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BEFORE THE STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

IN THE MATTER OF: ADMINISTRATIVE)
CIVIL LIABILITY AND CEASE AND)
DESIST ORDER AGAINST G. SCOTT)
FAHEY AND SUGAR PINE SPRING)
WATER, LP)

MEMORANDUM IN RESPONSE TO APRIL
3, 2019 BRIEFING REQUEST ON REVISED
DRAFT ORDER

1 **I. INTRODUCTION**

2 The Division of Water Rights Prosecution Team submits the following comments in
3 response to the State Water Resources Control Board’s (“State Water Board” or “Board”) April 3,
4 2019 request for written briefing on the March 29, 2019 Revised Draft Order Adopting a Cease and
5 Desist Order and Imposing Administrative Civil Liability (“Revised Draft Order”) against G. Scott
6 Fahey and Sugar Pine Spring Water, LP (collectively, “Respondent”).¹

6 **II. RESPONSES TO BRIEFING REQUEST**

7 **A. The Respondent May Provide Replacement Water in Advance and Credit it to**
8 **Future Replacement Water Requirements but May Not Carry Over Credits to**
9 **Subsequent Years.**

9 Term 20 in Permit 20784 and Term 34 in Permit 21289 allow the Respondent to divert or
10 use water adverse to the prior rights of Turlock Irrigation District (“TID”), Modesto Irrigation
11 District (“MID”), and the City and County of San Francisco (“CCSF”) (collectively “Intervenors”)
12 by providing replacement water. (WR-15, p. 6; WR-16, p. 9.) The Respondent may provide
13 replacement water in advance and credit it toward future replacement water requirements. (*Ibid.*)
14 Neither Permit 20784, Term 20 or Permit 21289, Term 34 specifically authorize carryover. (WR-
15 15, pp. 6-7; WR-16, p. 9.) Both permit terms do however provide that “permittee’s obligations to
16 provide replacement water... shall take into consideration permittee’s obligations to provide
17 replacement water under the Water Exchange Agreement.” (WR-15, p. 7; WR-16, p. 9.) The
18 Water Exchange Agreement with TID and MID allows the Respondent to provide make-up water
19 at any time of the year but specifically prohibits carryover to subsequent years. (WR-19, p. 2.) The
20 Water Exchange agreement allows the Respondent to build a surplus prior to the FAS period but
21 prohibits carry over to subsequent years. (*Ibid.*) The Board should interpret Permit 20784, Term 20,
22 and Permit 21289, Term 34 to operate similarly to the Water Exchange Agreement by allowing the
23 Respondent to provide replacement water in advance and credit the Respondent against future
24 replacement water requirements but prohibiting carryover to subsequent years.

23 **B. The Respondent Has No Right to Store Water in New Don Pedro Reservoir.**

24 The Respondent’s permits do not authorize storage in New Don Pedro Reservoir
25 (“NDPR”).² (WR-15, 16; RT (Jan 25, 2016), p. 100:19-22, 124:19-124:17, 174:8-10, 181:18-25,

26 ¹ References to Prosecution Team exhibits will be “WR-[Exhibit Number].” References to page numbers in exhibits
27 will be to the page of the pdf document. Citations to the Certified Reporter’s Transcript are indicated by “R.T.”
28 followed by the date, page, and line numbers.

² The Prosecution Team’s Closing Brief, filed June 17, 2016, discusses whether the Respondent has a right to store
water in NDPR. (Prosecution Team Closing Brief (June 17, 2016), pp. 12-13.) This memorandum incorporates and
references portions of that brief as relevant in the interest of avoiding duplicative, redundant briefing.

1 182:1-8; 187:2-10.) On cross-examination he acknowledged that he has no right to store water in
2 NDPR. (RT (Jan. 25, 2016), pp. 174:8-10, 182:1-4.)

