

State Water Resources Control Board

SEP 07 2012

Charlotte Ann Temple Testamentary Trust
c/o Ms. Katherine S. Zelazny
Block, DeVincenzi & Zelazny LLP
1505 Main Street
St. Helena, CA 94574

Dear Ms. Zelazny:

**ENFORCEMENT ACTION ENF00139 – FINAL CEASE AND DESIST ORDER REGARDING
UNAUTHORIZED DIVERSION OF WATER WITHIN THE NAPA WATERSHED IN NAPA COUNTY**

On August 29, 2012, the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) mailed out the final Cease and Desist Order WR 2012-0020-DWR (CDO) issued to Arthur Temple III and Katherine S. Zelazny (individuals and co-trustees). However, the Division mistakenly addressed the cover letter to the wrong mailing address. Please find enclosed the original cover letter and final CDO dated August 29, 2012.

The Division has also received the pond removal plan submitted via e-mail dated August 30, 2012. It is currently being reviewed, and Division staff will contact you with any questions or requests for additional information.

Sincerely,



Aaron Miller, Chief
Enforcement Unit 4
Division of Water Rights

Enclosures:

- August 29, 2012 Transmittal Letter
- Final Cease and Desist Order
- Exhibit A: Aerial Photograph
- Exhibit B: USGS Topographical Map

State Water Resources Control Board

AUG 29 2012

Charlotte Ann Temple Testamentary Trust
c/o Ms. Katherine S. Zelazny
1580 First Street
Saint Helena, CA 94574

Dear Ms. Zelazny:

**ENFORCEMENT ACTION ENF00139 – FINAL CEASE AND DESIST ORDER
REGARDING UNAUTHORIZED DIVERSION OF WATER WITHIN THE
NAPA WATERSHED IN NAPA COUNTY**

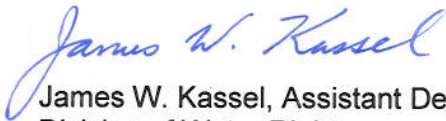
Enclosed is a final Cease and Desist Order WR 2012-0020-DWR (CDO) issued to Arthur Temple III and Katherine S. Zelazny (individuals and co-trustees), and the Charlotte Ann Temple Testamentary Trust (referred to collectively as Temple) that I have issued in accordance with California Water Code section 1831 et seq. and the authority delegated to me by State Water Board Resolution 2012-0029. Notice and opportunity to request a hearing on the CDO was provided to Temple by letter dated March 22, 2012 in conjunction with an Administrative Civil Liability Complaint.

A request for a hearing on the CDO was not made, and Temple has begun complying with the terms of the CDO by submitting a letter of intent dated April 23, 2012 (Letter of Intent). The Letter of Intent expresses the intent to pursue Option 3 of the CDO by not seeking a water right and committing to develop and submit a plan to render the reservoir incapable of storing water, subject to the State Water Board's authority. In addition, Temple has paid the full Administrative Civil Liability amount of \$6,300.

The next applicable deadline in Option 3 of the CDO requires that within 150 days of the date of the CDO, Temple shall submit a plan to permanently render the reservoir incapable of storing water, subject to the State Water Board's permitting authority. The plan shall include a time schedule not to exceed two years for completion of the proposed alteration and the identification of any permits or agreements necessary from other federal, state, and local agencies to complete the work.

If you have any questions concerning this matter or there are facts or circumstances that you would like to discuss, please contact one of the following: Mr. John O'Hagan, Manager, Enforcement Section, at (961) 341-5368 or via e-mail at: johagan@waterboards.ca.gov; or Ms. Yvonne West, Senior Staff Counsel, Office of Enforcement, at (916) 322-3626 or via e-mail at: YWest@waterboards.ca.gov.

