

## **ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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In the Matter of Violations or Threatened Violations of Emergency Regulations, Order for Reported Water Rights in the Scott River Watershed issued September 9, 2021, and the Measurement and Monitoring Regulations

### **FARMERS DITCH COMPANY** S002514

SOURCE: Scott River

COUNTY: Siskiyou

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#### **YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Farmers Ditch Company (Diverter) is alleged to have violated Title 23, Division 3, Chapter 2, Article 24, sections 875 and 875.7 of the California Code of Regulations which prohibit diversions of surface water when curtailments are in place and for inefficient livestock watering. Curtailments were in place from September 9, 2021 through October 24, 2021 and December 1, 2021 through January 4, 2022. The Inefficient Livestock Watering Prohibition (section 875.7) was in place from September 1, 2021 to January 31, 2022. Diverter is also alleged to have violated Title 23, Division 3, Chapter 2.8, Section 933 of the California Code of Regulations which requires that that water right holders who divert above a specified amount must have their diversion measured and may be subject to telemetry reporting requirements.
2. On August 17, 2021, the State Water Resources Control Board (State Water Board or Board) adopted an emergency regulation, titled Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath River Watershed (hereinafter "Emergency Regulation"). The Emergency Regulation went into effect on August 30, 2021, when it was approved by the Office of Administrative Law and filed with the Secretary of State. On June 21, 2022, the State Water Board readopted the Emergency Regulations, which went into effect on July 29, 2022.
3. The Emergency Regulation provides curtailment authority throughout the Klamath River watershed, establishes minimum instream flow requirements, and provides information order authority in the Scott River and Shasta River watersheds. The minimum instream flow requirements were established to protect fall-run Chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon.
4. Section 875 of the Emergency Regulation grants the Deputy Director for the Division of Water Rights (Division) the authority to issue Curtailment Orders ordering diverters to cease or limit their diversions. The Deputy Director issued a Curtailment

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Order on September 9, 2021, ordering the Diverter to cease all diversions unless an exception applied. Diversions under the Curtailment Order could continue for limited exceptions, including to meet the minimum necessary amounts for livestock watering, and only if the diversion was the only source of water for those needs and was conveyed without seepage losses. (Cal. Code Regs., tit. 23, § 875.3).

Curtailment Orders were in effect from September 9, 2021, to October 24, 2021, and again from December 1, 2021, to January 4, 2022. The Diverter violated, or threatened to violate, the Curtailment Order by diverting from the Scott River for livestock watering in an amount that was not authorized by the exception in section 875.3.

5. Section 875.7 of the Emergency Regulation prohibits the diversion of surface water above an amount that equates to ten times the amount necessary for livestock watering. This provision also states that excessive water diversions are unreasonable in light of available alternatives and the needs of the fishery. This prohibition was in place from September 1, 2021, through January 31, 2022. The Diverter violated, or threatened to violate, section 875.7 throughout the fall and winter of 2021 and 2022, by diverting an amount of water from the Scott River far in excess of the Diverter's regulatory limit. This diversion has direct impacts on the important Chinook and coho salmon fisheries that the Emergency Regulation was designed to protect.
6. On January 7<sup>th</sup>, 2022, the Division sent an Information Order for Winter Surface Diversions in the Shasta and Scott River Watersheds (Information Order) (Order WR 2022-0052-DWR) to water right holders requiring them to provide information, under penalty of perjury, of their livestock watering diversions, including the amount and the use of the water, and quantity of livestock. The first mailing of the Information Order to the Diverter was not received so it was resent on February 25, 2022.
7. Title 23, Chapter 2.8, Sections 931-938 of the California Code of Regulations (hereinafter Measurement and Monitoring Regulations) dictate requirements for measurement devices upon certain diversions. These regulations were approved by the Office of Administrative Law on March 21, 2016.
8. Section 932 (a) states that specified classes of diverters "shall install and maintain a measuring device or employ a measurement method capable of measuring the rate of diversion, rate of collection to storage, the rate of withdrawal or release from storage, and the total volume of water diverted or collected to storage."
9. Section 933 (b) of the Measurement and Monitoring Regulations sets in place additional reporting requirements on diversions for water rights holders who divert more than 30 cfs at any point between June 1 – September 30. Diverters who fall into this category must report their diversions via telemetry. Diversions must be recorded daily then uploaded at a frequency of at least weekly to a public website. (23 CCR § 933(b)(4)(C).)

