

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

**DIVISION OF WATER RIGHTS**

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**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**  
In the Matter of Unauthorized Diversion

**KEVIN GONZALVES**

SOURCE: Canal Creek, tributary to Bear Creek, tributary to San Joaquin River

COUNTY: Merced

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**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Kevin Gonzalves (the Diverter) is alleged to have diverted or used water in violation of California Water Code, (Water Code) section 1052, subdivision (a), which states:

“The diversion or use of water subject to [Division 2 of the Water Code (commencing with section 1000)] other than as authorized in this division is a trespass.”
2. Water Code, section 1052, subdivision (c)(2) provides that any person committing a trespass may be liable in an amount not to exceed five hundred dollars (\$500) for each day in which the unauthorized diversion occurs.
3. Water Code, section 1052, subdivision (c)(1) provides, in part, that if the unauthorized diversion occurs during a period for which the Governor has issued a proclamation of a state of emergency based on drought conditions, any person committing a trespass during this period 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.
4. 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) pursuant to Water Code, section 1055.
5. Water Code, section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. The Executive Director has

delegated this authority to the Deputy Director for the Division of Water Rights (Deputy Director), who has redelegated this authority to the Assistant Deputy Director for the Division of Water Rights (Assistant Deputy Director). State Water Board Resolution 2012-0029 authorizes the Deputy Director 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 has redelegated this authority to the Assistant Deputy Director.

### **BACKGROUND INFORMATION**

6. According to the Merced County Assessor's Office, the Diverter owns the properties bounded by Merced County Assessor Parcel Numbers 052-540-065-000 and 052-540-015-000 (collectively the Diverter's Properties). The Diverter acquired the right of possession of Parcel 052-540-065-000 (Reservoir Parcel) on April 24, 1995 and acquired title on April 3, 1996. The Diverter acquired the adjacent parcel on October 24, 1996. The Reservoir Parcel contains a reservoir and both parcels contain almond orchards.
7. In a 2015 ruling of the Merced County Superior Court, the Diverter lost access to the Merced Irrigation District (MID) lateral he had previously taken water from for irrigation. Following this, he constructed an irrigation system using the reservoir as the source of water.
8. In 2017, MID learned that the Diverter, who was at that time a member of the MID Board of Directors, was taking water from Canal Creek for use on the Reservoir Parcel. A subsequent investigation by MID revealed that the Diverter decreased his water purchases from MID dramatically in 2014 and ceased purchasing water altogether by 2016, even though he had previously purchased water for many years.
9. On June 30, 2017, the Diverter filed an Initial Statement of Diversion and Use (S027064, hereinafter referred to as Statement), claiming a riparian right to divert the water of Canal Creek to irrigate 40 acres of almonds. The Statement also indicated the Diverter intended to divert to an off-stream storage facility with a capacity of 8.5 acre-feet, and that he diverted 110 acre-feet of water from Canal Creek in 2016.
10. On July 13, 2017, MID sent the Diverter a "Notice and Order to Cease and Desist Unauthorized Water Diversions." This was followed by a charge for the alleged unauthorized diversions on July 20, 2017. The charge included penalties for treble damages and \$1,000 per occurrence in accordance with MID Resolution 2014-14. The Diverter, as a member of the Board at MID in 2014, voted to approve Resolution 2014-14 on March 14, 2014, and as such, understood the nature and gravity of his actions, and the consequences thereof.

11. On October 3, 2017, the Diverter filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief in Merced County Superior Court, which was sent to the Division of Water Rights (Division) as the Diverter's Response to the complaint MID had filed with the Division. In the Response the Diverter asserts that:
  - a. The reservoir has been a permanent feature of the Reservoir Parcel since the Diverter purchased the property.
  - b. The reservoir is a depression that naturally forms and has no outlet to Canal Creek.
  - c. The reservoir is filled when Canal Creek exceeds its banks during flood events and that the water from these flood events is no longer surface water, but "flood water" that is not within the permitting authority of the State Water Board. The Diverter further asserts this happened throughout the summer of 2015, and names Lake McClure as the source of the water.
  - d. The Diverter has riparian rights on the Reservoir Parcel and that he has never diverted from Canal Creek.
  - e. The Diverter directly measured his water use and that he has diverted and used a total of 97 acre-feet between August 2015 and October 2017.

