

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2009 – 0023 - EXEC**

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In the Matter of the Diversion and Use of Water by

**Brian Lowell**

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SOURCE: Unnamed Stream tributary to South Fork Cottonwood Creek

COUNTY: Tehama

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**ORDER APPROVING SETTLEMENT AGREEMENT**

BY THE EXECUTIVE DIRECTOR<sup>1</sup>

**1.0 INTRODUCTION**

This matter comes before the Executive Director of the State Water Resources Control Board (State Water Board or SWRCB) following the issuance of a notice of proposed Cease and Desist Order (CDO) and an Administrative Civil Liability (ACL) complaint to Mr. Brian Lowell (Lowell). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Prosecution Team) and Lowell have agreed to settle this matter in lieu of proceeding to a hearing. The issuance of a decision or order pursuant to a settlement agreement is authorized under Government Code section 11415.60. The settlement is approved.

**2.0 BACKGROUND**

Lowell's property is located within the SW¼ of Section 20, T27N, R6W, MDB&M in western Tehama County. Lowell constructed a 64 acre-feet reservoir on an unnamed stream tributary to South Fork Cottonwood Creek within his property without first securing a water right permit from the State Water Board. The reservoir stores water for recreation and fish and wildlife enhancement purposes. The Prosecution Team determined that Lowell's diversion of water to storage at his reservoir was unauthorized and issued a notice of CDO and an ACL complaint by

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<sup>1</sup> SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

certified letter dated July 7, 2008. Lowell requested a hearing on the CDO and ACL by letter dated July 18, 2008.

### 3.0 SETTLEMENT AGREEMENT

Lowell and the Prosecution Team have engaged in settlement discussions and reached an agreement on language that is mutually acceptable and is contained in the Settlement Agreement that is attached hereto. The general terms of the settlement are that Lowell (1) revokes his request for hearing on the ACL and CDO, (2) agrees to file an application to appropriate water and diligently pursue securing a permit, or render the reservoir incapable of storing water, (3) remits payment of \$13,500 in three monthly payments of \$4,500, (4) remits annual payments of \$1,665 until a permit is issued, or until the unauthorized diversions are curtailed, and (5) complies with all other terms of the Settlement Agreement.

### ORDER

**IT IS HEREBY ORDERED THAT** the attached Settlement Agreement between the Prosecution Team and Lowell is approved and is incorporated by reference into this Order.

Dated: 3/24/09

  
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Dorothy Rice  
Executive Director

Attachment

2009 MAR -9 AM 11:03  
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## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between Brian Lowell (Lowell) and the Division of Water Rights (Division) of the State Water Resources Control Board (State Water Board). The parties enter into this Settlement Agreement because it is their collective desire to settle the civil liability complaint and draft cease and desist order issues related to Lowell's unauthorized diversions of water to storage in an onstream reservoir located on his property. This Settlement Agreement will be submitted to the Executive Director of the State Water Board for approval and adoption pursuant to Government Code section 11415.60 as a decision by settlement and will become effective when the Executive Director of the State Water Board issues an order approving the Settlement Agreement.

### **BACKGROUND**

The Division and Lowell stipulate to the following facts:

1. Pursuant to Water Code section 1052, subdivision (a), the "diversion or use of water subject to [division 2 of the Water Code (commencing with section 1000)] other than as authorized in [division 2] is a trespass." Subdivision (b) provides that the State Water Board may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs. The State Water Board may also issue a cease and desist order in response to a trespass or threat thereof, or a violation of a permit or license term or condition. (Wat. Code, § 1831, subs. (a) & (d).)
2. Lowell is the current owner of Tehama County Assessor's Parcel number 021-070-15-1 and has owned the property since June 2000. Aerial photographs show a reservoir is located on this property and Lowell has indicated that the reservoir has been in existence since about 1997.
3. On April 7, 2006, Division staff conducted an inspection of the Lowell property located off of Pettyjohn Road in the SW¼ of Section 20, T27N, R6W, MDB&M in western Tehama County. Division staff observed the reservoir constructed on an unnamed stream tributary to South Fork Cottonwood Creek. The reservoir was storing water at the time of inspection and Lowell confirmed that the reservoir was used for insitu uses only, including recreation and fish and wildlife enhancement. Division staff observed a stream channel existing upstream and downstream of the reservoir. Division staff and Lowell's consulting engineer have determined that the capacity of the reservoir is 64 acre-feet.
4. Division staff determined that the water being collected to storage in the Lowell reservoir is subject to the State Water Board's water right permitting authority. The Division has no record of a water right authorizing the storage of water in the reservoir and Lowell did not provide evidence supporting an existing basis of right. Lowell has collected water to storage and used stored water since at least June 2000 without a basis of right.
5. By letter dated July 7, 2008, the Division notified Lowell of the inspection findings and that he should consider corrective actions by either submitting an application to appropriate water for the existing reservoir or rendering the facility incapable of storing water. The letter again notified Lowell that unauthorized diversions of water are subject to enforcement at the discretion of the State Water Board.