10. Water Code section 1846(a)(2) states: “a person or entity may be liable for a violation of any of the following in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs:...A regulation or order adopted by the Board.”
11. Water Code section 1055 grants the Executive Director for the State Water Board authority to issue an Administrative Civil Liability (ACL) Complaint to any person or entity to whom administrative civil liability may be imposed.
12. The Executive Director delegated this authority to the Deputy Director for the Division of Water Rights. Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized 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. This authority has been redelegated to the Assistant Deputy Director.

### **ALLEGATIONS**

13. Farmers Ditch (Ditch) is an approximately 11-mile-long, unlined ditch that has been in operation since 1870. The Diverter actively diverts water from the Scott River through a headgate into the Ditch for the purposes of conveying water to the various properties along the Ditch. The headgate, which maintains the flow of water into the Ditch, is located on a parcel owned by Caleb Justice Callahan. The Diverter diverts water into the Ditch in order to deliver water to the individual properties that have an adjudicated pre-1914 right along the Ditch.
14. The Diverter is the owner or operator of the Ditch, which serves the following property owners: Richard and Nancy Barnes, Arabella Merlo, Lynn and Geraldine Slaght, Mary D Roehrich Trust, George and Donna Poe, Jeffrey Fowle, Scott River Ranch, Carl Hammond Jr., Spencer Ranch, Marcus Johnson, and Andrew Hurlimann.
15. The Diverter admits that they received communications from the State Water Board regarding the Emergency Regulations and the Curtailment Orders. On September 20, 2021, Rick Barnes certified that diversions under the water right identified (S002514) had ceased. On that same day, Mr. Barnes also submitted a petition to the Division requesting an increased diversion quantity for livestock watering. The Division denied the request on October 15, 2021. The diverter also admitted that they received two informational letters regarding livestock water regulations.
16. The Diverter is an unincorporated association, acting on behalf of the above referenced individual water rights holders.
  - a. An unincorporated association is “an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not.” (Corp. Code, § 18035, subd. (a).) Further, “an unincorporated association is liable for its act or omission and for the act or omission of its director, officer, agent, or employee, acting within the scope of the office, agency, or employment, to the same extent as if the association were a natural person.” (Corp. Code, § 18250.) Filing as an unincorporated

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association is not required in order to be considered and treated as an unincorporated association. (Corp. Code § 18200.)

- b. Case law supports a broad interpretation of what constitutes an unincorporated association, especially where treating the association as a legal entity ensures the fairest outcome. “Fairness includes those situations where persons dealing with the association contend their legal rights have been violated.” (Barr v. United Methodist Church, 90 Cal. App. 3d 259, 266–67, (1979).) “...to be an unincorporated association they must have functioned as a group under a common name.” (Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 963 (2003).)
- c. The Diverter is an unincorporated association because: 1) it is comprised of two or more individuals associated under a common name, 2) the individual members are working in concert for a shared purpose, and 3) it has members and agents that operate and act on behalf of and to the benefit of all members.
  - i. Comprised of two or more individuals associated under a common name: There are 11 individual water rights holders who have organized under the name “Farmers Ditch Company”. While each individual member of the Farmers Ditch Company has pre-1914 appropriative rights that are incorporated into the Scott River Decree, Farmers Ditch Company is listed as the primary water right holder in the State Water Board’s Electronic Water Rights Information System, for all diversions into Farmers Ditch. The Primary Owner listing is the sole contact point for all diversions occurring on the Ditch. Any reports filed regarding water diverted into the Ditch are filed by the Diverter on behalf of all of its members.
  - ii. Members are working in concert for a shared goal: The individual water rights holders have the shared goal of diverting water from the Scott River for the benefit of all the members. This requires routine maintenance to the Ditch, operation and maintenance of the point of diversion, and ensuring compliance with applicable laws and regulations.
  - iii. There are members and agents that operate and act on behalf of and to the benefit of all the members: The current president of Farmers Ditch Company is Sam Thackeray. The two previous presidents were Rick Barnes and Jeff Fowle. The President is responsible for reporting relevant information to the State Water Board, including the amount of water diverted from the Scott River. They are also responsible, at a minimum, for maintaining a functioning measurement device. These actions are conducted on behalf of, and to the benefit of, all the individual water rights holders on the Ditch, because all the individual members receive water from the Scott River via diversions into the

Ditch.

