurred. Based on three years of unauthorized diversion and use of water by Gallo, a civil liability of \$547,500 could be considered (\$500 per day x 365 days x 3 yrs.) for the trespass.
3. In determining the amount of civil liability, Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator. In this case, Gallo has persisted in diverting water to storage from the Russian River for at least 3 years without a legitimate basis of right, and has used the stored water for frost protection and irrigation of 395 acres of commercial vineyard. Gallo's extent of harm is twofold. Its continued unauthorized diversion reduces the amount of water available for legitimate downstream water right holders. Secondly, while the adverse impacts on the steelhead trout fishery have not been quantified, Gallo's unauthorized diversions may contribute to reducing habitat for steelhead trout in the Russian River and its tributaries. On August 18, 1997, the National Marine Fisheries Service listed the steelhead trout as endangered under the Federal Endangered Species Act. Gallo ultimately took corrective actions with the filing of an application and petitions on January 30, 2009. However, from July 5, 2005, (date of original notification letter) until just prior to the Division's second inspection of the project on November 6, 2008, Gallo, the holder of four existing water right licenses for the project, failed to take any corrective actions to secure a water right permit or to render its reservoir incapable of storing water despite being provided an opportunity for voluntary compliance.
4. Gallo receives an economic advantage over other legitimate water right users producing vineyards in the area by foregoing the costs of buying water, forgoing the cost of filing for a water right, and forgoing the cost of annual water right fees assessed other water right permit holders. Division staff estimates the avoided costs for obtaining 250 acre-feet of water in the local area and infrastructure to deliver that water to be about \$16,000 per year. The staff cost to review the existing project and develop the enforcement document is estimated at \$ 6,600. The water right filing fee and petition fees for the current project amount to \$5,600 and the total annual water right fees for the last 3 years is \$17,930.
5. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL in the amount of **\$73,000**. For the three year period identified, this amount is less than \$67 per day. This liability amount is the minimum liability recommended by the Division, and the State Water Board may consider a different liability if this matter goes to hearing.

RIGHT TO HEARING

1. Gallo may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date this notice is received. (Water Code, § 1055, subd. (b).)

2. If Gallo requests a hearing, it will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
3. If Gallo requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the Water Code, and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
4. If Gallo does not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth in paragraph 9 above, to:

State Water Resources Control Board
Division of Water Rights
Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

5. If Gallo does not request a hearing and does not remit the ACL, the State Water Board may seek recovery of the ACL as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

James W. Kassel
Assistant Deputy Director for Water Rights

Dated: APR 20 2009