6. On March 20, 2007, Lowell submitted an application to the Division seeking a permit to appropriate water. On April 2, 2007, Division staff rejected and returned the application identifying the information that was either missing or incomplete.
7. Because records of the Division indicate that Lowell did not resubmit an application to appropriate water by permit, on July 7, 2008, the Assistant Deputy Director for Water Rights issued an Administrative Civil Liability (ACL) Complaint against Lowell in the amount of \$31,440. The Assistant Deputy Director also issued a Notice of Draft Cease and Desist Order (CDO) on the same day that requires Lowell to take certain corrective actions within specific time frames.
8. By letter dated July 18, 2008, Lowell requested a hearing before the State Water Board, as provided by Water Code sections 1055, subd. (b) and 1834, subd. (b), on the ACL Complaint and Notice of CDO.
9. The Division's Prosecution Team and Lowell met on October 6, 2008 to discuss potential settlement.

### **AGREEMENT**

The Division and Lowell agree to settle this matter on the following terms:

1. Lowell shall remit payment of a total of \$13,500 to the State Water Board by three payments of \$4,500 each. The payments shall be received by the State Water Board by April 1, 2009, May 1, 2009 and June 1, 2009. By submittal of these payments, Lowell acknowledges that he has annually diverted approximately 22 acre-feet per annum of water to storage in his reservoir from the unnamed stream to offset evaporative losses without authorization.
2. Lowell shall diligently pursue securing a water right permit. Diligently pursuing a permit includes, but is not limited to, prompt submittal of all necessary applications, documents, filing and annual fees, maps, reservoir survey, reservoir stage/area/capacity curve, responses to protests, and information necessary for environmental review under the California Environmental Quality Act (CEQA). The Settlement Agreement does not obligate the State Water Board to issue a water right permit on the application.
3. In the event that any application submitted by Lowell is denied or cancelled, Lowell agrees to render his reservoir incapable of storing water within one year of the cancellation or denial of his application consistent with any requirements imposed by the Department of Fish and Game, the Regional Water Quality Control Board, or any other regulatory agency.
4. Lowell dismisses his request for hearing regarding the ACL complaint and draft CDO notice on the effective date of this Settlement Agreement. Lowell also waives his right to request reconsideration by the State Water Board of the Order Approving the Settlement Agreement between the Division of Water Rights and Lowell provided no additional requirements are included in that order beyond the requirements of this Settlement Agreement.

5. Until such time as a permit is issued authorizing the diversion of water to storage in the Lowell reservoir, Lowell shall adhere to one of the following options:

- a. By October 1 of each year, commencing October 1, 2009, Lowell shall remit to the Division a civil penalty of \$1,665 for the water collected to storage without a basis of right during the prior year<sup>1</sup>; or
- b. Install a staff gage in the reservoir satisfactory to the Division and maintain readings on April 1 and October 1 of each year. The readings shall be made available upon the Division's request;

Install an outlet pipe, or other facility, acceptable to the Division by April 1, 2009 that is capable of withdrawing all the water collected prior to April 1 within 30 days;

By May 1 of each year, release the amount of water collected to storage from October 1 of the previous year to April 1 of each year into the stream channel immediately downstream of the Lowell reservoir; and

Maintain records of the staff gage readings of October 1 of the previous year and April 1 and May 1 of the current year and make them available to the Division upon request.

6. Miscellaneous:

- (i) *Independent Judgment.* Each party represents and declares that in executing this settlement agreement it relies solely on its own judgment, belief, and knowledge concerning the nature, extent, and duration of its rights and claims, and that it has not been influenced to any extent whatsoever in executing this Settlement Agreement by any representations or statements regarding any matters made by the other parties hereto or by any person representing them.
- (ii) *Additional Documents.* Each party agrees that it will cooperate fully in executing any additional and further documents necessary to give full effect to this Settlement Agreement.
- (iii) *Entire Agreement.* This Settlement Agreement contains the entire agreement between the parties and supersedes and replaces any and all prior understandings, representations, and agreements whether written or unwritten. Each party represents that it has not relied on any inducements, promises, or representations, made by the other party other than those contained in this Settlement Agreement.

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<sup>1</sup>The parties recognize that while the State Water Board cannot enter a binding agreement not to enforce for future violations, the State Water Board will take this settlement agreement into account in the exercise of its enforcement discretion, and any provisions of this settlement establishing payments for unauthorized diversions that occur after the date of this settlement do not apply if the State Water Board initiates an enforcement action for the same violation.

- (iv) *Mutual Agreement.* The parties have agreed to the particular language in this Settlement Agreement, and this Agreement shall not be construed against the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.
- (v) *Counterparts.* This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, together shall constitute one and the same instrument.
- (vi) *Reasonableness of Settlement.* The parties represent and warrant that this Settlement Agreement is made in good faith and in full recognition of the implications of such agreement.
- (vii) *Section Headings.* The parties intend that the section headings of this Settlement Agreement be used solely for convenience of reference and that they shall not in any manner amplify, limit, modify, or otherwise be used in the interpretation of this Settlement Agreement.
- (viii) *Effective Date.* This Settlement Agreement shall become effective immediately on signature of the State Water Board Executive Director's Order Approving the Settlement Agreement.
- (ix) *Choice of Law.* This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
- (x) *Authorization.* Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.

Date: 3-02-09

Brian Lowell

By Brian Lowell

Date: 3/11/09

Division of Water Rights

By James W. Kassel

James W. Kassel  
Assistant Deputy Director for Water Rights