1. Additionally, the Information Order was sent and addressed to the Diverter, yet Rick Barnes responded on behalf of all the members.
- d. As the Diverter is the party that operates and maintains the Ditch on behalf of its members, the interest in fairness supports the treatment of the Diverter as the proper party to be held accountable for the violations alleged in this Order.

17. Violations of the Prohibition on Inefficient Livestock Watering and Curtailment Orders

- a. On January 7, 2022, the Deputy Director of the Division of Water Rights issued an Information Order for Winter Surface Diversions in the Shasta and Scott River Watersheds (Order WR 2022-0052-DWR) (Information Order) to multiple water right holders, including the Diverter, requiring the submission of information regarding livestock watering diversions, including the amount diverted, the purpose of use, and the quantity of livestock.
- b. The Diverter responded to the Information Order on April 12, 2022, on behalf of all of its members. The Diverter reported that approximately 2,000 cows, 200 sheep, and 20 horses are watered along the Ditch using water from the Scott River.
- c. Division staff used this livestock data provided by the Diverter to calculate the amount of water necessary to support the number of livestock reported. Section 697 of the California Code of Regulations lists the daily quantities of water considered to be reasonable for each type of livestock. Thus, it is a simple matter of taking each type of livestock, multiplying it by the number of gallons per day per head of livestock, adding up the amounts from each type of livestock, then converting it to cubic feet per second. The resulting number is the amount of water that is allowed to be diverted under the livestock exception to curtailments. The amount of water that is within the limitations on inefficient livestock watering outlined in Section 875.7 can be determined by multiplying that number by 10.
- d. During the period when the prohibition on inefficient livestock watering occurred, the regulatory amount of water permitted to be diverted by the Diverter pursuant to section 875.7 of the California Code of Regulations was 0.47 cfs.
- e. When curtailments were in place, the amount of water that could be diverted under the livestock watering exception pursuant to sections 875 and 875.3 of the California Code of Regulations was 0.047 cfs.
- f. According to the data provided by the Diverter's Information Order response, daily diversions from the Scott River ranged from 0.8 to 8.7 cfs between December 2, 2021, and January 31, 2022. The Diverter claims no diversions occurred prior to December 2, 2021, solely on the basis that they did not have

- a working measurement device in place prior to that date.
- g. Despite the Diverter's assertions in its Information Order Response that no diversions occurred between September 1, 2021, and November 30, 2021, Division staff witnessed and photographed a significant amount of water flowing in the Ditch on October 26, 2021, and November 9, 2021. Staff were unable to access the Ditch but were able to observe the Ditch from a public road. Based on the staff's knowledge of size of the Ditch, the perceived depth of water in the Ditch, and a review of the reported diversion amounts, Division staff concluded that the water flowing in the Ditch exceeded the Diverters regulatory limit under section 875.7 of 0.47 cfs. The Division suspects that additional diversions in excess of the Diverter's regulatory limits were occurring routinely prior to December 2, 2021.
  - h. In the Diverter's Information Order response, it was revealed that the headgate for the Ditch periodically leaks approximately 1 cfs. The response does not provide context or explanation as to the frequency of this occurrence, for example, whether this occurs only after heavy storms or on a regular basis. Absent repairs, and depending upon the conditions in which leaks occur, this leak violates or threatens to violate both section 875 and section 875.7.
  - i. The Diverter should not even be relying upon the Ditch in order to meet their livestock watering needs. In 2002 the Siskiyou Resource Conservation District received a grant to implement a number of projects designed to benefit surface water flows in the basin. One project was to eliminate dependence upon the Ditch which was to be accomplished through the installation of groundwater-based systems. These systems were installed and reduced diversions by 7-10 cfs year-round and completely met all livestock watering needs. The members were tasked with maintaining the systems for at least 20 years. Despite this investment into alternative livestock watering systems for the members along the Ditch, an investment that was paid for through a grant administered by the California Department of Fish and Wildlife, the Diverter continued to divert water from the Scott River into the Ditch for its members livestock watering needs for at least the 2021-2022 season.
  - j. Prohibition on Inefficient Livestock Watering
    - i. Under section 875.7, when curtailments were not in place, the Diverter was permitted to divert a maximum of 0.47 cfs for the purpose of livestock watering. However, from December 2, 2021, through January 31, 2022, data from the Diverter's information order response showed diversions of a minimum 0.8 cfs per day and upwards of 8.7 cfs per day.
      - 1. Diverter also admitted that the headgate can leak around 1 cfs. When this occurs, it may contribute to a violation or threatened