Sincerely,



James W. Kassel, Assistant Deputy Director
Division of Water Rights

Enclosures:

- Final Cease and Desist Order
- Exhibit A: Aerial Photograph
- Exhibit B: USGS Topo Map

cc: A. Wayne Corley and Buddy Zeagler
204 Champions Drive
Lufkin, TX 75901

ec: Andy Sawyer, Assistant Chief Counsel
State Water Resources Control Board
Office of Chief Counsel
(with enclosures)

Yvonne West, Senior Staff Counsel
State Water Resources Control Board
Office of Enforcement
(with enclosures)

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

DIVISION OF WATER RIGHTS

ORDER WR 2012 -0020-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion by

**Arthur Temple III and Katherine S. Zelazny (individuals and co-trustees)
and
Charlotte Ann Temple Testamentary Trust**

SOURCE: Unnamed Stream tributary to Napa River thence San Pablo Bay

COUNTY: Napa County

The State Water Resources Control Board (State Water Board) is authorized under California Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Arthur Temple III and Katherine S. Zelazny (individuals and co-trustees) and Charlotte Ann Temple Testamentary Trust (referred to collectively as Temple) to cease and/or abate a threatened, unauthorized diversion, storage, and use of water in violation of California Water Code section 1052.

Temple is alleged to have violated or is threatening to violate California Water Code section 1052 for which section 1831 (d) provides, in part:

The State Water Board is authorized to issue a Cease and Desist Order when it determines that any person is violating or threatening to violate any of the following:

- (1) *The prohibition set forth in section 1052 against the diversion or use of water subject to division 2 (commencing with section 1000) of the Water Code other than as authorized by division 2.*

On March 22, 2012, and in accordance with the provisions of section 1834 of the California Water Code, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against Temple for the violation and threatened violation of the prohibition against unauthorized diversion, storage, and use of water.¹ Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is

¹ The draft CDO was noticed on March 22, 2012 along with an Administrative Civil Liability Complaint, both of which were issued to Arthur Temple III (individual and trustee) and Arthur Temple III et al. Trust, based on information obtained from Napa County assessor's office. Arthur Temple III and Katherine S. Zelazny are former trustees for the Trust and are listed as co-trustees on the last vested deed for the property. The correct legal name of the Trust is the Charlotte Ann Temple Testamentary Trust. Actual notice of the CDO was received by Arthur Temple III, Katherine S. Zelazny, and the Trust as evidenced by an April 5, 2012 response letter from Ms. Katherine S. Zelazny, attorney for the Trust. The April 5, 2012 letter also identifies the Trust as owner of the property. In addition, the Trust did not request a hearing on the CDO and has paid the full Administrative Civil Liability amount proposed in the complaint that accompanied the draft CDO.

authorized to issue a notice of cease and desist, and when a hearing has not been timely requested,² issue a CDO in accordance with California Water Code section 1831 et seq. State Water Board Resolution 2007-0057 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

The State Water Board or its delegee, the Assistant Deputy Director for Water Rights, finds that:

1. Temple owns property that includes a reservoir on an Unnamed Stream tributary to the Napa River. Any water diverted to storage in the reservoir from the Unnamed Stream is subject to the State Water Board's permitting and licensing authority, as detailed in division 2 (commencing with section 1000) of the California Water Code.
2. Temple does not have a water right permit or license to store surface water in said reservoir.
3. Temple has violated California Water Code section 1052 in the past by diverting surface water from the Unnamed Stream to storage in the reservoir for later use without a basis of right.
4. The reservoir also presents a threat of future unauthorized diversion and use of water in violation of California Water Code section 1052.

FACTUAL BASIS FOR ISSUING A CDO

The facts and information upon which this CDO is based are as follows:

1. In December 2007, the State Water Board produced a draft Substitute Environmental Document (SED) as part of its development of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Instream Flow Policy). Appendix E of the SED contains the report Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams produced by Stetson Engineers in December 2007. In order to complete this report, Stetson Engineers produced a Geographic Information System (GIS) layer which identified the locations of the existing potential unauthorized dams. In June and July of 2011, a review of the GIS layer, aerial photographs, and United States Geological Survey (USGS) topographic maps of the Napa River watershed was undertaken by the State Water Board's Division. The review provided evidence that Napa County Assessor's Parcel Number (APN) 025-070-053 contained a reservoir that appears to collect surface flow from an Unnamed Stream and is subject to the permitting authority of the State Water Board. According to Napa County records, Arthur Temple III and Katherine S. Zelazny are current owners of parcel 025-070-053 as Co-Trustees for the Charlotte Ann Temple Testamentary Trust.³ From a review of water rights filed with the Division, the Division concluded that there was no record of a Statement of Water Diversion and Use (Statement) having been filed in accordance with California Water Code section 5101 et seq. for the reservoir on this parcel.
2. On August 18, 2011, the Division mailed Temple a letter (Notice Letter) which notified Temple that a reservoir had been identified on APN 025-070-053. The Notice Letter informed Temple that the State Water Board does not have any record of a Statement or an appropriate water right authorizing the diversion of water for the subject property and that he needs to file for a water right if the reservoir is collecting water to storage from a surface stream. The Notice Letter explains that unauthorized diversions are considered a trespass against the State for which the State Water Board may issue a civil liability in the amount of \$500 per day for each day that the trespass occurs.

