

WR Exhibit 1

DECLARATION OF JOHN O'HAGAN

My name is John O'Hagan, and a statement of my qualifications is attached to this Declaration. I am testifying in this case in support of the proposed revocation of License 659 (Application 553). My testimony focuses on: (1) Water rights for diversions from the Millard Canyon watershed prior to 2001, (2) Limitations of water rights, (3) Support for Revocation of License 659, and (4) Necessity of Revocations and Recent State Water Board Orders.

(1) Water Rights For Diversions from Millard Canyon Watershed

There are three water right licenses that authorize the diversion and use of water from Millard Canyon or its tributaries in Riverside County. There are also pre-1914 rights for diversions from Millard Canyon. It is important to understand the parameters of these various rights to view License 659 in context. While some rights share a common point of diversion, each has a different and specified place and purpose of use.

License 659 (Application 553) is the subject of this hearing and has a priority date of January 3, 1917. License 659 was issued on January 31, 1928 to Southern Pacific Land Company and was later transferred in 1930 to South Pacific Railroad (both herein referred to as Southern Pacific). The license authorizes the direct diversion of 0.16 cubic feet per second (cfs) from an unnamed spring arising in Millard Canyon from January 1 to December 31 of each year for irrigation of 13 acres within the SW1/4 of Section 32, T2S, R2E, SBB&M (Section 32). The point of diversion for this license is located within NE1/4 of SW1/4 of Section 32. A copy of License 659 is shown as WR Exhibit 16. License 659 was issued for a reduced amount and reduced place of use based on inspection findings. Southern Pacific contacted the State Water Board's predecessor by letter dated February 20, 1928, questioning the reduction from the permit amount, and the State Water Board's predecessor responded by letter dated February 28, 1928, confirming the reduction in licensing amounts. (Both letters are in WR Exhibit 17.) The point of diversion and place of use served by this license is shown on Map Showing Area Irrigated 1924, Appl. #553, Per. #486. (WR Exhibit 10.)

License 660 (Application 554) has a priority of January 3, 1917 and was also issued to Southern Pacific on January 31, 1928. This license authorizes the direct diversion of 0.5 cfs from January 1 to December 31 of each year for domestic and industrial uses within N1/2 of Section 16, T3S, R2E, SBB&M. The point of diversion for License 660 is the same unnamed spring identified in License 659. A copy of License 660 is WR Exhibit 45.

License 174 (Application 84) was issued to Cabazon Water District (Cabazon). This license was issued on February 27, 1923 and authorized the direct diversion of 2.6 cfs from January 1 to December 31 of each year for domestic, stockwatering and irrigation uses within the Cabazon service area (WR Exhibit 48). This license covers a separate point of diversion and a separate place of use than License 659.

In 1938, the Riverside County Superior Court adjudicated the water rights of the Whitewater River watershed, including the above Millard Canyon post-1914 diversions. A copy of the Whitewater River Decree (Decree) is WR Exhibit 50. The claimed water rights to Millard Canyon were first identified in the Abstract of Claims by Appropriation to the Water of the Whitewater River Stream System dated September 1925. Southern Pacific's claimed pre-1914 priority rights and the 1917 priorities of the permits issued pursuant to Applications 553 and 554 for the spring developed in Section 32 are listed (WR Exhibit 7 at 19-20). An Order of Determination was entered on April 23, 1928 and reflected Southern Pacific's pre-1914 rights and the 1917 rights under permitted Applications 553 and 554 (WR Exhibit 8 at 25 and 26). The Decree was issued in 1938 with the rights to the Millard Canyon spring designation as Diversion 28. The Point of Diversion for License 174 (Application 84) was designated as Diversion 27.

For Diversion 28, the Decree was consistent with the Order of Determination. Paragraph 39 of the Decree identifies the right of Southern Pacific to the natural or developed flow of the spring rising in Millard Canyon at Diversion 28 for railroad and domestic purposes at and adjacent to the Cabazon Railroad Station. The Decree recognized rates and priority for this place of use from Diversion 28 as follows:

0.23 cfs with a priority of January 1, 1877

0.27 cfs with a priority of January 3, 1917

0.50 cfs total

This 0.5 cfs total is equivalent to the amount covered by License 660. License 660's place of use is within N1/2 Section 16, T3S, R2E, SBB&M.

Paragraph 40 of the Decree identifies the Southern Pacific's right to the natural or developed flow of the spring rising in Millard Canyon at Diversion 28 for domestic, stockwatering and irrigation use within 32.5 acres within the SW1/4 of Section 32, T2S, R2E, SBB&M. The decree recognized rates and priority from Diversion 28 for this place of use as follows:

0.12 cfs with priority of January 1, 1877

0.16 cfs with priority of January 1, 1917

0.28 cfs total

Only the 0.16 cfs rate with the 1917 priority is equivalent to the amount covered by License 659. Also, License 659 covers only Irrigation use for 13 acres within the 32.5 acres identified in the Decree.

(2) Limitation of Water Rights:

A term of License 659 provides that the diversions under this license which are to be directly applied to irrigation use without storage, shall not exceed the rate of one cubic foot per second continuous flow to each 80 acres of irrigated lands, provided, however, in the case of rotation the equivalent of such continuous flow allowance for any 30-day period may be diverted in a shorter time if there is no interference with other vested rights. Another term states "The right to the diversion and use of water aforesaid hereby confirmed is restricted to the point of diversion herein specified and to the lands or place of use described." Therefore, based solely on this term, any diversion of water from Diversion 28 for any non-irrigation uses, or for irrigation use outside the

authorized 13-acre place of use, should not be considered a beneficial use of water under License 659.

Paragraph 3 of the Decree defines that the rights identified in the Decree are to be directly applied to beneficial use without intermittent storage. Paragraph 5 of the Decree identifies the map showing the points of diversion and place of use for the Decree is entitled "Map of Whitewater River Watershed showing Diversion Systems and Irrigated Areas, San Bernardino and Riverside Counties, California". Exhibit WR 9 contains portions of these maps showing the location of Diversion 28, and the place of use served in Section 32.

Section XXIX, Page 68 of the Decree, enjoins every party of the Decree, and their successors in interest, from any interference with, or diversion or use of, the water therein decreed, except in the manner, and to the extent, and for the purposes provided therein, whenever such interference, diversion or use in any manner interferes with the diversion or use of the said water as decreed.

To my knowledge, prior to 2001, there was no change made by the Superior Court to the water rights authorizing the diversion of water from Diversion 28. To date, the State Water Board has not authorized any order to change the place of use or point of diversion for License 659.

(3) Support for Revocation:

The Reports of Licensee from 1934 through 1951 (WR Exhibit 19) were filed jointly for Licenses 659 and 660. These reports explicitly identified the irrigation of the 13-acre place of use in Section 32. Starting with the 1952-1954 Report of Licensee, and continuing through the 1955-57 report (WR Exhibit 19), Southern Pacific no longer made such clarification. It reported uses for locomotive, domestic and lawn services, and evaporative coolers only.

This change in reporting of water use, especially the lack of specific reporting of irrigation use, suggests that Southern Pacific discontinued irrigation of the place of use in Section 32 for a period of six consecutive years (1952-1957). The Report filed for License 659 for 1958-1960 does identify domestic use for 7 persons, and irrigation of 8-10 acres, but does not identify that the use was within Section 32. (WR Exhibit 19). Even assuming water was used for irrigation in Section 32, by using a rate of 55 gallons per day per person for domestic use, and 1 cfs per 80 acres for irrigation, the estimated rate of diversion would be less than 0.13 cfs. This estimate is reasonably covered by the 0.12 cfs Decreed pre-1914 right. Therefore, there may be nine years of non-use under License 659 prior to 1961 (1952-1960).

State Water Board staff conducted a site inspection of the licensed project in 1964. That inspection confirmed the lack of irrigation use within Section 32. The 1964 inspection report is WR Exhibit 20. The Report of Licensee for 1961-1963 (WR Exhibit 22) filed within a month after Division staff's inspection is in direct conflict with Mr. Pettit's findings of no irrigation use provided in WR Exhibit 3.

A follow-up inspection was made in 1968 and Division staff again found a lack of irrigation use of water within Section 32. In the Conclusions and Remarks section of the inspection report (WR Exhibit 23), the inspector stated that there was no doubt there was a lapse in use of water under this license for about 3 years (underline added). The inspector also concluded that the

existing diversion system was inadequate to irrigate the place of use and recommended necessary system changes. The inspector recommended a re-inspection in 1969.

A follow-up inspection was not made in 1969. The Division's file for Application 553 does not contain any indication that the diversion system changes recommended by Division staff in 1968 were ever made. If not, the existing system found in 1968 was considered incapable to irrigate the place of use. Any domestic and stockwatering uses that may have occurred are not authorized by License 659, and could reasonably be covered by the pre-1914 Decreed right. Therefore, I conclude that the record supports that no water was used under License 659 for at least five consecutive years prior to 1969. WR Exhibit 12 includes a copy of a 1966 aerial photograph of Section 32. This aerial does not show any agricultural activity within Section 32, which confirms the findings made by the Division's two inspections.