violation of section 875.7.

2. Additionally, Division staff witnessed water flowing in the Ditch on October 26, 2021, and November 9, 2021. This is in despite of claims that diversions were not occurring prior to December 2, 2021, a claim based upon a lack of data to show diversion rates.

ii. The Diverter exceeded its maximum diversion amount at a minimum on October 26, 2021, November 9, 2021, and from December 2, 2021 through January 31, 2022. The total number of days of violation of the prohibition on inefficient livestock watering (Cal. Code Regs., tit. 23, § 875.7) is 63 days.

k. Curtailment Order

i. Under section 875.3, when curtailments were in place, the Diverter was permitted to divert a maximum of 0.047 cfs, which is equal to the amount necessary to support the number of livestock on the Ditch. However, during the curtailment period of December 2, 2021, through January 4, 2022, the Diverter diverted water every day at a minimum rate of 0.8 cfs and upwards of 8.7 cfs.

1. Diverter also admitted that the headgate can leak around 1 cfs. When this occurs, it may contribute to a violation or threatened violation of section 875 as the diversion rate exceeds the limits expressed in section 875.3.

ii. The total number of days of violation of the curtailment orders (Cal. Code Regs., tit. 23, § 875.) is 34 days.

l. Due to the length and unlined nature of the Ditch, in order to reach the properties furthest from the points of diversion, the rate of diversion must be fairly high to account for seepage and infiltration. Absent changes to the structure of the Ditch, surface water diversions are more than likely to result in diversions in excess of the regulatory limit in the Emergency Regulations. Thus, the use of alternative livestock watering options is necessary to avoid noncompliance with the Emergency Regulations and future curtailment orders.

m. Diverter has made no measurable nor significant efforts to ensure their diversions are within the acceptable regulatory ranges. Diversions continued at high rates throughout the 2021-2022 inefficient livestock watering prohibition period with no changes. No changes have been made during the dry season to improve the efficiency of the Ditch to significantly reduce the amount of water lost to seepage. While some properties periodically utilize permanent or temporary troughs attached to individual groundwater wells, these alternative livestock watering options are not widely implemented or used often enough to assist the Diverter in meeting the regulatory limits.

Other livestock watering alternatives include water hauling, use of groundwater, and the movement of livestock to areas where access to water is not conveyed with significant losses. There is no evidence of these options being used in any significant or widespread manner.

- n. Based on the history of the Diverter's diversions and the lack of significant improvements to the Ditch, and absent the more widespread and frequent use of alternative livestock watering options, there is a real concern for continued violations for the 2022-2023 inefficient livestock watering prohibition period. This season began on September 1, 2022, and will continue until March 31, 2023, unless ended earlier by the Deputy Director of the Division. Continued diversions in excess of the regulatory limits pose a serious risk to fishery populations dependent upon the Scott River. It also undermines the orderly administration of the State Water Board's regulatory program designed to protect the fish and other beneficial uses in the watershed. The limits put in place in the Emergency Regulations were carefully considered to provide at least a minimum amount of protection to fish species dependent upon a minimum flow rate and to put the least amount of regulatory harm to water right holders.

