

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 Hill 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: