

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

DIVISION OF WATER RIGHTS

ORDER WR 2016-00XX-DWR

CEASE AND DESIST ORDER

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 North Fork Feather River, tributary to the North Fork Feather River, tributary to Feather River, tributary to Sacramento River.

COUNTY: Plumas

Delbert Lehr and Jeff Lehr, Delbert Lehr's son, (collectively Lehrs) are violating or are threatening to violate California Water Code section 1052, which prohibits the unauthorized diversion or use of water. Water Code section 1831 authorizes the State Water Resources Control Board (State Water Board or Board) to issue a Cease and Desist Order (CDO) requiring the Lehrs to cease such violations or threatened violations.

On {Date}, and in accordance with the provisions of Water Code section 1834, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against Lehr for the violation and threatened violation of the prohibition against unauthorized diversion and use of water. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a CDO in accordance with Water Code sections 1831, et seq. The Deputy Director for Water Rights has re delegated this authority to the Assistant Deputy Director for Water Rights pursuant to Resolution 2012-0029.

The State Water Board, or its delegee, finds that:

LEHR WATER RIGHTS AND REPORTED USE

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 or license, nor have either of them filed any Statements 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. Either Delbert Lehr or Jeff Lehr electronically submitted the annual Reports of Licensee for water right Licenses 217 and 3421 each year since at least 2009.
5. There are no records of a Statement of Water Diversion and Use (Statement) on file with the Division for any diversion by either Delbert Lehr or Jeff Lehr under any claimed basis of right or for any diversions without an identified basis of right in accordance with Water Code sections 5100, et seq.

DROUGHT ACTIONS

6. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
7. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
8. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.

9. On May 27, 2014, the State Water Board issued a “Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right” (2014 Unavailability Notice), which notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.
10. On October 31, 2014, the State Water Board issued a “Notice of Temporary Opportunity to Divert Water under Previously Curtailed Water Rights for Sacramento and San Joaquin River Watershed.” The State Water Board temporarily lifted the curtailment of water rights for post-1914 water rights holders in the Sacramento-San Joaquin watershed and continued the opportunity to divert until 7 AM on November 3, 2014. The temporary lifting of the curtailment was based upon a predicted rain event and did not apply to any diversions without authorization of a legitimate water right.
11. On November 19, 2014, the State Water Board temporarily lifted the curtailment of post-1953 water rights in the Sacramento-San Joaquin watershed. The temporary lifting did not apply to unauthorized diversions and the State Water Board did not issue any further notice of water unavailability for 2014.
12. On January 23, 2015, the State Water Board issued a “Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015” (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
13. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state’s ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the on-going severe drought conditions present urgent challenges across the state including water shortages for municipal use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions persist. The Executive Order confirms that the orders and provisions in the Governor’s previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2014, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
14. On May 1, 2015, the State Water Board issued a “Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento River Watershed with Post-1914 Appropriative Rights” (May 1 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.
15. On July 15, 2015, the State Water Board issued a clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring water right holders to curtail diversions under affected water rights, that language has been rescinded.

Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded. However, for purposes of noticing water rights holder of the unavailability of water for their priority of right, the Unavailability Notices remain in effect.

WATER AVAILABILITY DETERMINATIONS

16. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights.
17. To determine the availability of water for water rights of varying priorities, the State Water Board compares the current and projected available water supply with the total water right diversion demand.
18. To determine water availability, the State Water Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board used the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
19. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The State Water Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The State Water Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
20. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed

Analysis website

http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/

21. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes.
22. The availability and demand analysis shows that by May 27, 2014, and May 1, 2015, available supply was insufficient to meet the demands of post-1914 appropriative rights throughout the Sacramento River watersheds in each year.

INVESTIGATION

23. The Unavailability Notices of May 27, 2014, and May 1, 2015, and the related notices, apply to Licenses 217 and 3124 because both licenses are post-1914 appropriative water rights within the covered geographic areas. These notices clearly advised Delbert Lehr of the unavailability of water to supply diversions under water right permits and licenses caused by severe drought conditions, and by extension, the injury that their unauthorized diversions would cause legitimate water right holders. Both the May 27, 2014 Unavailability Notice and the May 1, 2015 Unavailability Notice were sent to Delbert H. Lehr at the mailing address of record that he provided to the Division.
24. On June 17, 2015, Division staff, accompanied by Delbert Lehr, conducted an on-site inspection of the Lehr property to assess compliance with the May 1, 2015 Unavailability Notice. The property contains one authorized point of direct diversion under License 217 and one authorized point of direct diversion under License 3421. The authorized points of diversion and uses of water under the licenses were the initial subjects of the on-site inspection.

The authorized Point of Diversion for License 217 is on an unnamed ravine tributary to the East Branch of the North Fork Feather River; and the authorized POD for License 3124 is on the East Branch of the North Fork Feather River upstream of its confluence with the unnamed ravine. The POD which was utilized in the past for both licenses and observed during the field inspection is located on the East Branch of the North Fork Feather River but upstream of the POD authorized under License 3124.

