

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

DIVISION OF WATER RIGHTS

ORDER WR 2022-0XXX-DWR

DRAFT CEASE AND DESIST ORDER

In the Matter of Violations or Threatened Violations of Klamath River Watershed Drought Emergency Regulations, and the Order for Reported Water Rights in the Scott River Watershed issued September 9, 2021

FARMERS DITCH COMPANY

SOURCE: Scott River

COUNTY: Siskiyou

The State Water Resources Control Board (State Water Board or Board) is authorized under Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Farmers Ditch Company (the Diverter) to cease and desist from an ongoing, or a threatened, violation of title 23, sections 875 and 875.7 of the California Code of Regulations.

Water Code section 1831, subdivision (d)(4), states, in part, that the State Water Board is authorized to issue a Cease and Desist Order when it determines that any person is violating or threatening to violate a regulation adopted under Water Code section 1058.5.

BACKGROUND INFORMATION

1. On August 17, 2021, the State Water Board adopted the Klamath River Watershed Drought Emergency Regulations (Emergency Regulations) which went into effect August 30, 2021. The Emergency Regulations provide curtailment authority throughout the Klamath River watershed, establish minimum instream flow requirements, and provide information order authority in the Scott River and Shasta River watersheds. The minimum instream flow requirements were established to protect fall-run Chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon. On June 21, 2022, the State Water Board readopted the Emergency Regulations, which went into effect

on July 29, 2022.

2. Section 875 of the Emergency Regulations grants the Deputy Director for the Division of Water Rights (Division) the authority to issue Curtailment Orders ordering diverters to cease or limit their diversions. The Deputy Director issued a Curtailment Order on September 9, 2021, ordering the Diverter to cease all diversions unless an exception applied. Diversions under the Curtailment Order could continue for limited exceptions, including to meet the minimum necessary amounts for livestock watering, and only if the diversion was the only source of water for those needs and was conveyed without seepage losses. (Cal. Code Regs., tit. 23, § 875.3) Curtailment Orders were in effect from September 9, 2021, to October 24, 2021, and again from December 1, 2021, to January 4, 2022. The Diverter violated, or threatened to violate, the Curtailment Order by diverting from the Scott River for livestock watering in an amount that was not authorized by the exception in section 875.3.
3. Section 875.7 of the Emergency Regulations prohibits the diversion of surface water above an amount that equates to ten times the amount necessary for livestock watering. This provision also states that excessive water diversions are unreasonable in light of available alternatives and the needs of the fishery. This prohibition was in place from September 1, 2021, through January 31, 2022. The Diverter violated, or threatened to violate, section 875.7 throughout the fall and winter of 2021 and 2022, by diverting an amount of water from the Scott River far in excess of the Diverter's regulatory limit. This diversion has direct impacts on the important Chinook and coho salmon fisheries that the Emergency Regulation was designed to protect.
4. When surface water is conveyed using gravity-fed earthen ditches, ranchers must divert significantly more water than is actually put to beneficial use due to seepage, evaporation, protection from the water freezing, and to ensure hydraulic function of the ditch.
5. In the Digest for the Emergency Regulations, the Board estimated that at ranches with the largest livestock diversions, less than one percent of the water diverted is ultimately consumed by livestock. This was determined by looking at the eight largest diversions which totaled approximately 758 acre-feet of water in order to water approximately 3,100 to 4,100 cows. Using a 15-gallon per day per cow estimate, the cows drank approximately 5.7 acre-feet of the 758 acre-feet of water, or 0.75% of the water diverted.

APPLICABLE LAW AND ALLEGATIONS

6. Farmers Ditch (Ditch) is an approximately 11-mile-long, unlined ditch that has been in operation since 1870. The Diverter actively diverts water from the Scott

River through a headgate into the Ditch for the purposes of conveying water to the various properties along the Ditch. The headgate, which maintains the flow of water into the Ditch, is located on a parcel owned by Caleb Justice Callahan. The Diverter diverts water into the Ditch in order to deliver water to the individual properties that have an adjudicated pre-1914 right along the Ditch.

7. The Diverter is the owner or operator of the Ditch, which serves the following property owners: Richard and Nancy Barnes, Arabella Merlo, Lynn and Geraldine Slaght, Mary D Roehrich Trust, George and Donna Poe, Jeffrey Fowle, Scott River Ranch, Carl Hammond Jr., Spencer Ranch, Marcus Johnson, and Andrew Hurlimann.
8. The Diverter admits that they received communications from the State Water Board regarding the Emergency Regulations and the Curtailment Orders. On September 20, 2021, Rick Barnes certified that diversions under the water right identified (S002514) had ceased. On that same day, Mr. Barnes also submitted a petition to the Division requesting an increased diversion quantity for livestock watering. The Division denied the request on October 15, 2021. In the Information Order Form the diverter also admitted that they received two informational letters regarding livestock water regulations.
9. The Diverter is an unincorporated association, acting on behalf of the above referenced individual water rights holders.
 - a. An unincorporated association is “an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not.” (Corp. Code, § 18035, subd. (a).) Further, “an unincorporated association is liable for its act or omission and for the act or omission of its director, officer, agent, or employee, acting within the scope of the office, agency, or employment, to the same extent as if the association were a natural person.” (Corp. Code, § 18250.) Filing as an unincorporated association is not required in order to be considered and treated as an unincorporated association. (Corp. Code § 18200.)
 - b. Case law supports a broad interpretation of what constitutes an unincorporated association, especially where treating the association as a legal entity ensures the fairest outcome. “Fairness includes those situations where persons dealing with the association contend their legal rights have been violated.” (Barr v. United Methodist Church, 90 Cal. App. 3d 259, 266–67, (1979).) “...to be an unincorporated association they must have functioned as a group under a common name.” (Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 963 (2003).)
 - c. The Diverter is an unincorporated association because: 1) it is comprised of two or more individuals associated under a common name, 2) the individual members are working in concert for a shared purpose, and 3) it

has members and agents that operate and act on behalf of and to the benefit of all members.

- i. Comprised of two or more individuals associated under a common name: There are 11 individual water rights holders who have organized under the name "Farmers Ditch Company". While each individual member of the Farmers Ditch Company has pre-1914 appropriative rights that are incorporated into the Scott River Decree, Farmers Ditch Company is listed as the primary water right holder in the State Water Board's Electronic Water Rights Information System, for all diversions into Farmers Ditch. The Primary Owner listing is the sole contact point for all diversions occurring on the Ditch. Any reports filed regarding water diverted into the Ditch are filed by the Diverter on behalf of all of its members.
- ii. Members are working in concert for a shared goal: The individual water rights holders have the shared goal of diverting water from the Scott River for the benefit of all the members. This requires routine maintenance to the Ditch, operation and maintenance of the point of diversion, and ensuring compliance with applicable laws and regulations.
- iii. There are members and agents that operate and act on behalf of and to the benefit of all the members: The current president of Farmers Ditch Company is Sam Thackeray. The two previous presidents were Rick Barnes and Jeff Fowle. The President is responsible for reporting relevant information to the State Water Board, including the amount of water diverted from the Scott River. They are also responsible, at a minimum, for maintaining a functioning measurement device. These actions are conducted on behalf of, and to the benefit of, all the individual water rights holders on the Ditch, because all the individual members receive water from the Scott River via diversions into the Ditch.
 1. Additionally, the Information Order was sent and addressed to the Diverter, and Rick Barnes, responded on behalf of all the members.
- d. As the Diverter is the party that operates and maintains the Ditch on behalf of its members, the interest in fairness supports the treatment of the Diverter as the proper party to be held accountable for the violations alleged in this Order.

