

EXHIBIT 36



Terry Tamminen
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights

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Arnold Schwarzenegger
Governor

MEMORANDUM

TO:

1. *Arnold Schwarzenegger*
Marias Thahanant
2. Steven Herrera *SH - 1-24/03*
3. Victoria Whitney *VW 1/26/04*

FROM:

Yoko Mooring
Yoko Mooring
Engineering Associate
Water Rights Processing Unit

DATE:

December 23, 2003

SUBJECT:

AUTHORIZATION TO ACCEPT AN APPLICATION (X3488)
IN A FULLY APPROPRIATED STREAM SYSTEM PURSUANT TO
EXCEPTION CONDITIONS SPECIFIED IN BOARD ORDER WR 98-08

This is a request for your written approval to accept an application to appropriate 0.089 cubic foot per second (cfs), annual limit of 64.5 acre-feet, from fully appropriated streams; Sacramento-San Joaquin Delta upstream and the Tuolumne River in Tuolumne County. Water Code section 1206(a) provides that the State Water Resources Control Board (SWRCB) shall not accept any application within that stream system, following the adoption of a Declaration that a stream system is fully appropriated. SWRCB Order 98-08 identifies the Sacramento-San Joaquin Delta watershed upstream from the Delta as fully appropriated between June 16 and August 31 (Decision 1594), and the Tuolumne River upstream from Don Pedro Reservoir as fully appropriated between July 1 and October 31 (Decision 995). However, Section 4.10 of Order WR 98-08 sets guidance for administrating the declaration and specifically allows an exception to accepting an application on a fully appropriated stream where water is made available under an Exchange Agreement.

Application X3488 submitted by G. Scott Fahey seeks to appropriate water, year round, by direct diversion, for industrial purposes (bottled water) from the three springs (Wet Meadows Springs, Marco Spring, and Polo Spring) which are tributary to the Tuolumne River thence the Sacramento-San Joaquin Delta water system. Decision 995 found that the Modesto Irrigation District (MID) and the Turlock Irrigation District (TID) hold water right licenses to appropriate all of the flow of the Tuolumne River water for power purposes from July through October of each year. Also, the City and County of San Francisco claims pre-1914 appropriative rights

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pursuant to the Raker Act of 1913 on any diversion of water flowing into New Don Pedro Reservoir.

Background History: On July 12, 1991, Mr. Fahey filed his first application (Application 29977) for 0.062 cfs, for industrial purposes, from the two springs (different from X3488) that are tributary to the Tuolumne River and the Sacramento-San Joaquin Delta water system. At the time, Mr. Fahey entered into a water exchange agreement, which was executed on December 12, 1992, with the MID and the TID for the period from June 16 to October 31 of each year, when water is not available for appropriation in the Tuolumne River and the Sacramento-San Joaquin Delta system. Any water that the applicant diverts pursuant to this application will be replenished into the Roger Creek arm of Lake Don Pedro by pumping an equal amount of groundwater from a well located in the SW ¼ of NE ¼ of NE ¼ of Section 8, T3S, R15E, MDB&M. With this agreement, the Chief of the Division of Water Rights approved for exception from the fully appropriated stream system and Application 29977 was accepted and processed for a notice. The application was protested by several organizations and Mr. Fahey successfully negotiated and resolved all protests except one filed by the City and County of San Francisco. After the field investigation (Filante) and the subsequent extensive negotiations, Mr. Fahey entered into a private agreement with the City and County of San Francisco. After the San Francisco protest was resolved, Permit 20784 was issued on March 23, 1995.

Therefore, with this experience behind, when Mr. Fahey submitted a new application (X3488), he included the statement under penalty of perjury, that the new application shall be conditional upon and subject to the terms and conditions of the previous agreements: (1) Agreement, dated December 12, 1992, between G. Scott Fahey and the TID and MID, and as enumerated by the State Water Resources Control Board, Division of Water Rights, Permit #20784, Item 19, (2) Conditions 1, 2a, 2b, 2c, 2d, and 2e within the City of San Francisco letter, dated December 19, 1994, and as enumerated by the State Water Resources Control Board, Division of Water Rights, Permit 20784, Item 20.

However, the Division, under the previous management, requested further evidence that the water exchange contract be updated and available for the new application. Subsequently, Mr. Fahey went through the application process with the Tuolumne Utilities District for surplus water service and updated the water exchange contract. On December 19, 2003, he provided the Division a copy of the executed contract, dated October 20, 2003.

If you agree with the above-described exception to the Declaration of Fully Appropriated Stream Systems regarding a Water Exchange Agreement, please execute the attached Statement for Files.

Attachment

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