### **INVESTIGATION**

12. On October 5, 2017, Division Staff met with MID to discuss the imminent submission of a complaint against the Diverter.
13. On November 17, 2017, Division staff received MID's complaint. In the complaint, MID objects to the claims made by the Diverter in the Initial Statement of Diversion and Use that the Diverter filed with the State Water Board. MID asserts the Diverter has engaged in the unauthorized diversion or use of water lawfully appropriated by MID via an off-stream reservoir located on the Diverter's property immediately adjacent to Canal Creek.
14. On January 18, 2018, Division staff contacted the Diverter to obtain additional information, and to schedule an inspection. Staff was then contacted by the Diverter's counsel, Anthony Chavez, who forwarded the Diverter's response to the MID complaint and requested to be present at the inspection.
15. On January 25, 2018, Division staff inspected the Diverter's property, which includes multiple parcels. The inspection included the Diverter's almond orchards, reservoir, and tailwater pond. After the inspection, Division staff generated an extensive Report of Investigation, which includes photos taken at the inspection as well as publicly available aerial imagery. Division Staff mailed the Report of Investigation to the Diverter on May 22, 2018. The Report of Investigation is attached to this Complaint, as **Attachment A**. During the inspection Division staff observed:

- a. No stream channels lead into or out of the reservoir, and there was no erosion of the soil separating the reservoir and Canal Creek.
- b. A pumping station constructed at the northwest corner of the reservoir.
- c. The levee on the northern side of the reservoir that separates the reservoir from the orchards extends to the eastern side of the property where it surrounds a second excavated area the Diverter referred to as a tailwater pond. Two 24" culverts extend from the tailwater pond through the levee, but they were completely obstructed at the time of inspection.
- d. The reservoir is significantly deeper than the adjacent stream channel.
- e. The reservoir is connected to Canal Creek through an open pipe extending from the bed of the stream through a levee into the reservoir.
- f. Based on the observations described above in subparagraphs a through e, Division staff concluded that water from Canal Creek flows through the pipe into the reservoir. There is always water in the reservoir, due to the height differential between the bottom of the reservoir and the bed of the creek, and the open pipe connecting the two.

16. During the inspection, the Diverter provided the following information to staff:

- a. The Diverter provided a written description of his crops, the year they were planted, and his property boundaries on aerial imagery provided by Division staff. This description indicates approximately 18 acres of almonds were planted in 1995 immediately north of the reservoir. The Diverter stated that the previous owner intended to plant the trees, but the Diverter opted to plant the trees himself in an orientation that would take advantage of the natural topography for irrigation.
- b. The Diverter estimated he uses 45 acre-feet of water per year to irrigate his orchard.
- c. The Diverter asserted Lake McClure was the source of the water in Canal Creek.
  - i. Further investigation by Division staff determined that Lake McClure is located on the Merced River and is outside of the watershed of Canal Creek. MID owns and operates Lake McClure and holds the water rights for Lake McClure. (See Attachment A, pages 3, 23.)
- d. The Diverter asserted that the reservoir was in existence when he acquired the property, and that it was constructed as part of the Castle Dam project by the United States Army Corps of Engineers (USACE). The Diverter stated he was unsure of the date, but that it was likely in the early 1990's.
  - i. Further investigation by Division staff found these claims to be unfounded: USACE staff confirmed that the reservoir was not part

of the Castle Dam project. (See Attachment A, pages 13-14.)

- e. The Diverter stated that the reservoir never empties and confirmed that it held water in 2015. The Diverter confirmed that a pipe connected the reservoir to Canal Creek and water has flowed through the pipe.
  - f. The Diverter stated that he uses the pumping station at the northwest of the reservoir to irrigate his orchard.
  - g. The Diverter stated that he has used the pond for nonconsumptive recreational activities. He stated that he acquired a fish stocking permit to stock various types of fish including bass, catfish, and mosquito fish. Division staff documented the presence of a boat in the reservoir during the inspection. The Diverter also stated he utilized the aesthetics of the reservoir in at least one instance for photography.
  - h. The Diverter stated that he had the property surveyed when he acquired it, and that the property boundary is in the middle of Canal Creek. He also presented an unrecorded parcel map to staff that depicted the property boundary in the center of Canal Creek.
    - i. Further investigation by Division staff of the Parcel Map, the Deed for the property, and documents submitted by the Diverter to the Central Valley Flood Protection Board (CVFPB) found these claims to be unfounded. (See Attachment A, page 20-22.)
12. Following the inspection, the Diverter claimed through his legal counsel that there is no pipe or connection to Canal Creek even though he admitted the pipe existed at the time of inspection, and staff both observed the pipe and collected photographic evidence documenting its existence.
13. Following the inspection, staff reviewed and confirmed the following pertinent background information:
- a. United States Army Corps of Engineers confirmed that it was not aware of the existence of the reservoir and did not authorize its construction as part of the Castle Dam Project.
  - b. The Castle Dam Operations and Maintenance Manual does not depict or mention the reservoir, and references to the property show point elevations within the current reservoir boundaries consistent with surrounding property grade.
  - c. The Central Valley Flood Protection Board (CVFPB) did not authorize construction of the reservoir and was unaware of the existence of the reservoir.
  - d. The County of Merced was unaware of the existence of the reservoir.

