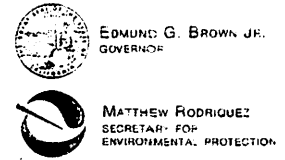




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State Water Resources Control Board

October 13, 2014

DIV OF WATER RIGHTS
SACRAMENTO

VIA HAND DELIVERY AND E-MAIL

Mr. Michael Buckman
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814
wrhearings@waterboards.ca.gov

**RE: MANN DRAFT CDO AND ACL HEARING –
DIVISION OF WATER RIGHTS PROSECUTION TEAM'S
CLOSING BRIEF AND PROOF OF SERVICE**

Dear Mr. Buckman:

The Division of Water Rights Prosecution Team submits three hard copies and one electronic copy of the attached Closing Brief for the Mann Draft CDO and ACL hearing. Also attached is a proof of service stating that one complete electronic copy of these documents was served today, October 13, 2014, via overnight mail and by e-mail on Mr. Robert Mann.

Sincerely,

Yvonne M. West
Senior Staff Counsel
Office of Enforcement

- Attachments: 1. Closing Brief
- 2. Proof of Service

cc: (Via E-Mail and Overnight Mail)

Robert C. Mann
29876 King Ridge Road
Cazadero, CA 95421
bob@bftb.net

1 CHRISTIAN CARRIGAN, Director (SBN 197045)
2 YVONNE M. WEST, Senior Staff Counsel (SBN 221414)
3 Office of Enforcement
4 State Water Resources Control Board
5 1001 I Street, 16th Floor
6 Sacramento, California 95814
7 Telephone: 916-322-3626
8 Fax: 916-341-5869
9 E-mail: Yvonne.West@waterboards.ca.gov
10 **Attorney for the Division of Water Rights Prosecution Team**

2014 OCT 13 11:20

STATE WATER RESOURCES CONTROL BOARD
SACRAMENTO

7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8 In the Matter of:)
9)
10 **Draft Cease and Desist Order and) Prosecution Team's**
11 **Administrative Civil Liability against) Closing Brief**
12 **Robert Mann (individual and Trustee))**
13 **and Robert C. Mann 1999 Trust)**

13 **I. INTRODUCTION**

14 The State Water Resources Control Board (State Water Board), Division of Water Rights
15 (Division), Prosecution Team (Prosecution Team) submits this closing brief in the matter of whether
16 to impose Administrative Civil Liability (ACL) and whether to issue a Cease and Desist Order
17 (CDO) against Robert Mann (Individual and Trustee) and the Robert C. Mann 1999 Trust (referred
18 to hereafter as Mann). The relevant circumstances in this case, as discussed below in more detail,
19 justify adopting the prosed CDO and imposing a significant ACL amount for past violations in order
20 to protect the integrity of the water rights regulatory program, gain compliance, and deter future non-
21 compliance.

22 **II. AUTHORITY AND ARGUMENT**

23 **A. THE STATE WATER BOARD SHOULD IMPOSE ADMINISTRATIVE CIVIL**
24 **LIABILITY UPON MANN FOR TRESPASS AND FOR FAILURE TO FILE A**
25 **STATEMENT OF DIVERSION AND USE.**

26 It is well established that unless a diverter has a riparian right or has perfected an appropriative
27 right prior to December 19, 1914, then the water use is subject to the statutory appropriation
28 procedures set forth in division 2 of the Water Code (commencing with section 1000). (State Water

1 Board Order 2001-22 at p. 25-26, citing Wat. Code, §§ 125, 1201.) The diversion or use of water
2 subject to statutory appropriation procedures without the necessary authorization from the State
3 Water Board is a trespass for which the State Water Board is authorized to impose administrative
4 liability. (Wat. Code, § 1052, subd. (a) & (b).) Furthermore, Water Code section 5101 requires
5 with limited exception the filing of a statement of diversion and use with the State Water Board
6 prior to July 1 of the succeeding year. (Wat. Code, § 5101.)
7

8 **1. The Prosecution Team has presented substantial evidence which establish that the**
9 **reservoir located on property owned and operated by Mann is a trespass within the**
10 **meaning of Water Code section 1052, subdivision (a).**

11 The reservoir in question is located in Sonoma on property that is owned by the Robert C.
12 Mann 1999 Trust (Property) for which Mr. Robert Mann is the sole trustee and has control over the
13 use of the reservoir and Property. (WR-11, ACL Complaint, p. 2; WR-6, WR-18; HT pp.70:11-
14 71:17, 75:11-76:19.) The Prosecution Team and Mann presented evidence into the record which
15 established that the reservoir collects water during the winter and stores it into the summer. (WR-3,
16 Testimony of Jeff Wetzal p. 2; HT, p. 73:18-23.) Mann's own testimony establishes that: (1) the
17 reservoir collects and stores water seasonally; (2) that the reservoir provides water during times and
18 in quantities when water would not otherwise be available to Mann; and (3) that water has been and
19 is still used for beneficial uses, such as stock watering and fire protection. (MANN-1; HT, pp.
20 60:14-22, 73:18-23.)

21 Mann does not have, nor does he claim to have, an appropriative water right for the
22 reservoir. (WR-11, ACL Complaint, section 7, p. 6; WR-7, Findings Letter; MANN-1.) While
23 Mann has a riparian right to surface streams that run through the Property, a riparian right to use
24 water in a stream that abuts the riparian property does not include the right to store flow for later use
25 or the right to flow that is not naturally available in the stream. (People v. Shirokow (1980) 26
26 Cal.3d 301; Lux v. Haggin (1886) 69 Cal. 255.)
27
28

1 The only defenses raised by Mann to the Prosecution Team's assertion that the reservoir is
2 an unauthorized diversion and use of water, is his claim that he did not understand until recently that
3 the reservoir is a "diversion" of water and that the reservoir was constructed for soil conservation
4 purposes. (MANN-1; HT, pp. 58:16-59:18, 95:16-18.) The collection of water in a reservoir is a
5 diversion explicitly included in the definition of "diversion" provided in Water Code section 5100,
6 subdivision (c). Furthermore, Mann has been given notice of Enforcement Staff's determination
7 that the reservoir is a diversion of water for which a permit or license is required and which is
8 subject to statement filing requirements. (WR-1, p.7, WR-3, pp 2-5) Mann has had ample time to
9 come into compliance and has failed to take any actions toward compliance aside from filing a
10 Statement. (HT, p. 36:8-11.) Mann's ignorance of what qualifies as a diversion within the State
11 Water Board's regulatory authority is not a legal defense or excuse for the failure to obtain the
12 appropriate water right permit and/or license. (*People ex rel. State Air Resources Bd. V. Wilmshurst*
13 (1999) 68 Cal.App.4th 1332, 1346 [finding that ignorance of the law does not excuse violations,
14 even if a particular defendant lacks the legal research skills to find the law].) Furthermore, the
15 construction of a reservoir for soil conservation purposes does not convey a right to continue to store
16 and then use water captured by the reservoir during a season when water would not otherwise be
17 available. (*Meridian, LTD. v. City and County of San Francisco*, 13 Cal.2d 424, 449 - 450.)

20 Lastly, Mann asserted a belief that the reservoir in question provided more of a benefit to the
21 public than to himself because of wildlife benefits and fire protection associated with having
22 access to water year round. (HT, P. 88:1-88:16.) It is important to remember that over 2,500 acres
23 that surround this 183 acre foot reservoir are privately owned by Mann and held in trust for Mr.
24 Mann and his family. (HT70:11-71:17.) Accordingly, there have been direct and substantial
25 private benefits to Mann from the reservoir, such as fire protection and access to water year round,
26 since before 1978 and those benefits will continue to be enjoyed by Mann and his family during
27 and after compliance with the water right permit and licensing process.

1 **2. The Prosecution Team has presented substantial evidence demonstrating that Mann**
2 **failure to file a statement of diversion and use in violation of Water Code section 5101.**

3 Mann's impoundment and storage of water in the onstream reservoir is a diversion for which a
4 Statement of Diversion and Use (Statement) is required. (Wat. Code § 5101; WR-3, Testimony of
5 Jeff Wetzel, p.2; WR-6, Reservoir Investigation Report, p.2.) Mann did not timely file an initial
6 Statement for diversions made in either 2009 or 2010 and has not contested this allegation or
7 provided evidence to the contrary.

