

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WRO-2003-0013-DWR

In the Matter of
Administrative Civil Liability Complaint No. 262.5-31
Omnium Estates

SOURCE: Unnamed Stream and McNab Creek tributary to the Russian River

COUNTY: Mendocino County

**ORDER IMPOSING ADMINISTRATIVE CIVIL LIABILITY
AGAINST OMNIUM ESTATES**

1.0 INTRODUCTION

This matter comes before the State Water Resources Control Board (SWRCB), Division of Water Rights (Division) following issuance of Administrative Civil Liability (ACL) Complaint No. 262.5-31, on November 15, 2002, against Omnium Estates (Omnium). The Division scheduled a hearing to consider the proposed ACL for May 14, 2002. Omnium failed to timely file a Notice of Intent to Appear (NOI) as required by the March 21, 2003 Hearing Notice. Omnium's failure to timely submit a NOI signals intent to not participate in the hearing, and in the absence of a hearing appearance, the proposed ACL issued against Omnium is unopposed. In this order, the Division affirms the proposed civil liability in Complaint No. 262.5-31 and orders Omnium to remit payment of \$3,000 within 15 days of the issuance of this order.

2.0 FACTS AND INFORMATION

On July 18, 2001, Division staff conducted a compliance inspection of the project covered by License 4777 (Application 14997) as part of its 2002 investigation of water rights in the Russian River watershed in Mendocino County. The license, owned by John E. Fetzer, Omnium, and Flight Rail Corporation (Flight Rail), authorized the direct diversion of water from the Russian River from May 1 to November 30 for irrigation uses. Division staff found that Omnium had not used water from the Russian River under License 4777 for over five consecutive years because the pipeline formerly used to deliver water to the property was destroyed. During the inspection,

Division staff found Omnium's property planted in a mature vineyard and found that an offstream pit-type reservoir had been constructed and was storing water on the property. Division staff also observed a pump on McNab Creek within the Omnium property. An aerial photograph shows the pit reservoir constructed and storing water by July 11, 1993. Division records indicate that neither Omnium, nor any other party, has a permit or license authorizing the storage of water in the observed reservoir.

By certified letter dated October 5, 2001, the Division notified Omnium and the other parties to License 4777 of the findings relative to the July inspection, and requested that Omnium, within 30 days of receipt of the letter, either identify a basis of right authorizing the storage of water at its reservoir, or explain why the reservoir water was not subject to the permitting authority of the SWRCB. The letter informed the parties that the SWRCB could impose an administrative civil liability penalty of up to \$500 per day for any unauthorized diversion of water. No response was received within 30 days on behalf of Omnium.

The Division engaged in various correspondence with Mr. Steven Grover, a representative of Omnium, in order to bring Omnium into compliance with the Water Code, but the Division never received the necessary forms and fees to begin processing a water right application. By November 1, 2002, over one year after being informed that its reservoir was storing water without a known basis of right and may be subject to enforcement without prompt corrective action, Omnium had not provided any evidence supporting a basis of right for the storage of water in its reservoir, and had not filed an application to appropriate water by permit.

The unauthorized diversion or use of water subject to appropriation under division 2 of the Water Code (commencing with section 1000) is a trespass for which civil liability may be imposed in an amount not to exceed \$500 for each day in which the trespass occurs. (Wat. Code, § 1052.) Water Code section 1055, subdivision (a), provides that the Executive Director of the SWRCB may issue a complaint to any person or entity which an ACL is imposed. On May 17, 2002, the Executive Director of the SWRCB delegated the authority provided by Water Code section 1055, subdivision (a), to the Chief of the Division of Water Rights.

On November 15, 2002, the Division issued ACL Complaint No. 262.5-31 against Omnium, pursuant to Water Code section 1055, subdivision (a), for its unauthorized diversion of water to storage from McNab Creek and for the unauthorized use of that water for irrigation of

approximately 76 acres of vineyard since 1993. The Complaint assessed a penalty of \$3,000 for three years of unauthorized diversion to storage of approximately 16 acre-feet per year at Omnium's reservoir. The Complaint was mailed certified and received by Omnium on November 19, 2002. By letter dated November 22, 2002, Mr. Grover requested a hearing as provided by Water Code section 1055, subdivision (b). In his letter, Mr. Grover denied that Omnium has been diverting water from McNab Creek. In a telephone conversation with Division staff on December 2, 2002, Mr. Grover again denied the allegations in the Complaint, stating that no water was pumped from McNab Creek to irrigate the vineyard, or to storage in the reservoir. He added that the reservoir was filled only from groundwater and direct runoff, and that the vineyard was irrigated only with groundwater.

Division staff met with Mr. Grover and his vineyard manager on December 16, 2002, to investigate and re-evaluate the facts stated in the ACL Complaint. During the visit, Division staff observed water being diverted from an unnamed stream tributary to McNab Creek into the reservoir by a gravity pipeline. The reservoir was about half-full, approximately twice the amount shown in a photograph taken earlier by Division staff on December 4, 2002. According to the vineyard manager, Roberto, the unnamed stream is the primary source of water for filling the reservoir during the winter months. Roberto also confirmed that an electrically-driven pump located on McNab Creek is used to refill the reservoir during and after frost events. He agreed that McNab Creek water is likely held in storage longer than 30 days. All parties agreed that because McNab Creek and the unnamed stream have insufficient flow during the summer months, irrigation of the vineyard is accomplished by remaining reservoir storage and a groundwater well located on the property.