25. During the on-site inspection, Delbert Lehr stated to Division staff that diversions of water had been occurring during the 2015 unavailability season; however the diversions were not made under either of his two licenses but rather under his riparian claim of right. According to Delbert Lehr, his son Jeff Lehr was selling water from the East Branch of the North Fork Feather River under claim of riparian right. Delbert Lehr explained that water was pumped onto trucks at his property and hauled to logging roads approximately 15 miles away for dust control use. Division staff did not observe water being pumped onto trucks or being hauled away from the property. Division staff informed Delbert Lehr he may not legally continue this practice if the place of use (logging roads) is not riparian to the source.

26. Delbert Lehr stated that he has diverted water in the past, but not currently, from two springs located near his property for domestic use. Although neither of the spring heads could be inspected, the storage tank and outlet works for one spring were observed, and found to be routing all water to the East Branch of the North Fork Feather River. It is possible, but unclear whether diversions from the springs can be a valid exercise of a riparian right, or whether such diversions would require an appropriative water right issued by the Division.
27. The 2014 annual report of use for License 3421 (submitted on July 2, 2015 by Jeff Lehr) indicates 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 unavailability, and at all times it is a violation of both the authorized purpose of use and place of use for the license. Diversion during the 2014 period of unavailability would not be authorized under a riparian right, if the place of use is not riparian to the source.
28. A Statement should be filed for any diversions not covered by the licenses, including diversions under valid riparian claim or for any unauthorized diversions that have occurred. An appropriative right should be acquired for any current or planned diversions that cannot be accomplished under a valid riparian claim or under the existing appropriative rights.
29. Recent Reports of Licensee submitted for License 217 and License 3421 indicate that the property is under development and the plans include using the existing licenses for usage that may not be authorized by the licenses. In addition, Reports of Licensee submitted after 1993 indicate diversion to seasonal storage. However, a review of Google Earth indicates that a reservoir has not existed at least since July 1993. If the water rights are not intended to be used in accordance with the authorized parameters then a revocation of the rights or a Petition for Change should be requested. Based on the circumstances, the State Board may proceed with a statutory revocation.
30. Water Code section 1052, subdivision (a) provides that "the diversion or use of water subject to this division other than as authorized in this division is a trespass." The circumstances described above indicate that the Lehrs are violating, or are threatening to violate, the prohibition set forth in Section 1052 against the unauthorized diversion or use of water. Thus, the Lehr's may be subject to a Cease and Desist Order pursuant to Water Code section 1831, subdivision (d)(1).

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, that the Lehrs immediately:

1. Cease and desist the unauthorized diversions and threatened unauthorized diversions of water from the East Branch of the North Fork Feather River.
2. File a Statement(s) for diversions and use of water not covered by the licenses, including diversions under valid riparian claim or for any unauthorized diversions that have occurred. A separate Statement should be filed for each diversion point from a river, stream or spring.
3. Cease and desist diversions made under Licenses 217 and 3421 that are in violation of license terms until a change petition is approved by the State Water Board.

IT IS ALSO ORDERED that within 30 days from the date of this order the Lehrs must:

4. Submit a description to the Division of all current and planned near-term diversions at all locations and under all bases of right; including any conjunctive groundwater uses under the licenses and use of the springs. The description should include enough information to determine validity of amounts, POD locations, purposes, uses, place of use, etc.

IT IS ALSO ORDERED that within 60 days from the date of this order the Lehrs must either:

5. 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 rights.

OR:

6. File a voluntary request for revocation of the licenses if there are not current or near future plans for using the licenses.

The State Board may proceed with a statutory revocation of the licenses if the Lehrs fail to comply with this order or if the State Board determines that a change petition is not justified.

Consequences of Non-Compliance

In the event that the Lehr's fail to comply with the requirements of the Order, the Lehr's shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to Water Code section 1845. Violation of a CDO issued during a period for which the Governor has issued a proclamation of a state of emergency based on drought conditions is subject to the imposition of administrative civil liability, pursuant to Water Code section 1845, subdivision (b)(1)(A) in the amount not to exceed \$10,000 for each day in which the violations occurs, or referral to the Attorney General to take further injunctive enforcement actions as described in Water Code section 1845, subdivision (a):

Upon the failure of any person to comply with a cease and desist order issued by the Board, pursuant to this chapter, the Attorney General, upon request of the Board, 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.

Reservation of Enforcement Authority and Discretion

Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including, but not limited to, the authority to bring enforcement against the Lehrs for unauthorized diversion or use of water in violation of Water Code section 1052.

Regulatory Changes

Nothing in this Order shall excuse the Lehrs from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

Compliance with Other Regulatory Requirements

Nothing in this Order shall excuse the Lehrs from meeting any additional regulatory requirement that may be imposed by other local, state, or federal regulatory entities for corrective actions taken by the Lehrs to comply with this Order.

Exemption from CEQA

This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

STATE WATER RESOURCES CONTROL BOARD

*John O'Hagan, Assistant Deputy Director
Division of Water Rights*

Dated: