



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

SEP 01 2015

G. Scott Fahey
2787 Stony Fork Way
Boise, ID 83706

Certified Mail No: 7003 1680 0000 2965 9572

Bart Barringer
Agent for Service of Process
Sugar Pine Spring Water LP
1324 J Street
Modesto, CA 95354

Certified Mail No: 7003 1680 0000 2965 9589

APPLICATION ID: A029977 AND A031491 - ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND DRAFT CEASE AND DESIST ORDER FOR UNAUTHORIZED DIVERSION FROM SPRINGS TRIBUTARY TO TUOLUMNE RIVER IN TUOLUMNE COUNTY

Enclosed are: (1) an Administrative Civil Liability Complaint (ACL Complaint) and (2) a draft Cease and Desist Order (CDO), both relating to your unauthorized diversions from springs tributary to the Tuolumne River in Tuolumne County. This letter serves as notice of the intent of the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) to proceed with formal enforcement against you. Specifically, the Division intends to impose the Administrative Civil Liability proposed in the ACL Complaint and adopt the CDO.

You have 20 days from receipt of this notice to act or face additional liability. Therefore, these matters require your immediate attention.

VIOLATION DESCRIPTION

G. Scott Fahey and Sugar Pine Spring Water, LP, own and operate a bulk water filling station located on Tuolumne County Assessor Parcel Number (APN) 052-060-048-00. The water filling station is fed by four springs operated by Fahey under water right Permits 20784 and 21289. These Permits are subject to the April 23, 2015, "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights," as well as a similar notice issued in 2014.

As described in the ACL Complaint and draft CDO, investigation by the Division has uncovered evidence that Fahey and Sugar Pine Spring Water, LP, have diverted during the periods covered by the 2014 and 2015 Unavailability Notices, and that they threaten to continue unauthorized diversions. Unauthorized diversions are a trespass pursuant to California Water Code section 1052.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | www.waterboards.ca.gov

ADMINISTRATIVE CIVIL LIABILITY

Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.

As described in the ACL Complaint, the maximum civil liability for the alleged violations in 2014 is \$345,866 [296 days at \$1,000 per day plus 19.95 acre-feet at \$2,500 per acre-foot], and the maximum civil liability for the alleged violations in 2015 is \$49,000 [44 days at \$1,000 per day plus 2.00 acre-feet at \$2,500 per acre-foot], for a total combined maximum civil liability of \$394,866 for the alleged violations.

Based on your failure to comply with these legal requirements, I am hereby issuing the enclosed ACL Complaint proposing that a liability of **\$224,875** be imposed for your failure to comply with the Unavailability Notice. **If you fail to respond to the ACL Complaint in one of the manners below within 20 days of receiving this notice, then the State Water Board will issue an ACL Order and seek recovery of this proposed liability amount as authorized by California Water Code section 1055.4.**

CEASE AND DESIST ORDER

California Water Code section 1831, subdivision (d)(1) authorizes the State Water Board to issue a Cease and Desist Order in response to a violation or threatened violation of the prohibition against unauthorized diversion of water.

If you disagree with the facts or time schedules for the corrective actions set forth in the CDO, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.**

You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the CDO. If you fail to comply with the adopted CDO, the State Water Board may consider additional enforcement of the CDO without further notice. Such enforcement may include the imposition of administrative civil liability of up to **\$10,000 for each day of noncompliance**, or referral to the Attorney General for further action.

SUMMARY OF OPTIONS

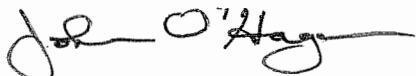
1. Submit a written request for hearing within 20 days of receiving the enclosed ACL Complaint and/or draft CDO. Any written request for hearing must specify whether you seek hearing on the ACL Complaint, the draft CDO, or both; or
2. Do nothing, and receive a final ACL Order and final CDO as described above.

INFORMATIONAL ORDER

Also enclosed is an Informational Order, which requires submittal of specific information regarding your water diversion and use.

If you have any questions regarding the CDO or ACL Complaint, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or Kathy.Mrowka@waterboards.ca.gov; or Andrew Tauriainen, Senior Staff Counsel, Office of Enforcement, at (916) 341-5445 or Andrew.Tauriainen@waterboards.ca.gov.