- e. MID provided further information regarding water delivery obligations, and the use of Canal Creek to make those deliveries, as well as MID's routine operational use of Canal Creek.
- f. According to State Water Board records, MID owns and operates Lake McClure and holds the water rights for Lake McClure. Lake McClure is located on the Merced River and is outside of the watershed of Canal Creek.

### **APPLICABLE LAW AND ALLEGATIONS**

- 14. Under Water Code, section 1201, "All water flowing in any natural channel... is public water of the state and subject to appropriation in accordance with this [Water Code]."
- 15. Under Water Code, section 1225, no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of Division 2.
- 16. The Diverter has diverted water from Canal Creek into a reservoir for aesthetic enhancement and recreation uses, as well as for irrigation of 29 acres of almond orchard, without a basis of right. This constitutes a trespass under Water Code section 1052, which states that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 of the Water Code is a trespass.
- 17. The following facts support the basis for the alleged trespass:
  - a. The Diverter owns the Reservoir Parcel and operates the reservoir. Despite the Diverter's claims to the contrary, Division staff allege that the Diverter constructed the reservoir after acquiring the right of possession to the Reservoir Parcel, without the approval of the State Water Board, the Army Corp of Engineers, the CVFPB, or any other governing agency, and according to Division staff's evaluation of publicly available aerial imagery, completed construction between June 27, 1995, and July 11, 1995.
  - b. The reservoir impounds and stores water from Canal Creek via a connecting pipe.
  - c. The water impounded and stored in the reservoir was surface water diverted from a natural channel and was not applied to beneficial use before December 19, 1914, thus is subject to appropriation in accordance with Division 2 of the Water Code.
  - d. The State Water Board has not authorized the Diverter to divert and use water from Canal Creek through the issuance of an appropriative permit or license.

- e. The Diverter's other basis of right claims to divert water from Canal Creek are without merit:
  - i. No riparian rights are attached to the Reservoir Parcel because it is not contiguous to Canal Creek. Moreover, due to the fact that the water is stored in an off-stream reservoir, the use of water on the Diverter's Properties is not consistent with a riparian claim of right. Any riparian rights that may have existed appear to have been severed from the Reservoir Parcel when Canal Creek was conveyed to MID by a predecessor in interest to the Diverter's Properties, and there is no evidence that riparian rights were retained. The diversion of water would not be authorized under a valid riparian claim of right even if the Reservoir Parcel was contiguous, because diversion to storage is not authorized under a riparian claim of right.
  - ii. The water diverted from Canal Creek is not flood water outside of the permitting authority of the State Water Board. Any surface water flowing in any natural channel, including flood flows, is subject to appropriation under the Water Code and the use of that water is only authorized through the issuance of a permit or license from the State Water Board. Canal Creek experiences backwater effects from the flood control operations at Castle Dam located below the Reservoir Parcel. There was a permanent flowage easement on the Reservoir Parcel for that express purpose. To the extent that water does inundate the Diverter's property in the permanent flowage easement, that water is not abandoned water, but planned flooding.

18. The Report of Investigation containing the staff determination and the facts relied on to make the determination was sent to the Diverter by certified mail, which he received on May 29, 2018. In the transmittal letter the Diverter was notified that he had 30 days to submit written supporting evidence if he disagreed with the conclusions or recommendations in the report, and he never contacted Division staff or submitted any written evidence in response.

19. As of the date of this document, the Division has no record of water rights authorizing diversion to storage in the reservoir.