8 Ms. Mann was informed of the need to file a Statement at the September 9, 2011 inspection.
9 (WR-3, Testimony of Jeff Wetzel, p.2; WR-11, ACL Complaint, Section 2.) An inadequate initial
10 Statement for the diversion and use of water at the reservoir in 2010 was filed 40 days later on
11 October 19, 2011. (WR-5, Statement filed by Mann.) A corrected statement was then filed on
12 February 24, 2013. (WR-16, Mann's Response letter correcting deficient Statement.) The only
13 defense raised by Mann that can be interpreted to apply to the failure to file a Statement violation is
14 Mr. Mann's assertion that he did not know the reservoir was a diversion. (MANN-1; HT, pp. 58:16-
15 59:12.) Again, ignorance of the law is not a valid legal defense or excuse. (*People ex rel. State Air*
16 *Resources bd. V. Wilmshurst*, 68 Cal.App.4th at 1346.)

17
18 **B. THE STATE WATER BOARD SHOULD IMPOSE THE PROPOSED LIABILITY OF**
19 **\$66,000 AGAINST MANN.**

20 Water Code section 1052, subdivision (b), authorizes the State Water Board to
21 administratively impose civil liability in an amount not to exceed \$500 for each day that such a
22 trespass occurs. In Addition, the failure to file a Statement as required by Water Code section 5101
23 for a diversion that occurs after January 1, 2009 is subject to enforcement through the imposition of
24 administrative civil liability of up to \$1,000, plus \$500 per day for each additional day on which the
25 failure to file continues past 30 days after the State Water Board has called the violation to the
26 attention of that person. (Wat. Code § 5107, Subds. (b) & (c)(1).)

27 Water Code section 1055.3 requires that when determining the amount of liability, the State
28 Water Board shall consider;

1 *all relevant circumstances, including, but not limited to, the extent of harm caused by the*
2 *violation, the nature and persistence of the violation, the length of time over which the*
3 *violation occurs, and the corrective action, if any, taken by the violator.*

4 Furthermore, the North Coast Instream Flow Policy (Policy) provides guidance on how relevant
5 circumstances are to be considered in this case when determining liability amount. (WR-26, Policy,
6 pp. H-1- H-3.) The Prosecution Team submitted evidence and testimony detailing the relevant
7 circumstances considered when determining the proposed liability of \$66,000 in the draft ACL
8 Complaint (WR-11, ACL Complaint, pp. 3-4; WR-1, Testimony of Aaron Miller, pp. 5-8; HT, pp.
9 32;11 - 37:21).

10 **1. The Prosecution Team Appropriately Considered the Relevant Circumstances**
11 **when Recommending the Proposed Liability.**

12 The prosecution team estimated economic benefit gained from Mann's unauthorized
13 reservoir then applied a disincentive factor to quantify the extent/potential of harm, nature and
14 persistence of violation, length of time over which the violation occurs, and corrective actions, if
15 any, taken. Staff cost were conservatively estimated and added to the proposed liability in
16 accordance with the Policy. (WR-11, ACL Complaint, pp. 3-4; WR-1, Testimony of Aaron Miller,
17 pp. 5-8; HT, pp. 32;11 - 37:2.).

18 During the hearing on this matter, Mann questioned the accuracy of a few of the assumptions relied
19 on by the Prosecution Team in reaching the recommended liability amount but failed to submit any
20 evidence to rebut those assumptions.

21
22 **a) Prosecution Team correctly considered economic benefit derived from the**
23 **unauthorized diversion and use of water.**

24 The Prosecution Team submitted evidence and testimony concerning economic benefit
25 gained from the trespass violation during the last three years of violation, including avoided costs,
26 and conservatively estimates economic benefit at \$20,054. (WR-1, ACL Complaint, pp. 5-6. WR-1,
27 Testimony of Aaron Miller, pp. 5-6; HT, pp. 34:6-35:6.) The calculation of economic benefit was
28 based in part on estimates of evaporative loss, estimated stock watering use, and pumping costs for
replacing evaporative losses assuming use of groundwater from a 120 foot deep well with