By letter dated December 31, 2002, the Division stated the findings from its December 16, 2002 visit, and re-affirmed that Omnium's diversion of water to storage was unauthorized. The letter also enclosed the necessary forms for filing an application to appropriate water by permit. Mr. Grover responded by letter dated January 17, 2003, and acknowledged that Omnium diverts water from an unnamed stream that runs through its property and from McNab Creek during spring for frost protection purposes. He also agreed that water collected to storage in the reservoir is used for frost protection and for irrigating the vineyard. Mr. Grover still requested a hearing before the SWRCB because he felt that the ACL penalty was too burdensome.

The Division mailed a Notice of Public Hearing dated March 21, 2003, setting the date and time of the hearing to consider ACL Complaint No. 262.5-31 for Wednesday, May 14, 2003, commencing at 10 a.m. Division records show that Omnium received the notice by certified mail on March 26, 2003. The notice required that parties intending to present evidence at the hearing submit a NOI. The notice specified that the SWRCB must receive the NOI no later than noon on Thursday, April 10, 2003. The notice stated that failure to submit a NOI and exhibits in a timely manner may be interpreted by the SWRCB as intent not to appear.

The Division did not receive a NOI from Omnium by the date specified in the March 21, 2003 Hearing Notice. The Division interpreted Omnium's failure to timely submit a NOI as intent to not participate in a hearing. In the absence of a hearing appearance, the ACL Complaint issued against Omnium is unopposed. The Division sent a Notice of Cancellation of Public Hearing dated April 17, 2003.

3.0 ADMINISTRATIVE CIVIL LIABILITY ASSESSMENT

Omnium failed to timely file a NOI and therefore the facts alleged in the ACL Complaint are unopposed. The facts and information show that Omnium illegally diverted water to storage from McNab Creek and an unnamed stream, and subsequently used that water for irrigation of approximately 76 acres of vineyard since August 1993 (date of aerial photograph). Moreover, in Mr. Grover's letter dated January 17, 2003, Omnium acknowledged that it diverts water from an unnamed stream that runs through its property and from McNab Creek during spring for frost protection purposes. He also acknowledged that water in the reservoir is used for frost protection and for irrigating the vineyard. These diversions are unauthorized and constitute a trespass against the State pursuant to Water Code section 1052, subdivision (a), and are thus subject to administrative civil liability. Water Code section 1055.3 provides:

“In determining the amount of civil liability, the 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 a violation occurs, and the corrective action, if any taken by the violator.”

Omnium and/or its predecessor diverted water from McNab Creek to storage and used that water to frost protect and irrigate approximately 76 acres of vineyard without a legitimate basis of right

for at least nine years. For over one year, Omnium also has failed to take any corrective action to pursue an appropriative water right permit by filing an application, despite significant correspondence from the Division informing Omnium to do so. While not quantified at this time, Omnium's unauthorized diversion to storage may contribute to a cumulative adversely impact to the steelhead trout fishery of McNab Creek and the Russian River. This continued unauthorized diversion also reduced the amount of water available for appropriation by downstream water right holders. Omnium enjoyed an unfair advantage over other vine growers in the Russian River watershed by foregoing the cost of buying water, pumping the water from a groundwater well, or pursuing a permit. The Division estimated these avoided costs for three years to range between \$2,000 and \$20,000. In light of all relevant information, I find that the amount of civil liability proposed in the Complaint for the past three years of unauthorized diversion in the amount of \$3,000 is reasonable and appropriate.

THEREFORE, IT IS ORDERED:

The Division finds that the facts and allegations stated in ACL Complaint No. 262.5-31 are unopposed. These facts show that Omnium currently stores water in its reservoir without a basis of right and has failed to file an application to appropriate water by permit to correct this trespass against the State. Omnium shall:

1. Remit payment of the \$3,000 administrative civil liability recommended by ACL Complaint No. 262.5-31 to the Division within 30 days of the issuance of this order,
2. Within 30 days of the date of this order, either: (1) file an application to appropriate water by permit for storage of water at Omnium Reservoir diverted from McNab Creek and the unnamed stream; or (2) submit a plan describing how it will render the reservoir incapable of storing water from the unnamed stream and McNab Creek. The plan must include details on how the reservoir will be removed, or how it can be operated without storing water subject to the permitting authority of the SWRCB; and a time line for completion of all work. Any plan submitted to the Division is subject to approval by the Division Chief. Consequently, if rejected, Omnium shall submit an application to appropriate water by permit within 15 days of being informed of the Division's rejection of the plan. If accepted, Omnium shall take all necessary actions to satisfy the time line specified in the plan.

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3. If Omnium fails to comply with conditions 1, and 2 above, or to diligently pursue securing a permit or conducting the work necessary to render the reservoir incapable of storing water subject to the SWRCB permitting authority, the Division may impose additional civil liabilities for any diversion of water to storage from McNab Creek or the unnamed stream commencing after the issuance of ACL Complaint No. 262.5-31, or request the Attorney General to file a legal action in the superior court, seeking injunctive relief against the ongoing trespass.

ORIGINAL SIGNED BY

Edward C. Anton, Chief
Division of Water Rights

Dated: June 13, 2003