² Temple did not request a hearing on the CDO and has already begun complying with terms of this CDO.

³ See fn. 1, supra.

Additionally, the Notice Letter advised him of the requirements to file a Statement and potential penalties for failure to file a Statement, pursuant to California Water Code section 5100 et seq. Lastly, the Notice Letter requested that Temple take one of the following actions: (1) If Temple is claiming an existing basis of right or diverting water not subject to the State Water Board's permitting authority, then he should submit evidence supporting those facts within 30 days of receipt of the Notice Letter; or (2) If Temple agrees that the diversion was subject to the permitting authority of the State Water Board, then the Notice Letter gave Temple 60 days to develop and submit a corrective action plan to prevent the unauthorized diversion of water.

3. As of February 24, 2012, Temple had not responded in any manner to the Notice Letter. The Notice Letter was sent regular mail via the U.S. Postal Service to the address of record with the Napa County Tax Assessor's office for Mr. Arthur Temple III and is presumed to have been delivered because it has not been returned as undeliverable. Temple has not submitted any of the following: (1) evidence supporting an existing basis of right or demonstrating that the diversion is not subject to the State Water Board's permitting authority; (2) a corrective action plan describing how Temple would prevent further unauthorized diversions from occurring; nor (3) a Statement for the diversion in question.
4. In December 2011, the Division did a detailed review of National Agriculture Imagery Program aerial photographs dated 2010 available from United States Department of Agriculture (USDA) (Exhibit A) and the St. Helena USGS Quadrangle, dated 1993 (Exhibit B). These aerial images and maps clearly show that the reservoir is formed by a single axis dam that has been constructed across an ephemeral stream channel. Division staff estimates the watershed area above the dam is 17.2 acres, and the reservoir surface area when full is approximately 0.15 acres. Assuming an average depth of 15 feet, Division staff estimates that the reservoir could store approximately 1.6 acre-feet. Using precipitation data from USGS Digital Line Graphs and the watershed area, Division staff estimate an average annual runoff of 10 acre-feet. The location of the reservoir, area of the watershed, capacity of the reservoir, and average annual runoff demonstrate that any reduction in water stored in the reservoir due to consumptive use, evaporation, and/or seepage would be refilled annually. Therefore, the dam and reservoir constitute a diversion of water as defined by California Water Code section 5100. Furthermore, the reservoir is a post-1914 diversion and use because it was not included on the original 1960 USGS Quadrangle map (Exhibit B) and is first documented on the map in 1993 as a photo revision. Therefore, the reservoir is a diversion and use subject to the State Water Board's permitting authority (division 2 of the California Water Code), for which Temple has not applied, or obtained a water right permit.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the California Water Code, that Temple shall cease the unauthorized diversion of water from the Unnamed Stream tributary to Napa River, file a Statement of Water Diversion and Use for the diversion of water at the reservoir, and pursue one of the following corrective action options and satisfy the appropriate time schedules outlined herein:

Corrective Action Options

Option 1:

1. If the reservoir in question qualifies for a Small Domestic Use or Livestock Stockpond Registration in accordance with California Water Code sections 1228 and forward, then within 30 days of the date of this Order, Temple shall provide evidence to the Assistant Deputy Director for Water Rights that a Small Domestic Use or Livestock Stockpond Registration form has been completed and submitted to the Water Rights Coordinator for the Department of Fish and Game (DFG) in the Region 3 Office in Napa, and Temple must diligently pursue that registration.

2. If the DFG or the State Water Board rejects Temple's registration request on the grounds that the reservoir in question is not eligible for registration, then within 30 days of DFG or the State Water Board issuing that decision, Temple shall: (1) file an appropriate water right application with the Division and comply with Option 2 below; or (2) inform the State Water Board that he will not pursue a water right permit and will comply with Option 3 below.

Option 2:

1. Within 30 days of the date of this Order, Temple shall file an appropriate water right application with the Division for storage and use of water in his reservoir, and diligently pursue securing a permit by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division; and
2. Within 90 days of the date of this Order, Temple shall submit a reservoir operation plan (Operation Plan) for acceptance by the Assistant Deputy Director for Water Rights. The Operation Plan must demonstrate how the reservoir will be operated without storing additional water subject to the State Water Board's permitting authority until a permit is issued pursuant to the Temple water right application submitted in accordance with paragraph 1 of this option.⁴
3. If the State Water Board denies or cancels the Temple water right application, then within 150 days of the State Water Board issuing that decision, Temple shall submit a plan to the Assistant Deputy Director for Water Rights for permanently rendering the reservoir incapable of storing water subject to the permitting authority of the State Water Board. The plan must satisfy the same requirements and is subject to the same acceptance criteria that are detailed below in Option 3.

Or,

Option 3:

1. Within 30 days of the date of this Order, Temple shall inform the State Water Board that he will not pursue a water right permit to authorize the collection of water to storage from the Unnamed Stream. Thereafter, within 150 days of the date of this Order, Temple shall submit a plan to the Assistant Deputy Director for Water Rights to permanently render the reservoir incapable of storing water subject to the State Water Board's permitting authority. The plan shall include a time schedule not to exceed two years for completion of the proposed alteration and the identification of any permits or agreements necessary from other federal, state, and local agencies to complete the work. Upon acceptance of the plan by the Assistant Deputy Director of Water Rights as sufficient to render the reservoir incapable of being an unauthorized diversion or threat of future diversion in violation of California Water Code section 1052, Temple shall diligently comply with all provisions and time schedules of the plan. If Temple is unable to comply fully with the plan due to other federal, state, or local agencies with authority over the work required, Temple shall immediately alert the Assistant Deputy Director for Water Rights of the reason for delay and any problems with fully complying with the provisions of the plan and diligently work to overcome such obstacles.

⁴ Since notice of this CDO was provided to Temple, the Alameda County Superior Court in *Living Rivers Council v. State Water Resources Control Board* (2012, No. RG10-543923) has ordered that State Board's Resolution 2010-0021 adopting the Instream Flow Policy be vacated. Accordingly, provisions of this order calling for compliance with the Instream Flow Policy are struck in compliance with the *Living Rivers* decision.

Compliance with Future Directives of Division

Whichever corrective action option is taken, Temple shall comply with any written directive of the Assistant Deputy Director for Water Rights regarding that corrective action option until such time as the State Water Board issues a water right permit or the reservoir is rendered incapable of storing water subject to the State Water Board's permitting authority.

Consequences of Non-Compliance

In the event Temple fails to comply with the requirements of this Order, he shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to California Water Codes section 1845 (b)(1) of up to \$1,000 for each day in which the violations occurs, or referral to the Attorney General to take further enforcement actions as described in California Water Code section 1845(a):

Failure of any person to comply with a CDO issued by the State Water Board pursuant to this chapter may subject that person to further enforcement action, including assessment of civil liability of up to one thousand dollars a day and referral to the Attorney General for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

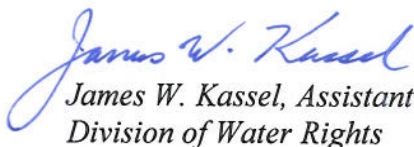
Reservation of Enforcement Authority and Discretion

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 Temple for unauthorized diversion or use in violation of California Water Code section 1052 regardless of Temple's compliance with an Operation Plan or other corrective action plan accepted in accordance with a corrective action option described above.

Regulatory Changes

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

STATE WATER RESOURCES CONTROL BOARD


James W. Kassel, Assistant Deputy Director
Division of Water Rights

Dated: **AUG 29 2012**



OWNER ARTHUR TEMPLE III

APN 025-070-053

IMAGERY SOURCE

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL AGRICULTURE IMAGERY PROGRAM