#### **MAXIMUM ADMINISTRATIVE CIVIL LIABILITY**

20. Water Code, section 1052 states that the maximum civil liability the State Water Board may impose for the unauthorized diversion or use of water is \$500 for each day a trespass has occurred. During a state of emergency based on drought condition, however, the State Water Board may impose an alternative civil liability of up to \$1,000 for each day a 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.

- i. 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, and on April 7, 2017, Governor Brown declared an end to the State of Emergency.

21. The Diverter began diverting and using water without any basis of right on or before July 11, 1995. Since that date, and through at least 2017, the Diverter used the reservoir for the nonconsumptive beneficial uses of recreation use and aesthetics. The Diverter stated during the inspection of his property that the reservoir always has water in it, and that he uses the reservoir for both aesthetic and recreation purposes. The Diverter stated that the reservoir has been stocked with fish, including bass, catfish, and mosquito fish. Division staff documented the presence of a boat in the reservoir, lending credence to the veracity of the statement regarding recreational use. The Diverter stated at the inspection that the reservoir had been used as a location for photography.
22. Prior to 2015, the Diverter diverted and used a relatively small amount of water for a non-consumptive use, representing an equally small potential for harm to the environment and downstream rights, and provided relatively little economic benefit. Beginning in 2015, the Diverter's unauthorized diversion increased dramatically for the consumptive purpose of irrigation. Water was stored and then used for the purpose of irrigating a high-value crop, generating significant economic benefit to the Diverter, and the resulting harm to the environment and other downstream water rights from these increased diversions was compounded due to the ongoing severe drought. Based on facts discussed below, the Division calculated the maximum statutory administrative liability only on the basis of the alleged consumptive use.
23. Calculation of maximum daily liability:
  - a. The Diverter's consumptive use of water from the reservoir diverted from Canal Creek for the purpose of irrigation of approximately 29 acres of almonds began in 2015. Division staff have determined through an examination of MID's billing records for the Diverter that irrigation occurred seasonally between March and October (approximately 32 weeks) of each year from 2015 to 2017. This use of water occurred without any basis of right and violates Water Code section 1052.
  - b. Daily water use for irrigation of the orchard cannot be precisely calculated, but a reasonable estimate can be determined through a review of MID's records. Division staff reviewed MID's estimate of unauthorized diversion between 2015 and 2017 as well as the Diverter's billing records for the 2014 irrigation season. These records coincide with the amount of water used in a particular month, as well as individual "irrigation events" which range from two to four days long. According to MID's records, Division

staff determined that irrigation events likely fluctuated month to month across the irrigation season, based on the crop need and weather patterns. Division staff conservatively estimate that, on average, the Diverter irrigated the orchard at least once a week between the months of March and October.

- c. Unauthorized diversion in violation of Water Code section 1052 for consumptive irrigation purposes began on March 1, 2015 and continued until at least November 1, 2017. Division staff calculate that the Diverter used water diverted from Canal Creek and stored in the reservoir for irrigation for no less than 96 days (32 days of diversion during 2015 + 32 days of diversion during 2016 + 32 days of diversion during 2017). On April 7, 2017 the end of the drought emergency was declared. Thus, of those 96 days of consumptive use, approximately 68 occurred during the drought and 28 occurred after the drought ended.
- d. Maximum daily penalty for violations occurring during declared drought emergency: 68 days x \$1000 per day = \$68,000
- e. Maximum daily penalty for violations occurring after declared end to drought emergency: 28 days x \$500 per day = \$14,000.

24. Calculation of maximum volumetric liability:

- a. The Diverter has provided contradictory statements regarding how much water was used for consumptive beneficial uses. In the Statements of Diversion and Use that the Diverter filed with the State Water Board, he variously reported diverting 80, 110, and 200, acre-feet per year to irrigate 29 acres of almonds. In the Diverter's response to the complaint that MID filed with the Division, he claimed that he used a total of 97 acre-feet over three years for irrigation. These statements cannot be relied upon with any degree of certainty; therefore Division staff calculated its own estimate as described below.
- b. According to the "*University of California Cooperative Extension 2016 Cost and Return Study for almonds in the North San Joaquin Valley with micro sprinkler irrigation and 90% efficiency*" the annual water use required for a mature almond orchard is approximately 42 inches per acre. Using that amount as a reasonable estimate of the water the Diverter used to irrigate the 29 acre orchard, Division staff estimate the annual diversion at 101 acre feet. This estimate is within the range of amounts reported by the Diverter and is consistent with MID's statement in the complaint filed with the Division that the Diverter historically ordered approximately 160 to 170 acre-feet of water per year prior to 2014.