1 horsepower motor. (*id.*) The evaporative loss number used by the Prosecution Team included a 5
2 acre-feet annual water use for stockwatering purposes. (WR-1, p.6.) The Prosecution Team used
3 300 head of cattle in developing these estimated based on what they believed was a previously
4 statement by Ms. Mann at the September 9, 2011 inspection. (WR-3, Testimony of Jeff Wetzal, p.2;
5 HT, p. 43:10-14.) Mr. and Ms. Mann both testified at the hearing that the number of cattle with
6 access to the reservoir is less than 300. (HT, p. 43: 15-16, 62:11-22.) Mann, however, did not
7 submit any evidence establishing the number of cows on the Property or supporting their contention
8 that the amount of water used for stock is in fact less the 5 acre-feet annual. In fact, Mr. Man, also
9 stated that for purposes of reporting diversion and use information he estimated the amount of water
10 diverted for stockwatering annually "in the thousands of gallons." (HT, p. 69:1-5.) Accordingly,
11 while the Prosecution Team's use of 300 head of cattle may be too high, the Prosecution Team's
12 estimate of 5 acre-feet annually for stock watering is not unrealistic and should not be discounted.
13 Even if no consideration is given to water loss from stockwatering, then the economic benefit
14 estimate would only be reduced by \$2,970 resulting in total maximum reduction of the proposed
15 liability of \$8,900. (HT, Mr. Miller Testimony, pp 84:14-85:6.)

16 Mr. Mann also made a statement questioning the use of a 10 horsepower motor for
17 pumping water to a trough. (HT, p. 63:1-5.) The use of the costs associated with a 10 horsepower
18 motor are appropriate because the economic benefit being quantified is the benefit from having a
19 183 acre foot reservoir that also provides stock watering, not just what it would cost to fill a trough.
20 The cost of using a 10 horsepower motor for pumping water from a 120 foot deep well into the
21 reservoir to replace evaporative loss is used as a conservative estimate of costs Mann would have to
22 spend to legally acquire water equivalent to the water supply illegally diverted. (See Policy WR-26,
23 p. H-2 [provides that avoided costs should represent true cost that violator would have to spend to
24 legally acquire water].)

25 Mr. and Ms. Mann also expressed skepticism that the reservoir capacity estimates of
26 both the Prosecution Team and Division of Dam Safety were accurate. (HT, pp. 62:6-10, 63:24-
27 64:17.) Mann had sufficient notice and opportunity to obtain an independent estimate or actual
28 reservoir capacity survey and even went so far as hiring an engineer and having him inspect the

1 reservoir but he did not obtain an engineer report. (HT, pp. 69:19-70:15 & 79:23-80:20.) It is
2 important to recognize that the economic benefit calculations used as the basis for the proposed
3 liability do not rely upon reservoir capacity, but instead use surface area when calculating
4 evaporative losses. Mann does not contest or otherwise challenge the calculation of the surface area
5 of the reservoir. Accordingly, for the reasons discussed in detail above, the Prosecution Team's
6 estimate of economic benefit is reasonable and supported by substantial evidence on the record.

7
8 **b) The Prosecution Team correctly applied a disincentive factor.**

9 Mr. Miller testified to the use of a disincentive factor of 3 times the economic benefit
10 to quantify other relevant circumstance in this matter. (WR-1, pp. 6-7; HT, pp. 35:6-13, 45:2-9.)
11 The extent of harm caused by the unauthorized diversion and use is unknown and has not been
12 quantified for this case. (*id.*) The potential for harm, however, was considered by the Prosecution
13 Team. (*id.*) Mr. Miller's testified to the fact that the unnamed stream that the reservoir is
14 constructed could be a class I stream during part of the year and that a stream classification survey
15 would need to be conducted to verify the stream designation. (WR-1, pp. 6-7; HT, pp. 51:8-52:11.)
16 Mr. Mann testified to the fact that his father and grandfather used to fish on their neighbor's
17 property and that fish came "basically, right to our property line." (HT, p.74:17-24.) Furthermore, a
18 threatened Central California Coastal Steelhead trout fishery exists in the watershed. (WR-1, p.6;
19 HT, pp.44:21-45:10.)
20

21 The fact that the reservoir in question has been in place since before 1978 is
22 uncontested. (MANN-1, p. 1.) Mr. Mann testified to the fact that the reservoir was constructed by
23 his grandfather, that he conducts continued maintenance of the reservoir, and has past and present
24 beneficial uses including stockwatering and fire protection. (MANN-1, p.1; HT, pp. 66:12-68:2
25 [maintenance]; HT, pp. 60:15-22, 63:19-21: 68:12-69:5 [stockwatering]; HT, pp. 59:13-15, 88:1-16
26 [fire protection].) The duration of the violation, therefore, is long standing. In fact the maximum
27
28

1 potential liability is in excess of \$3,000, 000. (WR-11, ACL Complaint, p. 7, section 17; HT, p.
2 33:20-21.)