Sincerely,



John O'Hagan, Assistant Deputy Director
Division of Water Rights

Enclosures: 1) Draft Cease and Desist Order
2) Administrative Civil Liability Complaint
3) Informational Order

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 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

YOU ARE HEREBY GIVEN NOTICE THAT:

1. G. Scott Fahey and Sugar Pine Spring Water, LP, (collectively Fahey) are alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized is a trespass.
2. Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Resources Control Board (State Water Board or Board) pursuant to Water Code section 1055.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the Board may issue a complaint to any person or entity on which Administrative Civil Liability (ACL) may be imposed. On June 5, 2012, the Executive Director delegated this authority to the Deputy Director for Water Rights. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. The Deputy Director for Water Rights has re-delegated this authority to the Assistant Deputy Director for Water Rights pursuant to State Water Board Resolution 2012-0029.

ALLEGATIONS

Fahey Water Rights

4. 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. Fahey does not hold or claim any other appropriative or riparian water rights on record with the State Water Board.

5. 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.
6. 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.
7. 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.
8. 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.
9. 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.
10. 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.

Drought Actions

11. 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.
12. 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.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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.
18. 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. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
19. 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.

20. 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.

Water Availability Determinations

21. 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.
22. To determine the availability of water for water rights of varying priorities, the State Water Board compares the current and projected available water supply with the total water right diversion demand.
23. To determine water availability, the State Water Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board used the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
24. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The State Water Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The State Water Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
25. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website (http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/).
26. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The

monthly amounts are averaged into cubic feet per second for graphical purposes.

27. The availability and demand analysis shows that by May 27, 2014, and April 23, 2015, available supply was insufficient to meet the demands of post-1914 appropriative rights throughout the San Joaquin River watersheds in each year.

Investigation

28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. In the Progress Reports by Permittee for 2014, Fahey reported the amount of water (in gallons) diverted during each month of the year for Permits 20784 and 21289. The table below shows the amount of water reported under each water right for each month in 2014 during the period in which water was determined to be unavailable for appropriation under the subject rights. The monthly amounts of water reported under each permit were totaled, and then converted to acre-feet. The total amounts of water reported during May, October and November were prorated in the last column of the table to reflect the number of days that the State Water Board had determined that no water was available to divert (5 days in May, 30 days in October, and 15 days in November).

Month	Permit 20784 (A029977) (Gallons)	Permit 21289 (A031491) (Gallons)	Total Diversion in Gallons	Total Diversion in Acre-Feet	Total Diversion with Pro-rated June, October and November Quantities (Acre- Feet)
May	639,117	437,740	1,076,858	3.30	0.53
June	681,103	600,075	1,281,178	3.93	3.93
July	718,556	661,652	1,380,208	4.24	4.24
August	644,405	452,645	1,097,050	3.37	3.37
September	648,128	396,315	1,044,443	3.20	3.20
October	694,220	469,579	1,163,799	3.57	3.46
November	576,025	219,493	795,518	2.44	1.22
Total					19.95

34. Permits 20784 and 21289 authorize the diversion and use of water year round, from January 1 to December 31 of each year. No water was available for diversion under the permits from May 27 through October 30 and from November 4 through November 18, 2014, a total of 172 days, inclusive of both periods. Based upon available information obtained from State Water Board staff's investigation, water is normally not diverted on Sundays. Therefore, staff concludes that Fahey diverted water for a total of 148 days in 2014 during periods when no water was available under Fahey's Permits. Fahey diverted a total of 19.95 acre-feet of water during those periods.
35. 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.
36. 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.
37. 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.
38. 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.
39. 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.

40. On August 5, 2015, State Water Board staff collected surveillance data from equipment deployed on July 23, 2015. During that visit, staff observed three tanker trucks entering and/or leaving the access road to APN 052-060-48-00. The data collected on August 5, 2015, includes surveillance data collected from July 23 through August 5.
41. State Water Board staff reviewed photo images collected from the surveillance equipment and observed that a total of 99 tanker trucks accessed the water transfer station property on 22 out of 25 days between July 12 and August 5, 2015, at a rate from one to eleven trucks per day (three days had zero trucks). Based on the available information consistent with the size of the water tanker trucks personally observed by State Water Board staff and by photo surveillance, staff estimates the capacity of these water tanker trucks to be approximately 6,600 gallons each. Thus, staff estimates that 653,400 gallons, or 2.00 acre-feet, of water were diverted during the period.
42. 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.
43. Diversion when there is no water available under the priority of the water right constitutes unauthorized water diversion and use. Unauthorized diversion is prohibited, and is a trespass. (Wat. Code § 1052.)
44. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each Notice; the Notices are not the basis for this enforcement action.

PROPOSED CIVIL LIABILITY

45. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
46. Evidence demonstrates that Fahey's unauthorized diversions in 2014 began on May 27, 2014, and continued, with a four-day interruption, until November 18, 2014, for a total of 148 days of unauthorized diversion under each Permit (assuming that diversions occur six out of every seven days), for a combined total of 296 days of unauthorized diversion in 2014. During that period, Fahey diverted 19.95 acre-feet of water in excess of that available to serve his permitted water rights.
47. Evidence demonstrates that Fahey's unauthorized diversions in 2015 have occurred from at least July 13 through August 5, 2015, for a total of 22 days under each water right, or a combined total of 44 days of unauthorized diversion. Over that period, Fahey diverted approximately 2.00 acre-feet of water (99 tanker trucks at 6,600 gal/tanker) in excess of that available to serve his permitted water rights. Evidence suggests that Fahey's unauthorized diversions in 2015 may have begun as early as April 29, 2015, and there is no evidence that diversions have ceased. The Division of Water Rights intends to submit all evidence of 2015 unauthorized diversions that is available at the time of any hearing on this matter, and may propose additional penalties based thereon.
48. The maximum civil liability for the alleged violations in 2014 is **\$345,866** [296 days at \$1,000 per day plus 19.95 acre-feet at \$2,500 per acre-foot], and the maximum civil liability for the alleged

- violations in 2015 is **\$49,000** [44 days at \$1,000 per day plus 2.00 acre-feet at \$2,500 per acre-foot], for a total combined maximum civil liability of **\$394,866** for the alleged violations.
49. In determining the amount of civil liability, California 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.
 50. In this case, Fahey has made unauthorized diversions of water from the Tuolumne River watershed during a severe drought, when there was insufficient water supply available for Fahey's permitted water rights. Fahey was aware that the State Water Board had determined that there was insufficient water supply available for Fahey's permitted water rights. These unauthorized diversions have reduced the amount of water available for downstream water right holders during an extreme drought emergency. Moreover, Fahey's diversions reduced the water available for instream resources and riparian habitat downstream.
 51. Fahey received a significant economic benefit by continuing diversions during the violations period. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 19.95 acre-feet of water from June 3, 2014 through November 18, 2014, and 2.00 acre-feet of water from July 13, 2015 through August 5, 2015, Fahey avoided purchased water costs of at least \$5,488. However, Fahey sells the spring water to commercial water bottling operations, likely at significantly higher costs than that paid by irrigation districts for replacement water.
 52. The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$15,624.
 53. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL for the unauthorized diversion of water in the amount of **\$224,875**. The recommended penalty is based on reducing the number of violation days to a single violation between the two rights per day, which is appropriate given the specific circumstances of this case, including Fahey's continued diversions despite lack of availability of water to serve his rights during 340 days of two consecutive drought years, Fahey's economic benefit derived from the water sales, and the need to provide a strong disincentive for continued unauthorized diversions by Fahey and any similarly-situated parties. The Division of Water Rights Prosecution Team may consider revising the proposed penalty based on all evidence that becomes available before any hearing on this matter, including evidence of economic benefit derived from water sales.
 54. Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. It is estimated that if this this matter goes to hearing, additional staff costs incurred for the prosecution staff would be approximately \$10,000.

RIGHT TO HEARING

55. Fahey may request a hearing on this matter before the State Water Board. Any such request for hearing must be in writing and received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
56. If Fahey requests a hearing, Fahey 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.
57. If Fahey 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

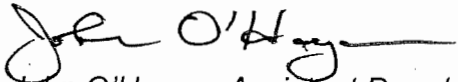
statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.

58. If Fahey 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 above to:

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

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

STATE WATER RESOURCES CONTROL BOARD



*John O'Hagan, Assistant Deputy Director
Division of Water Rights*

Dated: SEP 01 2015

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

DIVISION OF WATER RIGHTS

ORDER WR 2015 -00XX-DWR

CEASE AND DESIST ORDER

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

G. Scott Fahey and Sugar Pine Spring Water, LP, (collectively Fahey) are violating or are threatening to violate California Water Code section 1052, which prohibits the unauthorized diversion or use of water. Water Code section 1831 authorizes the State Water Resources Control Board (State Water Board or Board) to issue a Cease and Desist Order (CDO) requiring Fahey to cease such violations or threatened violations.

On {Date}, and in accordance with the provisions of Water Code section 1834, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against Fahey for the violation and threatened violation of the prohibition against unauthorized diversion and use of water. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a CDO in accordance with Water Code section 1831, et seq. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to Resolution 2012-0029.

The State Water Board, or its delegee, finds that:

FAHEY WATER RIGHTS

1. 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. Fahey does not hold or claim any other appropriative or riparian water rights on record with the State Water Board.
2. 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.

3. 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.
4. 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.
5. 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.
6. 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.
7. 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.

DROUGHT ACTIONS

8. 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.
9. 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.

10. 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.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. 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.
17. 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.

WATER AVAILABILITY DETERMINATIONS

18. 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.
19. To determine the availability of water for water rights of varying priorities, the State Water Board compares the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the State Water Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board used the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The State Water Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The State Water Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website (http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes.
24. The availability and demand analysis shows that by May 27, 2014, and April 23, 2015, available supply was insufficient to meet the demands of post-1914 appropriative rights throughout the San Joaquin River watersheds in each year.

INVESTIGATION

25. 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.
26. 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.
27. 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.
28. 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.
29. 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.
30. On April 29, 2015, in lieu of submitting an online Certification Form in response to the April 23, 2015 Unavailability Notice, Fahey submitted a copy of the June 3, 2014, letter submitted in response to the 2014 Unavailability Notice.
31. 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.
32. 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.
33. 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.

34. 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.
35. On August 5, 2015, State Water Board staff collected surveillance data from equipment deployed on July 23, 2015. During that visit, staff observed three tanker trucks entering and/or leaving the access road to APN 052-060-48-00. The data collected on August 5, 2015, includes surveillance data collected from July 23 through August 5.
36. State Water Board staff reviewed photo images collected from the surveillance equipment and observed that a total of 99 tanker trucks accessed the water transfer station property on 22 out of 25 days between July 12 and August 5, 2015, at a rate from one to eleven trucks per day (three days had zero trucks). Based on the available information consistent with the size of the water tanker trucks personally observed by State Water Board staff and by photo surveillance, staff estimates the capacity of these water tanker trucks to be approximately 6,600 gallons each. Thus, staff estimates that 653,400 gallons, or 2.00 acre-feet, of water were diverted during the period.
37. 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 indicated that he continues to sell water to commercial water bottling companies.
38. The circumstances described above indicate that Fahey is continuing to divert, or is threatening to continue diverting water even though no water is available to serve Fahey's Permit rights.
39. Diversion when there is no water available under the priority of the water right constitutes unauthorized water diversion and use. Unauthorized diversion is prohibited, and is a trespass. (Wat. Code § 1052.) Thus, Fahey is subject to a CDO pursuant to Water Code section 1831, subdivision (d)(1), which provides that the State Water Board may issue a CDO in response to a violation or threatened violation of the prohibition in section 1052 against unauthorized diversion.
40. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each Notice; the Notices are not the basis for this enforcement action.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, that G. Scott Fahey and Sugar Pine Spring Water, LP, shall immediately cease the unauthorized diversion of water from Unnamed Spring (AKA Cottonwood Spring), Deadwood Spring and Two Unnamed Springs (AKA Marco and Polo Springs) until the State Water Board determines that there is sufficient water in the system to support beneficial use at the priority of Permits 20784 and 21289.

Consequences of Non-Compliance

In the event Fahey fails to comply with the requirements of this Order, Fahey shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to Water Code section 1845. Violation of a CDO issued during a period for which the Governor has issued a proclamation of state of emergency based on drought conditions is subject to the imposition of administrative civil liability, pursuant to Water Code section 1845, subdivision (b)(1)(A) in the amount not to exceed \$10,000 for each day in which the violations occurs, or referral to the Attorney General to take further injunctive enforcement actions as described in Water Code section 1845, subdivision (a):

Upon the failure of any person to comply with a cease and desist order issued by the Board, pursuant to this chapter, the Attorney General, upon request of the Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

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 Fahey for unauthorized diversion or use of water in violation of Water Code section 1052.

Regulatory Changes

Nothing in this Order shall excuse Fahey from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

Compliance with Other Regulatory Requirements

Nothing in this Order shall excuse Fahey from meeting any additional regulatory requirement that may be imposed by other local, state, or federal regulatory entities for corrective actions taken by Fahey to comply with this Order.

Exemption from CEQA

This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

STATE WATER RESOURCES CONTROL BOARD

*John O'Hagan, Assistant Deputy Director
Division of Water Rights*

Dated:

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 appropriative 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).)

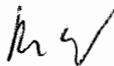
IT IS HEREBY ORDERED:

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