#### 18. Measurement of Diversion Flows

- a. As shown above, the Division was significantly hampered in its investigation by the lack of data for the majority of the inefficient livestock watering prohibition period. At a minimum from September 1, 2021, through December 1, 2021, the Diverter did not have a working measurement device, in violation of the Measurement and Monitoring Regulations, as evidenced by its Information Order response. Upon reviewing the Division's reporting records, the Diverter's Statements of Water Use and Diversion show it likely did not have a measurement device for several months prior to September 1, 2021.
- b. On July 19, 2021, the Division issued the Diverter a Notice of Violation (NOV) for failure to provide information regarding their measurement device and data on diversions. The NOV stated that the Diverter had 60 days to remedy the violations. On September 14, 2021, Mr. Barnes responded on behalf of the Diverter stating they were just starting to work on fixing the situation. Already 2 weeks into the prohibition on inefficient livestock watering season. The Division was not provided any evidence or explanation for the delay in repairs.
- c. Even once the measurement device was operating, the Diverter continued to be out of compliance with the Measurement and Monitoring Regulations due to a failure to comply with the telemetry reporting requirements. The Diverter has previously reported in its Statements of Water Diversion and Use that in some years it has diverted more than 30 cfs during June. If a Diverter diverts more than 30 cfs at any point from June 1<sup>st</sup> through September 30<sup>th</sup> in a calendar year, then they are subject to the telemetry reporting requirement of the Measurement and Monitoring Regulations. (Cal. Code Regs., tit. 23, §



933(b)(4)(A)(iii).)

- d. Telemetry data significantly improves the Division's ability to monitor larger diversions to ensure compliance. If a violation occurs, the Division can promptly work on rectifying the issue, whether that is through discussions with the Diverter to ensure voluntary compliance, or the issuance of enforcement documents. In regard to the Emergency Regulations, this data is critical to ensure compliance with the prohibition on inefficient livestock watering that is currently in place and with future curtailment orders. Considering the Diverter's history of non-compliance, and a lack of significant efforts to ensure its diversions are within the regulatory limits, having access to telemetered data will significantly ease the Division's ability to identify and address any violations.
19. The total number of days of violation of Section 875 (curtailment order) is 34 days (December 2, 2021 - January 4, 2022.).
  20. The total number of days of violation Section 875.7 (prohibition of inefficient livestock watering) is 63 days (October 26, 2021, November 9, 2021, December 2, 2021 – January 31, 2022).
  21. The total number of days of violation of Section 933 (Measurement and Monitoring Regulations) is 92 days (September 1, 2021 – December 1, 2021).
  22. Violation of the Emergency Regulations and the Measurement and Monitoring Regulations shall be subject to enforcement and any applicable penalties pursuant to Water Code sections 1058.5 and 1846.

### **PROPOSED CIVIL LIABILITY**

23. Water Code section 1846 states that a person or entity may be liable for a violation of a regulation or order adopted by the State Water Board in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs.
24. According to the allegations herein, the Diverter violated section 875 of the Emergency Regulations for at least 34 days, the Diverter violated section 875.7 of the Emergency Regulations for at least 63 days, and the Diverter violated section 933 of the Measurement and Reporting Regulations for at least 92 days. The total days of violation alleged herein is 189 days. The statutory maximum liability for the alleged violations is \$94,500 (189 days x \$500 per day of violation).
25. In determining the appropriate amount of a civil liability, Water Code section 1848(d) and Water Code section 1055.3 provide that 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."