3 **c) Additional liability should be imposed for Mann's failure to file a Statement.**

4 The State Water Board can also impose liability on Mann for failure to file a Statement
5 at \$1,000 for the initial violation plus \$5,000 per day for the 10 days past 30 days from when Ms.
6 Mann was given notice of the need to file a Statement. (WR-11, ACL Complaint, pp.3-4, section
7 18.) Here, the Prosecution Team only seeks penalties for the initial failure to file a Statement
8 violation and recommends imposing \$1,000 in liability for Mann's failure to file a Statement. The
9 \$1,000 in liability for failure to timely file a Statement is justified due to the duration of the
10 violation, to deter future non-compliance, and to be consistent with past failure to file statement
11 enforcement actions issued by the State Water Board. (WR-3, Testimony of Jeff Wetzal, p.2 [Ms.
12 Mann informed on need to file Statement on Sept. 9, 2011]; WR-5, Statement filed by Mann
13 [October 19, 2011]; WR-26, Policy, p.H-2, Deterrent amount section [The civil liability should be
14 set at a level that will deter future noncompliance of the violator or others in the same regulated
15 community]; see Order WR 2012-0024-DWR, Order WR 2012-0025, and Order WR 2013-0023-
16 EXEC.)

17
18
19 **d) The Prosecution Team conservatively estimated Staff Costs incurred up to**
20 **issuance of the ACL complaint and notice of proposed CDO and considered those**
21 **costs when determining the proposed liability.**

22 In accordance with the Policy, the Prosecution Team conservatively estimated staff cost
23 for the initial investigation, reviewing the existing project and developing the enforcement document
24 at \$5,136. (WR-1, Testimony of Aaron Miller, p. 8; WR-11, ACL Complaint, p. 4, Section 21; HT,
25 p. 73:12-16.) The Policy provides that the administrative civil should at a minimum be set at a level
26 that recovers economic benefit plus staff costs. (WR- 26, Policy, H-3, Staff costs section.) Here,
27 that Prosecution team estimate is \$25,190 for economic benefit plus staff costs incurred up to
28 issuance of the ACL complaint and Proposed CDO. In addition, the State Board should consider

1 that staff costs have increased as this action proceeded to hearing. (see *In the Matter of The*
2 *Vineyard Club, Inc.*, Order WR 2008-0015 and *In the Matter of Lake Arrowhead Community*
3 *Services District*, Order WR 2006-0001.)

4 **e) The Prosecution Team has submitted sufficient evidence to establish Mann's**
5 **ability to pay the proposed liability.**

6 In some situations it is appropriate to consider ability to pay when setting a liability
7 amount and ability to pay is limited by a diverter's revenues and assets. (WR-26, Policy, p. H-3,
8 Ability to pay section.) The Prosecution Team submitted evidence of the substantial real property
9 assets owned by Mann. (WR-23a-d, additional Real Property Asset Information.) Mr. Mann's
10 testimony confirmed the ownership of the majority of the assets identified by the Prosecution team
11 and the estimated tax assessor's value of those assets. (HT, pp. 76:14-79:20.)

12 The reduction of an administrative civil liability for ability to pay reasons is only appropriate "[i]f
13 there is strong evidence that administrative civil liability would result in . . . undue hardship to the
14 diverter." (WR-25, Policy, pH-3, Ability to pay section.) In his closing remarks Mr. Mann made a
15 statement to the effect that the value of the farm property should not be considered by the State
16 Water Board. (HT, p. 87:10-16.) Mann, however, has not submitted any evidence that would
17 support a reduction of the proposed liability and in fact has not even claimed an inability to pay.
18 Accordingly, there is no evidence or testimony that would support reducing the proposed liability
19 due to ability to pay concerns.