- c. Staff estimates the Diverter diverted and used approximately 101 acre-feet per year for three years to irrigate his 29-acre almond orchard, totaling 303 acre-feet. On April 7, 2017 the end of the drought emergency was declared. Thus, of those 303 acre-feet of water diverted and used, approximately 212 acre-feet were diverted and used during the drought and 91 acre-feet were diverted and used after the drought ended.
  - d. Volumetric penalty for violations occurring during declared drought emergency:  $212 \text{ AF} \times \$2,500 = \$530,000$ .
25. The State Water Board may consider a total maximum civil liability for unauthorized diversion for the consumptive use of irrigating the Diverter's 29-acre almond orchard of \$612,000.

### **PROPOSED ADMINISTRATIVE CIVIL LIABILITY**

26. Under Water Code, section 1055.3 in determining the amount of civil liability, the State Water Board shall take into consideration 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 the corrective action, if any, taken by the violator.
27. Extent of harm caused by the violation to other water rights:
- a. The Diverter has been diverting water from Canal Creek into the reservoir and has been continually using that water for recreation, and aesthetics since at least 1995. It is reasonable to assume that in times of shortage even the small diversion amounts necessary to maintain his nonconsumptive uses caused at least some harm to downstream water rights holders. However, beginning in 2015 when the Diverter began using much larger amounts of water to irrigate his almond orchard during the height of the drought, the extent of harm caused by the violation became much more severe.
  - b. The reservoir receives water from Canal Creek. Canal Creek is hydrologically connected to the San Joaquin River, via a series of named, and unnamed creeks and channels. There are intermittent ephemeral natural flows in Canal Creek above the Diverter's property. During much of the dry summer months that the Diverter diverted water for irrigation of his almond orchard, the natural flows of Canal Creek were de minimus. It is reasonable to infer that any water flowing in more than de minimus amounts in Canal Creek during the dry summer months is therefore not natural flow of the Canal Creek watershed but is instead water being delivered by MID either to MID customers or other downstream water rights.

- c. Based on records obtained from MID that during the times when the Diverter was diverting and using water for the irrigation of his almond orchard, Canal Creek was being used as conveyance for deliveries to downstream senior water rights holders. MID routinely sends water from Lake McClure down Canal Creek and past the Diverter's property to satisfy downstream senior water rights holders located at the confluence of Bear Creek and the San Joaquin River.
- d. According to a settlement agreement between MID and Stevinson Water District's predecessor-in-interest, MID is required to send at least 24,000 acre-feet of water to Stevinson Water District each year. MID staff informed the Division that these deliveries did not occur in 2015, pursuant to a limitation in the settlement agreement, but that water deliveries to Stevinson Water District did occur in 2016, and 2017.
- e. The Diverter's passive diversion system pulls water out of Canal Creek at times when the level of water in Canal Creek is higher than the pipe that was installed at the base of the reservoir. According to MID Staff, MID delivered water during the summer months of 2016 and 2017 to Stevinson Water District. The Diverter confirmed during an interview with Division staff that large amounts of water were flowing in Canal Creek for a short duration during the summer months of 2016. It can be reasonably inferred that the Diverter diverted water from Canal Creek as it was being delivered downstream to MID customers and Stevinson Water District. This water was then used to irrigate the Diverter's almond orchard. This resulted in a direct harm to MID, MID's customers, and Stevinson Water District by reducing the amount of water available for their use.
- f. In addition to this particular harm to MID and Stevinson Water District, the Diverter's unauthorized diversion indirectly harmed all other downstream water rights that were unable to divert during the height of the drought in 2015. Throughout the summer of 2015, hundreds of water right holders in the Lower San Joaquín River watershed downstream of the Diverter were informed that no water was available for their priority of right. The Diverter's unauthorized diversion contributed, in part, to the reduction the amount of water available for those parties.

28. Extent of harm caused by the violation to public trust beneficial uses:

- a. The water delivered under the MID and Stevinson Water District agreement is, at times, used for wildlife habitat in the San Luis National Wildlife Refuge. Water diverted from Canal Creek by the Diverter over the past 20 years has reduced, in part, the amount of water available for wildlife habitat.