### **26. Violations of the Emergency Regulations**

- a. Extent of harm caused by the violation to the environment and other water rights users.
- i. The Emergency Regulation was adopted by the State Water Board in response to Governor Newsom's Declaration of a state of emergency due to drought conditions. The prohibition on inefficient livestock watering was included in the Emergency Regulation for the primary purpose of protecting the fall migration of fall-run Chinook and coho salmon.
  - ii. September to January is a critical period when fall-run Chinook and coho salmon must migrate from the mainstem Klamath River into the Scott and Shasta River watersheds to find safe places to spawn and rear. Most of this period coincides with reduced irrigation requirements, but flow remains a limiting factor in dry years, thus the need for stronger protections during times of drought.
  - iii. For the 2022-2023 prohibition on inefficient livestock watering season, the restrictions are in place from September 1, 2022, through March 31, 2023, in order provide extended protections to the fisheries.
  - iv. Curtailments are imposed by the Deputy Director of the Division of Water Rights when it is determined that without curtailments, flows will drop below drought emergency minimum flows. If water rights users subject to curtailment orders fail to comply, it endangers the health of the Chinook and coho salmon which depend upon a minimum quantity and quality of river water to survive.
  - v. When curtailments were not in place, the Diverter was permitted to divert 0.47 cfs, and when curtailments were in place, only 0.047 cfs. Instead, the Diverter diverted between 0.8 and 8.7 cfs, with the high end of those diversions largely occurring during periods of curtailment. Ensuring adequate flows for the health and safety of the fishery requires all diverters on the Scott River to comply with the Emergency Regulations and curtailment orders. Adequate flows ensure not only that there is an adequate depth of water for fish survival, but also maintains acceptable water temperatures for the fish to maintain adequate dissolved oxygen levels, and to prevent the growth of harmful bacteria or other toxic algae plumes from threatening the fish.
  - vi. The Diverter's excessive use of surface water harms other water user's water rights and their ability to access water which they may legally use.

vii. Monitoring issues: The Division's investigation and determination of the days of violation were severely hampered by the lack of working monitoring equipment installed prior to December 2, 2021. This resulted in a lack of data for three months. Further, Division staff witnessed on October 26, 2021, and again on November 9, 2021 water flowing in the Ditch, thereby establishing that at least on some days prior to December 2, 2021, that diversions were occurring, potentially in amounts which violate the emergency regulations. This investigation was further stymied by the fact the Diverter must have known water was being diverted prior to December 2, 2021 but failed to disclose this information in their Information Order response.

b. Length of time over which the violation has occurred.

i. The diversions occurred during a critical time of the year for Chinook and coho salmon. The diversions occurred for at least 63 days when curtailments were not in place and 34 days when curtailments were in place. The amount of time over which the diversion violations occurred is also likely much longer considering the lack of data provided by the Diverter as to diversions that occurred prior to December 2, 2021.

c. Nature and persistence of the violation.

- i. The drought is not a new phenomenon. Water users throughout the state are aware of the precarious nature of California's water resources and the need to implement best management practices to reduce water waste and operate efficiently with limited resources. The Diverter continued diverting, was aware that they were supposed to limit diversions from September through January, acknowledged they received the curtailment orders, had access to alternative sources to meet livestock water needs, and did not take steps to comply, even in a time of extreme drought. .
- ii. The Diverter continued diverting throughout the season far in excess of what is permissible under the prohibition on inefficient livestock watering and the curtailment orders.
- iii. In 2002, the Siskiyou Resource Conservation District was awarded a grant to implement several projects to reduce diversions from the Scott River. One of the projects, "The Scott River Flow Enhancement Project" was supposed to replace Farmers Ditch with a groundwater-based system. The groundwater-based systems were installed and eliminated seasonal water diversion of 7-10 cfs and was designed to meet all livestock watering needs. The users agreed to maintain the system for at least 20 years.

- iv. Despite the groundwater-based systems that were installed on the Diverter's member properties, it appears that the Diverter, at least for the 2021-2022 season, chose to forego their grant obligations and instead utilized surface water diversions from the Scott River into the Ditch to meet livestock watering needs.
- d. The corrective action, if any, taken by the violator.
- i. Due to the length and unlined nature of the Ditch, in order to reach the properties furthest from the points of diversion, there must be a fairly high rate of flow coming from the diversion points. This means that absent changes to the structure of the Ditch, diversions of surface water to the Ditch are more than likely to result in diversions in excess of the Emergency Regulations. Thus, the use of alternative livestock watering options is necessary.
  - ii. As mentioned above, in 2002 the Diverter's members had groundwater-based systems installed upon their properties in order to meet their livestock watering needs. Despite this alternative livestock watering system that would prevent the violations described in this Complaint, for whatever reason, the Diverter has chosen to forego these groundwater-based systems and has continued to divert Scott River water at amounts exceeding what is permissible under section 875.3 and 875.7 of the Emergency Regulations.
  - iii. The 2022 season for the prohibition on inefficient livestock watering began on September 1, 2022 and will continue until March 31, 2023. The Division is aware of no evidence indicating that the Diverter has made any significant changes to its diversion practices. Absent any sign of upgrades to the Ditch or widespread use of alternative livestock watering systems, it is reasonable to infer that the Diverter is currently in violation of the prohibition on inefficient livestock watering.
- e. Economic benefit: The Diverter's excessive diversion of Scott River water via the Ditch provides an economic benefit to all parties who utilize the Ditch. By continuing to use the Ditch in its current form, it allows the users to avoid necessary costs to modify the Ditch to prevent or reduce water loss, and/or develop alternative water sources. The Ditch is both unlined and continues for over 11 miles. The combination of these two factors provides ample opportunity for the loss of the vast majority of the total water diverted to seepage and other sources.