IMAGERY DATE 2010

SCALE: 1:12,000

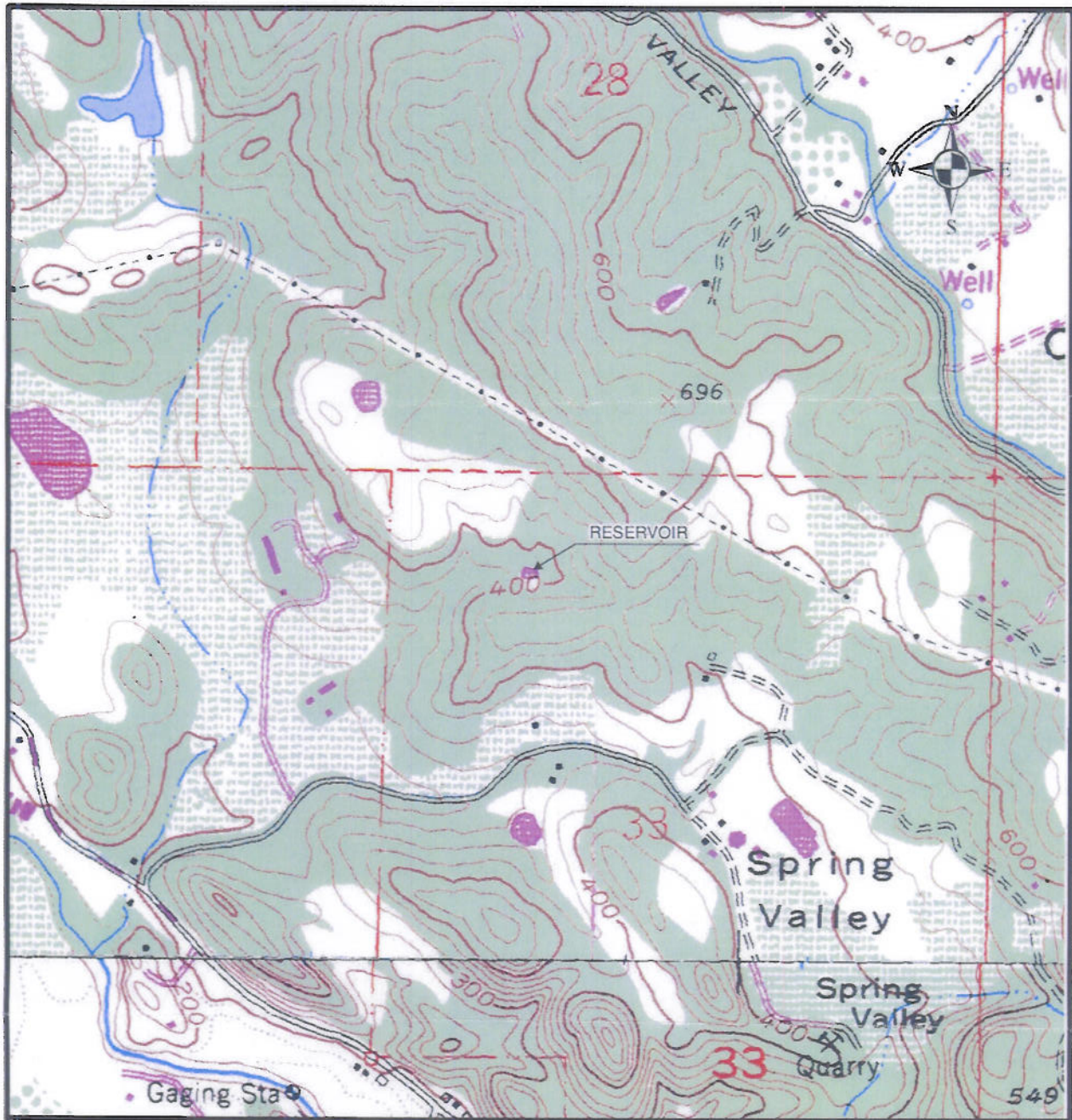
STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

RESERVOIR ID # 1169

EXHIBIT A

DATE:	DRAWN:	CHECKED:
02/16/2012	BR	

Note: This map does not constitute a public land survey as defined by California Business & Professions Code section 8726. It has been prepared for descriptive purposes only.



OWNER: ARTHUR TEMPLE III

APN: 025-070-053

U.S.G.S. QUAD: ST. HELENA

DATE PHOTO REVISED: 1993

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

RESERVOIR ID# 1169

EXHIBIT B

SCALE: 1:12000

DATE:

2/16/2012

DRAWN:

BR

CHECKED:

Note: This map does not constitute a public land survey as defined by California Business & Professions Code section 8726. It has been prepared for descriptive purposes only.