- b. The San Joaquin National Wildlife Refuge constitutes thousands of acres of wetlands, and is host to significant numbers of birds, mammals, reptiles, amphibians, fish, insects, and plants; some of which, such as the California tiger salamander, the long-horned fairy shrimp, and San Joaquin kit fox, and the riparian brush rabbit are endangered species.
- c. Unauthorized diversions generally, as well as the Diverter's specific diversion from Canal Creek, contribute to the cumulative impact of reducing water supplies and reducing the habitats of these vulnerable species. Unauthorized diversions cumulatively impact public trust resources and increase the cost and difficulty of allocating water among competing interests, and the Diverter has directly added to these cumulative impacts.

29. Extent of harm caused by the violation to the health, life, and safety of the public:

- a. The reservoir was constructed through excavation in a permanent flood easement acquired by USACE for operation of Castle Dam, a reservoir constructed for flood protection. The levee separating the reservoir from Canal Creek consists of native soil and was not engineered. As such, it presents a public safety hazard to the works of Castle Dam and downstream residents if the reservoir and Canal Creek do not remain in hydrostatic equilibrium.

30. Length of time over which the violation has occurred:

- a. The Diverter began diverting and using water without any basis of right on July 11, 1995, for the nonconsumptive beneficial uses of recreation and aesthetics. This unauthorized diversion or use occurred over a course of more than 20 years but became significantly more egregious beginning around 2015 when the Diverter increased his water diversion for consumptive use. The unauthorized use of water diverted into the reservoir for irrigation of 29 acres of almonds occurred during 2015, 2016, and 2017, three of the driest years on record.

31. Nature and persistence of the violation:

- a. The reservoir has an estimated capacity of at least 8.5 acre feet, and has been used for both nonconsumptive aesthetic and recreation purposes: the reservoir has been stocked with fish, a boat was observed, and the Diverter stated it has been used as a location for photography. However, the amount of unauthorized water diverted and used for irrigation purposes increased dramatically while the drought was deepening in 2015 and continued on for years after. During the height of the drought, the diverter was using 101 acre feet of water per season for the irrigation of his orchard.

- b. The Diverter built the reservoir in a permanent flowage easement that prohibits excavation to store and use water without a basis of right.
- c. The Diverter has personal knowledge of the recorded Parcel Map showing the true boundaries of the Reservoir Parcel yet presented an unrecorded and incorrect Parcel Map to staff during the inspection. The Diverter also has personal knowledge of the construction of the reservoir since it was constructed while the Reservoir Parcel was in his possession, yet he has offered mutually exclusive explanations for the origin of the reservoir and denied knowledge of its construction during the January 25, 2018 inspection.
- d. The Diverter engaged in the unauthorized diversion or use of water while a Board member of MID. Given the Diverter's prior position on the MID Board, it is reasonable to presume that the Diverter is familiar with MID's policies and procedures, including MID's policy for unauthorized diversion, as well as California water law, and the Water Code's prohibition against diversion and use of water without an appropriative water right permit.
- e. Prior to 2015, the Diverter reported a relatively small amount of water for a non-consumptive use that provided relatively little economic benefit. After 2015, unauthorized diversion or use increased dramatically for the purpose of irrigation. That water was stored and then used for the purpose of irrigating a high-value crop that generated significant economic benefit to the Diverter. The resulting harm to the environment and other downstream water rights from these increased diversions was compounded due to the ongoing severe drought.

32. The corrective action, if any, taken by the violator:

- a. The Diverter has not contacted the Division to dispute any of the findings of the investigation, provided any additional information, or attempted to achieve compliance. The Diverter has not attempted to correct the violation and has never applied for any permit related to the reservoir, even after being informed by Division Staff that a permit was required.

33. Other relevant circumstances:

- a. Staff costs: A conservative estimate of staff costs is \$43,293.
- b. Economic benefit: Through the Diverter's unauthorized diversions, he obtained the economic advantage of diverting and using water during a severe drought emergency while depriving downstream diverters of water to which they were entitled and avoiding the cost of otherwise securing water in a manner authorized by Division 2 of the Water Code. The

Diverter's economic benefit from his unlawful diversion or use is not less than the delayed cost of purchasing water illegally diverted, plus the avoided construction costs of building a new connection to MID's water delivery system, and the avoided water rights fees, totaling approximately: \$41,811.