- i. It is unclear as to why the Diverter was not relying in whole or in large part on the groundwater systems installed as part of the Siskiyou Resource Conservation District grant. The grant terms require that the members maintain the systems for 20 years, yet the 2021-2022 season clearly falls within that timeline. If the systems needed repairs, or upgrades, to meet the needs of the members, then these are costs that the Diverter was able to avoid by utilizing the Ditch. If by using the systems, members identified ways the systems were not fully meeting their needs, the costs of such upgrades were again avoided by falling back upon Scott River water deliveries via the Ditch.
- ii. Alternative sources of water for livestock watering: One or more of the four alternatives listed below could have been used by the Diverter to come into compliance. The avoided cost of implementing any one of these compliance alternatives is an economic benefit the Diverter derived from the act or omission that constitutes the violation.
  1. Groundwater wells: The use of groundwater for strictly overlying uses is largely permissible under the emergency regulations. The uses of wells do include energy costs and other operational costs. Further, not all properties have a groundwater well or one that can meet their needs and would thus need to drill a new well or upgrade an existing one.
  2. Permanent troughs: These can be installed and connected to small solar powered wells that continuously maintain water levels in the trough. The regulation digest estimates these solutions to cost between \$20,000 to \$40,000.
  3. Temporary troughs: Aluminum or plastic troughs can be purchased for approximately \$500. If a property has a well on site, then the well can be used to source water to fill the troughs. Additional costs may occur due to purchasing conduits to convey water from the well to the troughs or portable tanks that can help transport the water to the troughs. Further, if the water freezes the rancher will need to break up the ice or install a heating element.
  4. Water hauling: The cost of water hauling would depend significantly upon how much livestock the property has and the current cost of water hauling services and water itself.
- iii. Upgrades or modifications to the Ditch:

1. Lining the Ditch: Lining all or critical portions of the Ditch would significantly reduce water loss during the conveyance of surface water to the individual properties. This is a longer-term project, and not one that the Diverter may have had time to implement prior to the adoption of the emergency regulations. However, it is a tool that must be considered in light of the frequent cycle of multi-year droughts our state experiences.
2. Ending the Ditch early: In order to reach the further ends of the Ditch, there must be a fairly high volume of water entering the Ditch at the point of diversion. If the Ditch were to be capped at a shorter length, with the properties who would be cut off either compensated or an alternative source of water provided, it would result in a significant reduction in seepage, and could permit future diversions to meet the inefficient livestock watering prohibition.

## 27. Measurement and Monitoring Regulation Violations

a. Extent of harm caused by the violation.

- i. The absence of diversion data prevents the Division from fully assessing harms that occurred prior to December 2, 2021. Diversion data is critical to assess not only compliance but to compare to actual flows and conditions in surface water bodies such as the Scott River, particularly for larger diversions. Without this diversion data, the Division is not able to make timely and accurate water management decisions to ensure the proper administration of the water rights system, including protection of senior water rights and the fishery resources that the regulations were designed to protect.

b. Length of time over which the violation has occurred.

- i. The lack of a measurement device on the diversions spanned over half of the period of time in which the prohibition on inefficient livestock watering took place. For the dates of September 1, 2021, through December 1, 2021, the Diverter was unable to provide the Division with flow data regarding diversions into the Ditch from the Scott River. The Diverter further claims that diversions were not occurring prior to when their measurement device was installed, yet Division staff witnessed on two separate occasions a significant amount of water flowing in the Ditch prior to December 2, 2021.

c. Nature and persistence of the violation.

