

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

DIVISION OF WATER RIGHTS

ORDER WR 2018-0067-EXEC

In the Matter of Unauthorized Diversion by

DELBERT LEHR AND JEFF LEHR

License 217 (Application A001024) and License 3421 (Application A011786)

SOURCE: East Branch of the North Fork Feather River, tributary to the North Fork Feather River,
tributary to Feather River, tributary to Sacramento River

COUNTY: Plumas

ORDER APPROVING SETTLEMENT AGREEMENT

BY THE EXECUTIVE DIRECTOR¹:

1.0 INTRODUCTION

This matter comes before the Executive Director of the State Water Resources Control Board (State Water Board or Board) following the issuance of a draft Cease and Desist Order (Draft CDO) to Delbert Lehr and Jeff Lehr (collectively, the Lehrs). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Division Prosecution Team) and the Lehrs 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.

2.0 BACKGROUND

Delbert Lehr holds water right License 217 (Application A001024) and License 3421 (Application A011786) to appropriate water from sources that are ultimately tributary to the Sacramento River.

On May 27, 2014 and May 1, 2015, Notices of Water Unavailability (Unavailability Notices) were sent to the Lehrs regarding both License 217 and License 3421 advising the Lehrs that there

¹ State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

was an unavailability of water to supply diversions under their water right licenses due to severe drought conditions.

On June 17, 2015, Division staff conducted a site inspection of the Lehr property to determine compliance with the Unavailability Notices. During this inspection, Delbert Lehr indicated that diversions had been occurring during the 2015 period of unavailability under a riparian claim of right. At that time, Delbert Lehr indicated that Jeff Lehr was selling water from the East Branch of the North Fork of the Feather River under a riparian claim of right.

On March 16, 2016, the Assistant Deputy Director for Water Rights issued a Draft CDO alleging that the Lehrs were engaged in an unauthorized diversion from the East Branch of the North Fork of the Feather River in Plumas County.

On April 5, 2016, the Lehrs submitted a request for a public hearing on the Draft CDO. On July 8, 2017, the State Water Board issued a Notice of Public Hearing, which scheduled the hearing for September 27 and 28, 2017. On August 28, 2017, the Division Prosecution Team and the Lehrs jointly requested that the hearing and all associated deadlines be postponed for 60 days to allow for a settlement agreement between the parties to be finalized. Subsequently that day, the hearing officer approved the request. On September 13, 2017, the Board issued a Notice of Rescheduled Public Hearing, which rescheduled the hearing for January 11 and 12, 2018.

On December 1, 2017, the Division Prosecution Team notified the Board that the Lehrs and the Division Prosecution Team had mutually agreed to settle the matters identified in the Draft CDO in lieu of a hearing. At the request of both parties, the hearing was postponed.

3.0 SETTLEMENT AGREEMENT

The Lehrs and the Division Prosecution Team executed the Settlement Agreement attached hereto.² The general terms of the settlement require that the Lehrs: (1) file Statements of Water Diversion and Use (Statements) addressing all existing claims of right; (2) voluntarily relinquish License 3421; (3) limit their use of License 217 to domestic use and comply with all of the terms and conditions of the license, including filing any necessary change petitions and receiving approval prior to operating in a manner that would constitute a violation of the license terms and

² The Lehrs and the Division Prosecution Team signed a revised settlement agreement to correct scrivener's errors. We note a typographical error in the date of Jeff Lehr's signature in the revised settlement agreement. The date should be January 26, 2018.

conditions; (4) not sell water to third parties without confirming to the Division's Enforcement Program Manager that the water will be used within the authorized place of use of an appropriative right or as an exercise of a valid riparian right; (5) not sell water to third parties that claim a riparian right to the water that do not have a Statement on file with the State Water Board; and (6) comply with the requirements set forth in California Code of Regulations title 23, chapters 2.7 and 2.8. The general terms of the settlement agreement require that the Division Prosecution Team not seek monetary penalties regarding the Draft CDO.

ORDER

IT IS HEREBY ORDERED THAT the attached Settlement Agreement between the Division Prosecution Team and Delbert and Jeff Lehr is approved and is incorporated by reference into this Order.

This Order constitutes a Cease and Desist Order for purposes of California Water Code division 2, part 2, chapter 12 (§ 1825 et seq.). Violations of this Settlement Agreement and the Order will be subject to further enforcement under California Water Code section 1845 at the discretion of the State Water Board.

Upon the failure of any person or entity to comply with a Cease and Desist Order issued by the State Water Board, and upon the request of the State Water Board, the Attorney General shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a).)