20
21
22 **C. THE STATE WATER BOARD SHOULD ADOPT THE CEASE AND DESIST ORDER**
23 **AS PROPOSED.**

24 The State Water Board can issue a CDO when "any person is violating or threatening to violate"
25 prohibitions against the unauthorized diversion or use of water provided in Water Code section
26 1052. (Wat. Code § 1831, subd. (d).) Mann has been given notice and ample opportunity to take
27 steps toward coming into compliance and has failed to take any actions toward compliance aside
28 from filing a Statement. (WR-1, p.7, WR-3, pp 2-5; HT p. 36:8-11.) The proposed CDO is

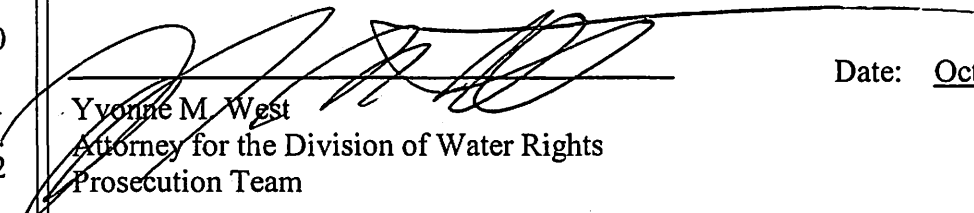
1 necessary to bring Mann's reservoir into compliance, to provide firm and enforceable deadlines for
2 compliance, and to discourage future unauthorized diversion and use of water.

3 The proposed CDO provides two options by which Mann can come into compliance and a time
4 certain by which Mann must make and inform the State Water Board of which option will be
5 pursued. (WR-11, proposed CDO, p.3, 4.) Mann can either pursue compliance by filing and
6 diligently pursuing an appropriate water right application while operating the reservoir in
7 compliance with the Policy, or decide to permanently render the reservoir incapable of storing water
8 subject to the State Water Board's permitting authority. (*Id.*) The proposed CDO is particularly
9 important here because the capacity of the Mann's reservoir makes it ineligible for the expedited
10 registration process, and its location within the policy area will require stream class determination
11 and other technical studies in order to determine whether or not the Division can issue a water right
12 permit or if a case specific exemption from the Policy will need to be sought. (*Id.*)

13 III. CONCLUSION

14 For the reasons detailed above, the Prosecution Team recommends issuing an administrative
15 civil liability order imposing the proposed liability of \$66,000 and the cease and desist order as
16 proposed to bring Mann into compliance in a timely fashion and prevent future unauthorized
17 diversion and use.

18 Respectfully submitted,

19
20 
21 Yvonne M. West
22 Attorney for the Division of Water Rights
23 Prosecution Team

24 Date: October 13, 2014

1 **AFFIDAVIT AND PROOF OF SERVICE**

2 I, Barbara K. Neal, declare that I am over 18 years of age. I am employed in Sacramento County at
3 1001 I Street, Sacramento, CA 95814. My mailing address is 1001 I Street, 16th Floor, Sacramento, CA 95814.
4 On this date, I served the within document:

5 **DIVISION OF WATER RIGHTS**
6 **PROSECUTION TEAM'S CLOSING BRIEF**

7

8 X	BY PERSONAL DELIVERY: I caused three true and correct hard copies of the document(s) to be personally served on Mr. Michael Buckman or another qualified person in Mr. Buckman's office located at Water Rights Records Unit at 1001 I Street, 2 nd Floor, Sacramento, CA 95814 and one electronic copy via e-mail to Mr. Buckman at wrhearings@waterboards.ca.gov on October 13, 2014 before 12:00 noon
9	
10 X	BY ELECTRONIC MAIL AND OVERNIGHT MAIL TO: I caused one true and correct copy of the document(s) to be sent to Robert C. Mann via On Trac Overnight Mail (Tracking Number B10300090583) to 29876 King Ridge Road, Cazadero, CA 95421 and via e-mail at bob@bftb.net on October 13, 2014 before 12:00 noon
11	
12	

13 I certify and declare under penalty of perjury under the laws of the State of California that the
14 foregoing is true and correct and that this document was executed on October 13, 2014 at Sacramento,
15 California.

16
17
18 

19 Barbara K. Neal
20 Senior Legal Typist
21 Office of Enforcement