3 **C. The Prosecution Team is Unaware of How the Respondent Can Provide**
4 **Replacement Water in Advance and Credit it to Future Use Without Pre-**
5 **Positioning Water in New Don Pedro Reservoir.**

6 Term 20 in Permit 20784 and Term 34 in Permit 21289 require the Respondent to provide
7 replacement water to NDPR. (WR-15, p. 6; WR-16, p. 9.) They offer no alternative method.

8 **D. A Credit for Advance Replacement Water is Distinguishable from a Right to**
9 **Store Water, Because the Respondent May Only Use the Credit to Offset**
10 **Diversions Adverse to the Intervenor’s Prior Rights.**

11 **1. Advance Replacement Water Credits do not Authorize Diversion When**
12 **Water is Unavailable for the Respondent’s Priority of Right.**

13 The hallmark of storage requiring an appropriative right is the detention of surplus water for
14 future use at the convenience of one appropriator, while depriving others of their use and service of
15 the stream in its natural condition. (*Seneca Consolidated Gold Mines Ltd. v. Great Western Power*
16 *Co.* (1930) 209 Cal. 206, 217, quoting *Still v. Palouse Irr. & Power Co.* (1911) 64 Wash. 606,
17 609.) Storing water for future use, whether cyclic or seasonal, constitutes an appropriation of water.
18 (*Moore v. California-Oregon Power Co.* (1943) 22 Cal.2d 725, 731; *City of Lodi v. East Bay*
19 *Municipal Utility Dist.* (1936) 7 Cal.2d 316, 335; *Colorado Power Co. v. Pacific Gas and Electric*
20 *Co.* (1933) 218 Cal. 559, 564; *Seneca, supra* 209 Cal. at 216-217.) A right to store water would
21 allow the Respondent to impound water when natural flow is available for his priority of right and
22 detain that water for future use at a time of his convenience, even when water is unavailable for his
23 priority of right. But the Respondent has no right to store water in NDPR.

24 The Respondent’s permit terms requiring him to provide the Intervenor’s with replacement
25 water for diversions adverse to their senior rights do however implement a physical solution. A
26 physical solution allows a subsequent appropriator to beneficially use water without materially
27 injuring a prior appropriator’s rights. (WR-9 ¶ 15; *City of Lodi v. East Bay Municipal Utility*
28 *District* (1936) 7 Cal. 2d 316; 339-341.) A physical solution usually operates by requiring the
subsequent appropriator to furnish a substitute supply of water to a prior user in place of the
existing supply. (WR-9 ¶ 15; *City of Lodi v. East Bay Municipal Utility District* (1936) 7 Cal. 2d
316; 339-341.) But a physical solution does not change water right priority. (*City of Barstow v.*
Mojave Water Agency (2000) 23 Cal. 4th 1224, 1250.) When water is unavailable for a junior
appropriator’s priority of right, the junior appropriator still must cease diverting. (*U.S. v. St.*
Resources Control Bd. (1986) 182 Cal.App.3d 82, 101.)

The Respondent’s rights under the physical solution are extremely limited. He may only use

1 replacement water and advance replacement water credit, assuming its availability, for the narrow
2 and singular purpose of offsetting diversions adverse to the Intervenor's prior rights. He may not
3 use replacement water or advance replacement water credits to offset his diversions during the FAS
4 period, to offset diversions adverse to other prior rights, or to divert or use water when water is
unavailable for his priority of right, even during the non-FAS period.³

5 **E. The Respondent Failed to Fulfill Requirements for the Physical Solution for**
6 **Offsetting Diversions Adverse to the Intervenor's Prior Rights.**