STATE WATER RESOURCES CONTROL BOARD



Eileen Sobeck
Executive Director

Dated: **MAR 07 2018**

SETTLEMENT AGREEMENT

This Settlement Agreement is made this 1 December, 2017, by and between Delbert Lehr and Jeff Lehr and the Prosecution Team of the State Water Resources Control Board's ("State Water Board") Division of Water Rights ("Division"). Delbert and Jeff Lehr and the Prosecution Team are collectively referred to here as the "Settling Parties."

RECITALS

1. Delbert Lehr holds water right License 217 (Application A001024) and License 3421 (Application A011786) to appropriate water from sources that are ultimately tributary to the Sacramento River. Neither Delbert Lehr nor Jeff Lehr hold any other appropriative water right permit of license, nor have either of them filed any Statement of Water Diversion and Use (Statements) with the State Water Board for diversion under claim of riparian or pre-1914 appropriative water rights.
2. License 217 has a priority date of July 16, 1918, and authorizes the direct diversion and use of water from an Unnamed Ravine (a.k.a. Kingsbury Ravine) at a rate of diversion not to exceed 0.15 cubic-foot per second (cfs) between January 1 and December 31 of each year for boiler use (i.e. industrial) in a lumber mill and domestic use. The authorized places of use for this license are within Plumas County, California Assessor Parcel Numbers (APN) 002-470-002-000 and 002-470-010-000. Lehr's annual Report of Licensee filed with the Division as required under California Water Code chapter 2.7 section 348, indicates water has not been diverted under License 217 since at least 2009; however the annual reports indicate groundwater was being used at times in lieu of using available surface water.
3. License 3421 has a priority date of March 19, 1947, and authorizes the direct diversion and use of water for industrial use from the East Branch of the North Fork Feather River at a rate of diversion not to exceed 0.525 cfs from about March 1 to about December 15 of each year, provided that consumptive use of water diverted will be limited to 0.05 cfs and that all water diverted, but not consumed, will be returned to the stream. In addition, License 3421 authorizes the diversion of 10 acre-feet per annum by storage from the East Branch of the North Fork Feather River for a rate of diversion not to exceed 1,400 gallons per minute to be collected from about March 1 to about December 15 of each year for industrial use. Lehr's annual Reports of Licensee indicate water was not diverted under License 3421 between 2009 and 2012 and it was noted on the reports that redevelopment of the property is planned, which will require commercial and recreational uses of water. The 2013 Report of Licensee indicates 296,000 gallons were directly diverted and/or collected to storage for dust control. The 2014 Report of Licensee indicates 44,000 gallons were directly diverted and/or collected to storage for dust control. The annual reports indicate that groundwater was being used at times in lieu of using available surface water.
4. The unavailability Notices of May 27, 2014 and May 1, 2015, and the related notices apply to Licenses 217 and 3142 because both licenses are post-1914 appropriative water

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rights within the covered geographic areas. These notices clearly advised the Lehrs of the unavailability of water to supply diversions under their water rights permits and licenses caused by severe drought conditions, and by extension, the injury that their unauthorized diversions would cause legitimate water rights holders.

5. The 2014 annual report of use for License 3421 indicated that 44,000 gallons were diverted during July and August 2014 for dust control. This diversion was not authorized under License 3421 during its 2014 period of availability, and at all times it is a violation of both the authorized purpose of use and place of use for the License.
6. On June 17, 2015 Division staff conducted an inspection of the Lehrs' property to inspect the points of diversion and uses of water under the Licenses. During this inspection, Mr. Delbert Lehr told Division staff that water had been diverted during the 2015 unavailability season under a riparian claim of right. Mr. Delbert Lehr also informed staff that water was being sold for off-site use.
7. On March 16, 2016, the Assistant Deputy Director for Water Rights issued a Draft Cease and Desist Order (CDO) against Delbert and Jeff Lehr alleging that the Lehrs were engaged in an unauthorized diversion from the East Branch of the North Fork Feather River within the Sacramento River watershed in Plumas County
8. The Draft CDO sought no monetary penalties but did seek to enjoin unauthorized diversions and threatened unauthorized diversion of water from the East Branch of the North Fork Feather River. The Draft CDO also required that the Lehrs file Statement(s) for diversions and use of water that were not currently covered by the Licenses, including any diversions taking place under valid riparian claim or for any unauthorized diversions that have occurred. The Draft CDO directed the Lehrs to file a Statement for each separate diversion point from a river, stream or spring.
9. In addition, the Draft CDO directed the Lehrs to stop any diversions under Licenses 217 and 3421 that are in violation of the terms until a change petition is approved by the State Water Board. The Draft CDO also ordered that the Lehrs provide information to the Division regarding all current and planned near-term diversions at all locations and under all bases of right.
10. Finally, the Draft CDO required that the Lehrs either (a) file with the Division a Petition for Change for License 217 and/or License 3421 or apply for a new appropriative water right to cover all current and planned near-term diversions not authorized by existing water right or (b) file a voluntary request for revocation of the licenses if there are not current or near future plans for using the licenses.
11. On April 5, 2016 Delbert Lehr and Jeff Lehr submitted a request for public hearing on the CDO. On July 8, 2017 the State Water Board issued a Notice of Public Hearing. A hearing on the Draft CDO was set for September 27, 2017.

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12. On June 28, 2017 Delbert Lehr and Jeff Lehr submitted a Notice of Intent to Appear (NOI) at the public hearing scheduled for September 27, 2017. The Prosecution Team for the State Water Board also submitted an NOI.
13. At the time of this Settlement Agreement, the hearing has been postponed at the request of the Settling Parties to engage in settlement negotiations.
14. In order to resolve this matter, the Lehrs have submitted the following documents to the Division:
 - a. The Timber Harvest Plan associated with the property upon which water diverted from the Lehrs' property was applied for dust control.
 - b. Parcel information related to Assessor Parcel (APN) Numbers 002-470-2-000 and 002-470-010-000, the authorized place of use for the Lehrs' licenses.
 - c. USGS maps showing the Timber Harvest Plan property and the springs utilized as a water supply for the Lehrs' property pursuant to U.S. Forest Service Special Use Permit.
15. The Settling Parties have engaged in settlement negotiations and agree to settle the matters identified in the Draft CDO through this Settlement Agreement in lieu of hearing.
16. The Settling Parties will submit this Settlement Agreement and a draft order approving the Settlement Agreement to the Hearing Team for approval and adoption by the State Water Board's Executive Director pursuant to Government Code section 11415.60 as a decision by settlement, and this Settlement Agreement will become effective when the State Water Board's Executive Director issues an order approving the settlement, provided that the Settling Parties concur in any substantive changes to the approving order proposed by the Hearing Team or the Executive Director.

NOW, THEREFORE, in consideration of these Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, the Settling Parties do hereby agree to settle the Draft CDO as follows:

17. **Recitals Incorporated.** The preceding Recitals are incorporated herein.
18. **Settlement Conditionally Confidential.** Unless and until the State Water Board's Executive Director issues an order approving this Settlement Agreement, this Settlement Agreement is a confidential settlement document subject to all of the limitations on admissibility set forth in California Evidence Code sections 1152 and 1154. Furthermore, pursuant to Government Code section 11415.60, this Settlement Agreement is not admissible in an adjudicative proceeding or civil action for any purpose.
19. **No Admission of Liability.** This Settlement Agreement is not an admission of liability by the Lehrs for any violations alleged in the Draft CDO.

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20. Draft Cease and Desist Order. The Settling Parties agree to settle the Draft CDO as follows:

- a. The Lehrs will file Statements addressing all existing claims of right within 60 days of the adoption of this Settlement Agreement. Filing a Statement shall not be construed as State Water Board acknowledgement of the extent or validity of any claimed rights.
- b. The Lehrs will voluntarily relinquish License 3421.
- c. The Lehrs will limit their use of License 217 to domestic use including irrigation not to exceed one half-acre in lawn, ornamental shrubbery, or gardens at any single establishment.
- d. The Lehrs shall not sell water to other parties without confirming to the Division's Enforcement Program Manager that the water will be used within the authorized place of use of an appropriative right, or as an exercise of a valid riparian right. If water is sold under claimed riparian right, within 15 days of entering into a sales agreement, the Lehrs shall provide the following information to the Enforcement Program Manager: date of Sale; party water sold to; point of diversion used for the sale; coordinates of point of diversion; quantity sold (in gallons per minute and total); dates water will be conveyed to seller; parcel maps highlighting where water will be used; documentation that the purchaser has a valid riparian right to divert at the Lehr point of diversion; and Statement number of purchaser. Water sales to purchasers lacking a Statement on file with the State Water Board are prohibited.
- e. The Lehrs will comply with the measuring and reporting requirements of SB-88, as set forth in tit. 23, CCR, CH 2.7 Water Diversion and Use Reports and CH 2.8 Measuring and Monitoring. Irrespective of any other requirements, the Lehrs shall measure all water sold to other parties.
- f. The Division will not seek monetary penalties against the Lehrs in association with the current Draft CDO. This does not preclude the Division from pursuing enforcement of violations of the Settlement Agreement, including monetary penalties, pursuant to article 18 herein.

21. Enforcement of this Settlement Agreement. The terms and conditions of the Settlement Agreement and the implementing Order shall be treated as a final cease and desist order issued by the State Water Board pursuant to chapter 12 of the California Water Code (commencing with section 1825). Violations of this Settlement Agreement and the Order will be subject to enforcement under Water Code section 1845 at the discretion of the State Water Board.

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- 22. Request for Executive Director Approval and Postponement of Hearing.** Upon execution of this Settlement Agreement by each of the Settling Parties, the Settling Parties shall submit this Settlement Agreement and a proposed order approving this Settlement Agreement to the Hearing Team, and shall jointly request that: 1) the Hearing Team bring the Settlement Agreement and proposed order to the Executive Director for consideration and approval; 2) the Hearing Team bring any proposed substantive changes to the approving order language to the settling parties for consideration prior to approval by the Executive Director; and 3) the Hearing Team postpone the hearing in this matter indefinitely pending the Executive Director's approval of this Settlement Agreement.
- 23. Opportunity for All Parties to Comment.** The Settling Parties acknowledge that although the consent of other parties is not required before the State Water Board, or the Executive Director under State Water Board Resolution No. 2012-0061, can approve a proposed settlement agreement between the Prosecution Team and a party subject to a proposed enforcement action, the Notice of Public Hearing provides that the Hearing Team will give all parties the opportunity to comment on any settlement submitted to the State Water Board or the Executive Director for approval.
- 24. Hearing Requests.** Delbert And Jeff Lehr's requests for hearing on the Draft CDO shall be deemed withdrawn upon approval of this Settlement Agreement by the State Water Board's Executive Director, provided that the Settling Parties concur in any substantive changes to the draft approving order proposed by the Hearing Team or Executive Director. If the Settling Parties do not concur in any substantive changes to the approving order proposed by the Hearing Team or Executive Director, this Settlement Agreement shall be deemed void and the parties shall request that the matter be placed back on calendar for hearing.
- 25. Time is of the Essence.** Time is of the essence and the Settling Parties shall submit this Settlement Agreement and proposed implementing order to the Executive Director before noon on October 26, 2017, and sooner if possible.
- 26. Waiver of Reconsideration.** Delbert and Jeff Lehr each waive the right to request reconsideration of the State Water Board Executive Director's order approving this Settlement Agreement, provided no material modifications to this Settlement Agreement or additional requirements beyond the requirements of this Settlement Agreement are included in that order.
- 27. Successors.** This Settlement Agreement is binding on any successors or assigns of Delbert and Jeff Lehr, and the State Water Board.
- 28. Independent Judgment.** Each party represents and declares that in executing this Settlement Agreement it is relying solely on its own judgment, knowledge and belief concerning the nature, extent and duration of its rights and claims, and that it has not been influenced to any extent whatsoever in the execution of this Settlement Agreement

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by any representations or statements regarding any matters made by other parties hereto or by any person representing them. The parties are represented by counsel.

29. **No Precedent.** This Settlement Agreement involves unique facts and legal issues and shall not be used as a precedent decision of the State Water Board.
30. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
31. **Entire Agreement.** This Settlement Agreement reflects and represents the entire agreement between and among the parties and supersedes 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.
32. **Mutual Agreement.** The parties have agreed to the particular language in this Settlement Agreement, and this Settlement Agreement shall not be construed against the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.
33. **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.
34. **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.
35. **Section Headings.** The parties intend that the paragraph headings of this Settlement Agreement be used solely as a convenient reference and that they shall not in any manner amplify, limit, modify or otherwise aid in the interpretation of this Settlement Agreement.
36. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving Settlement Agreement.
37. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
38. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
39. **State Water Board Is Not Liable.** Neither the State Water Board members nor the Board's staff, attorneys or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by Delbert or Jeff Lehr, or their directors, officers, employees, agents, representatives or contractors in carrying out

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activities pursuant to this Settlement Agreement, nor shall the State Water Board, its members or staff be held as parties to or guarantors of any contract entered into by Delbert or Jeff Lehr's directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement.

40. No Waiver of Other Requirements. Nothing in this Settlement Agreement or any implementing Order shall excuse Delbert or Jeff Lehr from applicable legislation, regulation, order or any other requirements or restrictions imposed by the State Water Board or pursuant to its delegated authority.

Dated: Jan 19, 2017-2018

Julie Rizzardo
Julie Rizzardo
Assistant Deputy Director
State Water Board, Division of Water
Rights Prosecution Team

Dated: _____ 2017

Delbert Lehr

Dated: JAN 26 2017

Jeff Lehr
Jeff Lehr

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Dated: Jan 19, 2017-2018

Julie Rizzardo
Julie Rizzardo
Assistant Deputy Director
State Water Board, Division of Water
Rights Prosecution Team

Dated: 1-26 2017-2018

Delbert Lehr
Delbert Lehr

Dated: _____ 2017

Jeff Lehr