WR Exhibit 24 is a copy of a letter dated March 24, 1971 from the State Water Board to Southern Pacific that confirms the ownership change of License 660 to Cabazon, and retention of License 659 and a Decreed right serving Section 32 by Southern Pacific. Ownership of the Section 32 property served by License 659 was changed by Grant Deeds in 1989 from South Pacific to Coussoulis Development Company, and in 1990 from Coussoulis to The Steele Foundation, Inc. The property was again transferred in 1991 to Feydoun and Doris Ahadpour. Mr. Mozafar Behzad represented the Ahadpours.

The Ahadpours filed a petition to change License 659 in 1995. WR Exhibit 30 is a copy of a letter dated June 23, 1995 from the Ahadpours' representative (Mr. Behzad), which states "at the present time the water is being completely wasted and runs down along Millard Canyon." WR Exhibit 4 is Mr. Behzad's declaration confirming the lack of water use under License 659 during the Ahadpours' ownership of the property.

WR Exhibit 34 is a copy of the Morongo's protest to the Ahadpours' change petition. Morongo claimed that granting the petition by allowing a water bottling plant would injure the ability to exercise their claimed downstream reservation rights to the groundwater of Millard Creek. This suggests that the water covered by License 659 was being allowed to flow downstream in Millard Canyon to recharge the groundwater basin.

WR Exhibit 11 is a copy of the 1988 (Photorevision) Cabazon Quadrangle map published by the United States Geological Survey (USGS). This map shows the locations of the points of diversion and places of uses for Licenses 659 and 660. WR Exhibit 12 contains 1990's aerial images of the same place of use area in Section 32. All of these exhibits do not show any sign of the irrigated crops that were depicted on the 1924 map (WR Exhibit 10).

I conclude that the evidence supports at least five consecutive years of non-use of water under License 659 prior to 1969, and during the entire ownership of the Ahadpours. Any minor stockwatering or domestic use that may have occurred from Diversion 28 within Section 32 would likely be covered by the existing pre-1914 Decreed right. I recommend that the State Water Board revoke License 659.

(4) Necessity of Revocation and Recent State Water Board Orders

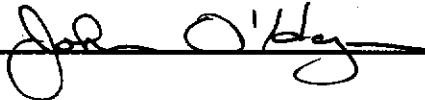
The State Water Board's authority to revoke water right permits and licenses is authorized by Water Code sections 1410 and 1675, respectively. In Order WR 2004-0034, the State Water Board denied Morongo's petition for reconsideration and included: "Water Code section 1675 provides that the SWRCB may revoke a license if the licensee has ceased to put water to beneficial use as required by the Water Code or if the licensee has not complied with any of the terms and conditions of the license. Under Water Code section 1241, a water right permit or license may be forfeited if water is not beneficially used for a five-year period. That Order also states "Until 1980, section 1241 provided for a three-year forfeiture period. Section 1241 was amended in 1980 to provide for a five-year forfeiture period."

In its Orders WRO 2008-0045 and WRO 2011-0016, the State Water Board clearly identified that the purpose of both the forfeiture doctrine and the due diligence requirement for potential revocation of water rights is to ensure that appropriators do not hold water rights in "cold storage," thereby preventing water resources from being put to beneficial use. The State Water Board has also found that the forfeiture doctrine and the due diligence requirement are in furtherance of the fundamental public policy embodied in article X, section 2 of the California Constitution and Water Code section 100, which require the water resources of the State to be put to beneficial use to the fullest extent of which they are capable, and limit all water rights to the amount of water reasonably required for the beneficial use to be served.

Finally, Order WRO 2011-0016 identified that the provision of Article X, section 2 of the California Constitution limits water rights to the amount of water reasonably required for the beneficial use to be served. If a beneficial use is or may be served through the exercise of a riparian right, then no additional amount of water is reasonably required to serve that use, and therefore an appropriative right to serve the same use cannot be obtained consistent with article X, section 2. It is reasonable to conclude that the State Water Board would apply this same principle of exercising a prior right first when a beneficial use is, or may be served under a pre-1914 right. There would be no additional amount of water reasonably required to serve that use. All of these State Water Board orders are included as exhibits, by reference.

I declare under penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Executed on this 27th day of April, 2012, in Sacramento County, California.

Name



STATEMENT OF QUALIFICATIONS FOR JOHN O'HAGAN

I, John O'Hagan, earned a Bachelor of Science Degree in Civil Engineering on January 3, 1980 from California State University, Sacramento, and I have been registered in the State of California as a Civil Engineer since September 5, 1984. I currently serve as a Supervising Water Resource Control Engineer with the State Water Resources Control Board's (State Water Board), Division of Water Rights (Division). I have over thirty years of experience with the Division working in the California water right programs of licensing, complaints, compliance and enforcement. In 2003, I was promoted to serve as the Manager of the Licensing and Enforcement Section of the Division, and I continue to serve as Manager of the Enforcement Section. In this position, I am responsible for directing all Division activities related to water right complaint and compliance field investigations, enforcement activities and program resources and strategies.