7 The Respondent's permits include multiple requirements for the physical solution
8 implemented in Term 20 of Permit 20784 and Term 34 in Permit 21289. (WR-21; WR-15, p. 7;
9 WR-16, p. 9.) He must report the source, amount and location at NDPR of replacement water
10 discharged to the reservoir with his annual Progress Report to the State Water Board. (WR-15, p. 7;
11 WR-16, p. 9.) He must furnish MID and TID with semi-annual reports showing his monthly
12 diversion amounts. (WR-19, p. 2.) Finally, he and the Intervenor's to mutually agree on the source,
13 amount, and location at NDPR of replacement water discharged to NDPR. (WR-16, p. 9.) Merely
14 providing replacement water is insufficient. The Respondent must communicate and coordinate
with the Intervenor's to avoid diversions adverse to their prior rights and avoid interfering with
CCSF's obligations under the Raker Act. (WR-21; WR-15, p. 7; WR-16, p. 9.)

15 The Respondent fulfilled none of these requirements. He never notified the State Water
16 Board that he had positioned water in NDPR until his June 3, 2014 letter and he never furnished
17 MID and TID with bi-annual reports of his diversions. (R.T., Jan. 25, 2016, pp. 170:24 to 171:9,
18 183:22-184:10.) The Respondent claimed the Intervenor's handled all accounting for his
19 replacement water in NDPR. (R.T., Jan. 25, 2016, p. 182:9-183:11.) However, he admitted that he
20 never informed the Intervenor's that he provided replacement water before sending them a letter
21 dated June 3, 2014. (R.T., Jan. 25, 2016, p. 183:12-21.) Even assuming the Respondent's permits
22 allow him to carry over advance replacement water credit to subsequent years, he failed to
23 substantially fulfill the requirements necessary to coordinate with the Intervenor's and maintain
24 whatever account he had in NDPR. If he had any advance replacement water credit in NDPR
carried over from prior years, the Respondent lost it through his own negligence.

25 _____
26 ³ The Revised Draft Order describes senior demand far exceeding the Respondent's water right priority in 2014 and
27 2015. (Revised Draft Order, p. 43.) In 2014, for most of the period from May 27 through November 19, there was no
28 water available for water rights with post-1953 priority. (*Id.*) In 2015, from April until mid-September, senior demand
exceeded the Respondent's priority of right by 5,000 to 10,000 cfs. (*Id.*) With such severe deficits, the Respondent's
unauthorized diversions would have diminished available water to the many rights downstream of NDPR with rights
senior to his and the MID and TID's post-1914 rights. (R.T., Jan 25, 2016, pp. 49:23 to 50:9; R.T., Jan 26, 2016, pp.
18:8 to 19:9; WR-9, p. 6, ¶ 32; see also R.T., Jan 25, 2016, p. 36:23-25.)

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F. The Respondent has Additional Liability for Unauthorized Diversion During the Non-Fully Appropriated Stream Period

If the Board finds that the Respondent may not carry over advance replacement water credit to subsequent years, the Respondent violated Term 20 in Permit 20784 and Term 34 in Permit 21289 and lacked an affirmative defense to unauthorized diversion during the non-FAS period. (Revised Draft Order, p. 51-62.) The Respondent still lacks an affirmative defense to unauthorized diversion during the non-FAS period if the Board finds that the Respondent’s advance replacement water credits do not authorize diversion or use when water is unavailable for his priority of right. (*Id.*) The Respondent thus has additional liability for unauthorized diversion during the non-FAS period when water was unavailable for his priority of right. The additional liability results in a higher statutory maximum liability under Water Code section 1052 and, because he would have sold more water, a higher economic benefit. The additional liability increases the Respondent’s days of violation for trespass by 63 days and the amount diverted by 7.62 acre-feet.⁴ (Revised Draft Order, p. 40.) Thus, the Respondent trespassed a total of 241 days during both the FAS and non-FAS periods when water was unavailable for his priority of right and diverted a total of 32.95 acre-feet, with 19.35 acre-feet diverted in 2014 and 13.6 acre-feet diverted in 2015. (*Id.*) Under Water Code section 1052, this brings the statutory maximum liability for trespass during drought to \$323,375.