- i. On July 19, 2021, the Division sent the Diverter an NOV regarding Diverter's lack of measurement data required by the Measurement and Monitoring Regulations. The NOV required the Diverter to remedy the situation within 60 days. Despite the fact that the Diverter knew or should have known that the Diverter was required to have a measurement device installed to keep track of diversion amounts, the Diverter failed to have a working device in place for several months. The first three months of the period of time in which the prohibition on inefficient livestock watering resulted in no data in which the Division could use to easily verify compliance. Instead, the Division was required to rely upon their own observations in the field that showed diversions were occurring at least for a period of time. Staff witnessed and photographed water flowing in the Ditch on October 26<sup>th</sup> and November 9<sup>th</sup>. These flows run counter to the narrative that the Diverter put forth in their Information Order response.
- d. The corrective action, if any, taken by the violator.
- i. On July 19, 2021, the Division sent the Diverter an NOV regarding Diverter's lack of measurement data required by the Measurement and Monitoring Regulations. The NOV required the Diverter to remedy the situation within 60 days. On September 14, 2021, Mr. Barnes reached out to the Division stating that only as of September had the Diverter been working on remedying the situation despite an inability to access data from their data logger from December 2019 onwards. It was not until December 2, 2021 that a working measurement device was operating for the Ditch.
- e. **Economic benefit:** By failing to timely identify and repair their mandated measurement device for diversions leading into the Ditch, the Diverter was able to delay the costs associated with repairs or replacement. Further, their inability to provide diversion data prevented the Division from assessing compliance with the Emergency Regulations for three months. Three months in which additional diversion violations may have been occurring, and an associated liability would have accrued.
- i. Additionally, the Diverter has failed to comply with the telemetry requirements which requires the reporting of daily diversion data to a public website, updated at a frequency no less than weekly. This is an additional cost that the Diverter has been able to avoid by noncompliance with the regulations.

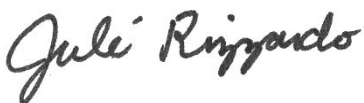
28. Other relevant circumstances.

- a. Staff costs: Total staff costs are conservatively estimated at \$16,468. This includes time spent reviewing Farmers Ditch's information order submission, and time spent preparing the Report of Investigation, Draft Cease and Desist Order, and ACL Complaint.
29. Having taken into consideration all relevant circumstances, including but not limited to: the extreme over-diversion by the Diverter, impacts to the watershed, the length of time the diversion continued for, the likelihood of future violations due to the length and unlined nature of the Ditch, the lack of historical attempts to make modifications or implement best management practices to reduce the amount of water loss, complications to the investigation caused by the Diverter's lack of action to ensure flow measurements were occurring during September through the start of December, the Diverter's failure to disclose diversions that occurred prior to December 2, 2021, historical noncompliance with the Measurement and Monitoring Regulations, costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the Division of Water Rights Prosecution Team recommends the imposition of \$94,500 in administrative civil liability (Proposed Liability).

#### **RIGHT TO HEARING**

30. The Diverter may request a hearing on this matter before the State Water Board. Any such request for hearing must be delivered to or received by mail by the Board within 20 days after the date that this notice is received in accordance with Water Code section 1055, subdivision (b).
31. If the Diverter requests a hearing, the Diverter will have an opportunity to contest the allegations in this complaint and the imposition of a fine by the Board. The Board will issue a notice setting the specific time and place for the hearing. The hearing notice will be mailed not less than 10 days before the hearing date.
32. At the hearing, the Board will consider whether to impose a monetary fine, and if so, whether to adjust the Proposed Liability within the amount authorized by statute. Any Board order imposing an ACL shall be final and effective upon issuance.
33. If the Diverter does not request a hearing within 20 days of receipt of this Complaint, then the right to a hearing on the matter is waived. The Assistant Deputy Director for the Division of Water Rights may then issue a final Administrative Civil Liability Order assessing the Proposed Liability.

STATE WATER RESOURCES CONTROL BOARD



Julé Rizzardo, Assistant Deputy Director  
Division of Water Rights

Dated: September 16, 2022