- i. Delayed cost of water: The Division has been able to determine the rates MID charged for water between 2015 and 2017. Division staff concluded the Diverter avoided purchasing 303 acre feet of water, with a cost of approximately \$57,000. However, after MID became aware of the unauthorized diversion, MID charged the Diverter for the water taken for irrigation during 2015 and 2017. The Diverter ultimately paid MID that amount.
  1. The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit derived from this delayed cost. Cost estimates and other assumptions are detailed in the attached table, as **Attachment B**. The economic benefit generated by the Diverter's delayed payment for the water is *de minimus*.
- ii. Avoided construction costs: The Diverter avoided the cost of constructing a new lateral pipe connecting to MID's water delivery system necessary to purchase the water between 2015 and 2017. The Prosecution Team has determined that the nearest connection point to MID's water delivery system is approximately 2,255 linear feet from the Diverters existing irrigation system. Considering the water demand of 29 acres of almonds, and the amount of water pumped during an irrigation event, the Diverter would likely have needed an 8-inch diameter pipe, delivering approximately 780 gallons per minute. Assuming a standard PVC construction material cost of \$18.10 per linear foot, and installation costs it's likely that the total cost for construction would be approximately \$56,000.
  1. The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit derived from this avoided construction cost. Cost estimate and other assumptions are detailed in the attached table, as **Attachment C**. For computational purposes, the penalty payment date was established as February 28, 2020. Changes to this date will affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately \$37,157.

- iii. Avoided water right fees: The Diverter failed to apply for and obtain a permit to appropriate water from the State Water Board. This includes the initial application fee for 8.5 AF in 1995, an application fee for the additional 101 AF in 2015, and annual fees from fiscal years 2004 through 2019.
    1. The BEN financial model provided by the United States Environmental Protection Agency was used to compute the total economic benefit derived from these avoided water right fees. Cost estimates and other assumptions are detailed in the attached table, as **Attachment D**. For computational purposes, the penalty payment date was established as February 28, 2020. Changes to this date will affect the total economic benefit. Based on specific assumptions within the model, the total economic benefit of noncompliance was determined to be approximately \$4,654.
  - c. Need for deterrence: The Prosecution Team believes that the assessed liability must be significant enough to provide a meaningful deterrent to future violations and encourage the regulated community to anticipate, identify, and correct violations. Administrative civil liability is warranted for unauthorized diversion violations that occur despite the exercise of due care, with higher penalties justified for negligent or knowing violations. In this case, the Diverter knowingly diverted water without a basis of right and made multiple misrepresentations to Division staff when confronted. The penalty should discourage purposeful and negligent unlawful diversion by other similarly situated diverters.
34. Minimum liability considerations: The Division recommends that the State Water Board should assess a minimum liability at a level equal to the sum of staff costs and economic benefits, if any, associated with the acts that constitute the violation. Disgorgement is particularly important during a critically dry year where scarce water is especially valuable and hence when incentives for unlawful diversion are especially strong. The Division conservatively estimates that its staff cost to investigate and develop the enforcement documents for the violations alleged in this complaint to be \$43,293. The total economic benefit of the violations alleged in this complaint is \$41,811. Therefore, the minimum ACL equal to the sum of staff costs and the economic benefit of noncompliance for the violations alleged in this complaint would be \$85,104.
35. Total Proposed Penalty: Based on a consideration of all relevant circumstances, the Assistant Deputy Director for Water Rights proposes an ACL for unauthorized diversions in the amount of **\$165,000**. Should the matter go to hearing, the State Water Board may consider a different liability, up to the maximum amount provided by law.

## RIGHT TO HEARING

36. The Diverter 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.
37. If the Diverter requests a hearing, the Diverter 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, a separate notice setting the time and place for the hearing will be mailed no later than 10 days before the hearing date.
38. If the Diverter 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 Water Code sections 100, 275, and 1050 *et seq.* and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall be final and effective upon issuance.
39. If the Diverter does not wish to request a hearing within 20 days of the date of this complaint, Diverter shall waive its rights to a hearing and reconsideration of this matter, and remit a cashier's check or money order for the ACL amount set forth in paragraph 35 above, to:

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

40. If the Diverter does not request a hearing and does not remit the ACL, the State Water Board will issue a final ACL Order and seek recovery of the full amount of the ACL as authorized by Water Code, section 1055.4

STATE WATER RESOURCES CONTROL BOARD

*Julé Rizzardo, Assistant Deputy Director  
Division of Water Rights*