According to the Revised Draft Order, “All else equal, a civil penalty for unlawful diversion should at minimum recover enforcement costs and disgorge the economic benefit obtained from a violation. Fahey’s economic benefit from his unlawful diversion... is not more than Fahey’s gross sales during the period and is not less than the avoided cost of providing make-up water to senior diverters in those years...” (Revised Draft Order, p. 71.) The Respondent’s economic benefit, based on his spring water sales, would have been approximately \$127,932 in 2014 and \$110,785 in 2015, for a total of \$238,717.⁵

In disgorgement, a claimant must merely show a causal connection between a defendant's wrongdoing and a reasonable approximation of the measurable increase in the defendant's net assets attributable to the wrongful conduct. (Rest. (Third) Restitution and Unjust Enrichment, § 51(5)(a) (2011).) Even if damages are unascertainable amount below an upper limit and uncertainty arises from a defendant's wrong, the upper limit is still considered the proper amount. (*Gratz v. Claughton* (2d Cir. 1951) 187 F.2d 46, 51–52.) The defendant bears the risk of uncertainty arising

⁴ Additional liability for non-FAS period unauthorized diversion is based on the number of days of diversion and acre-feet diverted reported in Table 2, on page 40, of the Revised Draft Order.

⁵ During the period of unavailability in 2014, the Respondent sold water for an average price of \$6,611.52 per acre-foot. (Revised Draft Order, p. 72.) During the period of unavailability in 2015, he sold water for an average price of \$8,146 per acre-foot. (*Ibid.*)

1 from the wrong and the evidentiary burden to demonstrate wrongfully gained profits are less than
2 the upper limit. (Rest. (Third) Restitution and Unjust Enrichment, § 51(5)(d) (2011).)

3 The Prosecution Team offered evidence reasonably approximating the Respondent's
4 economic benefit. (WR-72, p. 4; WR-65, pp. 6-8; WR-67, pp. 6-10.) The Prosecution Team
5 utilized every available means to reasonably approximate the Respondent's economic benefit, with
6 an information order, subpoena, and a motion to compel. (WR-3, pp. 6-7; Prosecution Team,
7 Motion to Compel Production of Documents in Response to Subpoena Duces Tecum (Nov. 25,
8 2015).) The Prosecution Team met its burden. Although the Respondent's net profits may be
9 uncertain, the Respondent's gross sales are nonetheless the "upper limit" considered an appropriate
10 and reasonable approximation of the economic benefit attributable to his unauthorized diversion.

11 The Respondent had the burden to offer evidence showing his economic benefit was less
12 than the Prosecution Team's reasonable approximation. (Rest. (Third) Restitution and Unjust
13 Enrichment, § 51(5)(d) (2011).) However, the Respondent refused to disclose this information,
14 waiving any argument his economic benefit was less than the Prosecution Team's reasonable
15 approximation. (Opposition of G. Scott Fahey and Sugar Pine Spring Water, L.P. to Motion to
16 Compel Production of Documents in Response to Subpoena Duces Tecum (Dec. 8, 2015);
17 Procedural Ruling: Motion by Prosecution Team to Compel Production of Documents in Response
18 to Subpoena Duces Tecum (Dec. 14, 2015), pp. 4-5.)

19 **III. CONCLUSION**

20 The Respondent has no right to store water in NDPR and his permits cannot reasonably be
21 interpreted to authorize carry over of replacement water credits to subsequent years. Regardless,
22 replacement water credits are only part of a physical solution limited to offsetting diversions adverse
23 to the Intervenor's prior rights. The Respondent cannot use replacement water credits to divert or use
24 water when water is unavailable for his priority of right, whether during the FAS or non-FAS periods.
25 This results in additional days of violation and unauthorized water diverted during the non-FAS
26 period and additional economic benefit from spring water sales. The Prosecution Team recommends
27 revising the Revised Draft Order to reflect the additional liability and economic benefit.

28 Respectfully submitted,



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