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BEFORE THE

STATE WATER RESOURCES CONTROL BOARD

In Re:

Emmerson Investment Inc.

Shasta River Tributary to Klamath River in
Siskiyou County

Proposed Revocation of Permits 19164 and
19165 (Applications 26306 and 26307)

**WRITTEN TESTIMONY OF JACK
FROST, LAND MANAGER, EMMERSON
INVESTMENT, INC.**

DATE: July 20, 2009
TIME: 9:00 a.m.

I was employed by Emmerson Investment, Inc. (“Emmerson”) as a Land Manager from approximately 1988 through 2007. In this position, I handle a number of administrative issues related to Emmerson’s land holdings, including leases and property taxes. I was also responsible for preparing reports to the State Water Resources Control Board for dozens, if not hundreds, of separate water rights, including Permits 19164 and 19165 which are associated with the Hole-in-the-Ground Ranch (“Ranch”).

I began my career in land management and surveying during my service in the United States Air Force, when I received survey training. After leaving the Air Force, I went to work for the County of Shasta as a land surveyor. While working for the County, I received training in real estate management through Shasta College. I later went to work for SP Land Company, as a land manager and surveyor for SP’s holdings in California. I continued in this position for the same geographic area when Emmerson acquired the SP California lands in 1988. I also performed the same duties for the lands already owned by Emmerson.

The Ranch holds decreed water rights from the Shasta River Adjudication, a Licensed water right (License 4151, Application 8809) for a spring that feeds into the Shasta River, and water right Permits 19164 (Application 026306) and 19165 (Application 026307) for surplus water in the Shasta River which is available at times in some years.

The diversion point for Permit 19164 is generally referred to as the “upper diversion,” as

1 it is the more upstream of the two diversions. This diversion is also used for decreed water under
2 the Adjudication. It is also sometimes referred to as the “gravity ditch.”

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4 The diversion point for Permit 19165 is known as the “lower diversion,” as it is the more
5 downstream of the two diversions. It is also sometimes referred to as the “pumped diversion.”
6 This diversion is also used for decreed water. In addition, the spring that serves as the source of
7 water for License 4151 discharges into the Shasta River in between the two diversions, and the
8 water under License 4151 is diverted at the lower diversion.

9 At the time that Emmerson acquired the Ranch in 1995, I understood and believed that all
10 of the requirements had been met to issue water right licenses for Permits 19164 and 19165. I
11 filled out the Reports of Permittee for these water rights based on information provided by Mr.
12 Pete Scala, the Ranch Manager. It was my understanding that the Shasta River Watermaster
13 controlled all diversions from the Shasta River and was measuring the diversions and keeping
14 records about all diverted water, including how much of the water was diverted under our
15 adjudicated water rights, and how much was “surplus” water diverted under the Permits. It is my
16 understanding that the Watermaster provides the diversion records to Pete Scala.

17 I prepared a number of “Progress Reports of Permittee” for each Permit based on
18 information provided by Pete Scala, from the Watermaster, as listed below and attached:

19 Exhibit 7 – Progress Report of Permittee for year 1995, Permit 19164

20 Exhibit 8 – Progress Report of Permittee for year 1995, Permit 19165

21 Exhibit 9 – Progress Report of Permittee for year 1997, Permit 19164

22 Exhibit 10 – Progress Report of Permittee for year 1997, Permit 19165

23 Exhibit 11 – Progress Report of Permittee for year 1998, Permit 19164

24 Exhibit 12 – Progress Report of Permittee for year 1998, Permit 19165

25 Exhibit 13 – Progress Report of Permittee for year 1999, Permit 19164

26 Exhibit 14 – Progress Report of Permittee for year 1999, Permit 19165

27 Exhibit 15 – Progress Report of Permittee for year 2000, Permit 19164

28 Exhibit 16 – Progress Report of Permittee for year 2000, Permit 19165

- 1 Exhibit 17 – Progress Report of Permittee for year 2001, Permit 19164
- 2 Exhibit 18 – Progress Report of Permittee for year 2001, Permit 19165
- 3 Exhibit 19 – Progress Report of Permittee for year 2002, Permit 19164
- 4 Exhibit 20 – Progress Report of Permittee for year 2002, Permit 19165
- 5 Exhibit 21 – Progress Report of Permittee for year 2003, Permit 19164
- 6 Exhibit 22 – Progress Report of Permittee for year 2003, Permit 19165
- 7 Exhibit 23 – Progress Report of Permittee for year 2004, Permit 19164
- 8 Exhibit 24 – Progress Report of Permittee for year 2004, Permit 19165
- 9 Exhibit 25 – Progress Report of Permittee for year 2005, Permit 19164
- 10 Exhibit 26 – Progress Report of Permittee for year 2005, Permit 19165
- 11 Exhibit 27 – Progress Report of Permittee for year 2006, Permit 19164
- 12 Exhibit 28 – Progress Report of Permittee for year 2006, Permit 19165

13
14 From 1995 until approximately early 2000, I did not hear from Board staff regarding the
15 Permits or the Progress Reports of Permittee submitted by the Ranch.

16 In about 2000, I was informed that the Permits were not ready for license following a field
17 inspection by Board staff, as documented in a letter from Wayne Smith to me dated August 29,
18 2000. Exhibit 29 contains a true and correct copy of that letter. While the Board staff recognized
19 that construction and beneficial use of water under Permits 19164 and 19165 had been completed,
20 a device to measure bypass flows was still required, and records were still needed to quantify the
21 amount of surplus water diverted under the two Permits.

22 In response to the need to measure the bypass flows, I facilitated coordination between our
23 Ranch Manager, the Watermaster, and the Board staff to develop an appropriate measuring device
24 that would be acceptable to the Board staff. I understood from Board staff that these efforts
25 resulted in an acceptable design, as described in a letter from Wayne Smith, of SWRCB, to me,
26 dated October 6, 2000, which is contained in Exhibit 30.

27 Based on these efforts, and as described in Mr. Smith's letter dated October 6, 2000, an
28 orifice was designed and installed to assure the minimum bypass flow of 1 cfs in the upper

1 diversion. The lower diversion had a bypass flow orifice already installed. The orifice was later
2 modified at Board staff's request to address further concerns raised by the Board staff as to its
3 operation. Exhibit 31 contains a true and correct copy of a letter from Mr. Wayne Smith,
4 SWRCB, to me dated May 2, 2001, describing a revised design developed by Mr. Smith and Mr.
5 Scala to address conditions observed in the field. This letter indicated that "all matters are in
6 order," which indicated to me that Condition 17 of the Permits—the requirement of the bypass
7 flow measurement device—had been met.

8
9 I also facilitated coordination between Mr. Scala, the Watermaster, and the Board staff to
10 confirm that the required record of diversions under Permits 19164 and 19165 would be
11 developed and maintained by the Watermaster. In response to the October 6, 2000, letter from
12 Board staff (Exhibit 30), I sought additional written assurance that the Watermaster would collect
13 and record that information. Specifically, I confirmed that the Watermaster would measure the
14 diversions, record them, and forward those records to the Board staff, and reported that to Mr.
15 Smith of the Board staff by letter dated October 13, 2000, which is contained in Exhibit 32. In
16 addition, because the Board staff had indicated that the Permits were not yet ready for licensing,
17 the same letter included a request for an extension of time to comply with the necessary Permit
18 terms.

19 By letter dated October 17, 2001, the Watermaster provided written confirmation to the
20 Ranch that the required diversion measurements would be collected. Mr. Smith of the Board staff
21 was copied with that letter, which is contained in Exhibit 33.

22 Based on the May 2, 2001, letter from Mr. Smith of the Board staff (Exhibit 31), it was
23 my understanding that the Ranch had addressed the Board staff concerns with measurement of
24 bypass flows and developing a record of use of water under the two Permits. I also understood
25 from that letter that the Board staff would accept a record of diversions under the Permits which
26 would be developed based on future diversions, and that the Board staff recognized that the
27 Ranch can only divert surplus water in years that surplus water is actually available.

28 This understanding was confirmed in an October 7, 2003 letter from Mr. Stretars of the

1 Board staff to me (a true and correct copy of which is Exhibit 34). That letter discussed a
2 compliance inspection performed on August 23, 2002, and again indicated that records of future
3 water use could be use to support the issuance of a license.
4

5 A subsequent letter from Ms. Mrowka of the Board staff, dated February 18, 2004 (a true
6 and correct copy of which is Exhibit 35), again discussed the August 23, 2002 compliance
7 inspection. That letter stated that “there has not been any water surplus to the Shasta River
8 adjudication rights in the last few years,” and that “there are still no records of diversion.” The
9 letter also requested that, in connection with petitions for extension of time, the Ranch provide a
10 new analysis to document the availability of water to serve Permits 19164 and 19165.

11 On March 30, 2004, I received documentation from the Watermaster of diversions during
12 2003. Those records were sent to the Board staff, and I also re-sent them with my letter to the
13 Board staff dated November 22, 2004 (a true and complete copy of which is Exhibit 36). Those
14 records show the amounts diverted at the Ranch’s two points of diversion, and also indicate when
15 releases were made from Lake Shastina to support diversion of adjudication water. As shown,
16 diversions were made by the Ranch from April 12 to June 25, 2003, during a period when no
17 releases were made from the Ranch’s stored water in Lake Shastina. Because water diverted
18 under the Ranch’s adjudicated rights must be supported by releases of stored water from Lake
19 Shastina, the diversions prior to June 25, 2003 could only have been of surplus water.

20 In the Board staff’s letter to me dated December 28, 2004 (a true and complete copy of
21 which is Exhibit 37), Ms. Mrowka indicated that the Watermaster’s information on 2003
22 diversions was unclear as to whether the diversions were pursuant to our adjudicated rights or
23 pursuant to Permits 19164 and 19165. This letter did not acknowledge that those diversions prior
24 to June 25, 2003 could only have been of surplus water.

25 On February 14, 2005, I sent a letter further responding to Board staff concerns (a true and
26 correct copy of which is Exhibit 38). That letter included the water availability analysis first
27 requested in the Board staff’s letter of February 18, 2004. That analysis considered available
28 hydrologic information. Because permit term number 14 of each Permit required that the

1 permittee request the services of the Watermaster, and permit term number 15 of each Permit
2 specifically provided that the Watermaster is to identify when surplus water is available for
3 diversion, the analysis also reflects our understanding of the Watermaster's criterion for
4 determining when surplus water is available. That analysis showed surplus water available in
5 some months in about 18 of the last 27 years, or about two-thirds of the years. In that letter, I also
6 indicated that a meeting would be an appropriate method for us to address any remaining
7 concerns of the Board staff. While not stated in my letter, I particularly believed that such a
8 meeting might offer the Ranch its best opportunity to address the Board staff's apparent
9 confusion about how the Shasta River is operated, and to understand that the Watermaster records
10 that had been provided do, in fact, document diversions of surplus water under the Permits in
11 2003.

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13 In a letter to me dated November 21, 2005, attached as Exhibit 39, Board staff indicated
14 that the water availability analysis was not acceptable, and asserted that the 2003 Watermaster
15 information on diversions does not identify water diverted under the permits. This letter also, for
16 the first time, indicated that the Board staff would only accept records of diversions of surplus
17 water from 1998 or earlier years to demonstrate use of water under Permits 19164 and 19165.
18 The Board staff further indicated that, absent records from 1998 or earlier, the Board staff would
19 recommend revocation of Permits 19164 and 19165.

20 Having diligently worked with Board staff to address their concerns, including obtaining
21 records of diversion to show use of surplus water and installing the required flow measurement
22 device, I concluded that the Ranch had met the permit requirements, but was left with no viable
23 options to protect that right except to request that the Permits be licensed. I withdrew the request
24 for extension of time and requested issuance of licenses for the permits by my letter to Board staff
25 dated December 16, 2005, an accurate copy of which is Exhibit 40. In that letter, I continued to
26 request that Board staff meet with the Ranch staff and the Watermaster to discuss the availability
27 of water for our permits, and the records of actual use of water under the permits.

28 Since requesting the license, the Ranch has continued to be a good steward of the Shasta

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River, and has continued to improve conditions in the river by working with the Department of Fish and Game. We have replaced our diversion dam and orifice system with rock weirs, which bypasses more than 1 cfs and allows for fish passage. The Ranch has also installed fish screens to allow fish that might become entrained in the diversions to escape back into the river, and is working with the DFG on a study to improve the Ranch's irrigation efficiency.