10. Violations of the Prohibition on Inefficient Livestock Watering and Curtailment Orders

- a. On January 7, 2022, the Deputy Director of the Division of Water Rights issued an Information Order for Winter Surface Diversions in the Shasta and Scott River Watersheds (Order WR 2022-0052-DWR) (Information Order) to multiple water right holders, including the Diverter, requiring the submission of information regarding livestock watering diversions, including the amount diverted, the purpose of use, and the quantity of livestock.
- b. The Diverter responded to the Information Order on April 12, 2022, on behalf of all of its members. The Diverter reported that approximately 2,000 cows, 200 sheep, and 20 horses are watered along the Ditch using water from the Scott River.
- c. Division staff used this livestock data provided by the Diverter to calculate the amount of water necessary to support the number of livestock reported. Section 697 of the California Code of Regulations lists the daily quantities of water considered to be reasonable for each type of livestock. Thus, it is a simple matter of taking each type of livestock, multiplying it by the number of gallons per day per head of livestock, adding up the amounts from each type of livestock, then converting it to cubic feet per second. The resulting number is the amount of water that is allowed to be diverted under the livestock exception to curtailments. The amount of water that is within the limitations on inefficient livestock watering outlined in Section 875.7 can be determined by multiplying that number by 10.
- d. During the period when the prohibition on inefficient livestock watering occurred, the regulatory amount of water permitted to be diverted by the Diverter pursuant to section 875.7 of the California Code of Regulations was 0.47 cfs.
- e. When curtailments were in place, the amount of water that could be diverted under the livestock watering exception pursuant to sections 875 and 875.3 of the California Code of Regulations was 0.047 cfs.
- f. According to the data provided by the Diverter's Information Order response, daily diversions from the Scott River ranged from 0.8 to 8.7 cfs between December 2, 2021, and January 31, 2022. The Diverter claims no diversions occurred prior to December 2, 2021, solely on the basis that they did not have a working measurement device in place prior to that date.
- g. Despite the Diverter's assertions in its Information Order Response that no diversions occurred between September 1, 2021, and November 30, 2021, Division staff witnessed and photographed a significant amount of water flowing in the Ditch on October 26, 2021, and November 9, 2021. Staff were unable to access the Ditch but were able to observe the Ditch from a public road. Based on the staff's knowledge of size of the Ditch, the

perceived depth of water in the Ditch, and a review of the reported diversion amounts, Division staff concluded that the water flowing in the Ditch exceed the Diverters regulatory limit under section 875.7 of 0.47 cfs. The Division suspects that additional diversions in excess of the Diverter's regulatory limits were occurring routinely prior to December 2, 2021.

- h. Additionally, the Diverter disclosed in their Information Order response, that the headgate for the Ditch periodically leaks approximately 1 cfs. The response does not provide context or explanation as to the frequency of this occurrence, for example, whether this occurs only after heavy storms or on a regular basis. Absent repairs, and depending upon the conditions in which leaks occur, this leak violates or threatens to violate both section 875 and section 875.7.
- i. The Diverter should not even be relying upon the Ditch in order to meet their livestock watering needs. In 2002 the Siskiyou Resource Conservation District received a grant to implement a number of projects designed to benefit surface water flows in the basin. One project was to eliminate dependence upon the Ditch which was to be accomplished through the installation of groundwater-based systems. These systems were installed and reduced diversions by 7-10 cfs year-round and completely met all livestock watering needs. The members were tasked with maintaining the systems for at least 20 years. Despite this investment into alternative livestock watering systems for the members along the Ditch, an investment that was paid for through a grant administered by the California Department of Fish and Wildlife, the Diverter continued to divert water from the Scott River into the Ditch for its members livestock watering needs for at least the 2021-2022 season.
- j. Prohibition on Inefficient Livestock Watering
 - i. Under section 875.7, when curtailments were not in place, the Diverter was permitted to divert a maximum of 0.47 cfs for the purpose of livestock watering. However, from December 2, 2021, through January 31, 2022, data from the Diverter's Information Order response showed diversions of a minimum 0.8 cfs per day and upwards of 8.7 cfs per day.
 - 1. Diverter also admitted that the headgate can leak around 1 cfs. When this occurs, it may contribute to a violation or threatened violation of section 875.7.
 - 2. Additionally, Division staff witnessed water flowing in the Ditch on October 26, 2021, and November 9, 2021. The Diverter submitted an information form that stated diversions were not occurring prior to December 2, 2021, a claim that cannot be supported by data, because at that time the

Diverter did not have a working flow measurement device.

- ii. The Diverter exceeded its maximum diversion amount at a minimum on October 26, 2021, November 9, 2021, and from December 2, 2021 through January 31, 2022. The total number of days of violation of the prohibition on inefficient livestock watering (Cal. Code Regs., tit. 23, § 875.7.) is 63 days.

k. Curtailment Order

- i. Under section 875.3, when curtailments were in place, the Diverter was permitted to divert a maximum of 0.047 cfs, which is equal to the amount necessary to support the number of livestock on the Ditch. However, during the curtailment period of December 2, 2021, through January 4, 2022, the Diverter diverted water every day at a minimum rate of 0.8 cfs and upwards of 8.7 cfs.
 1. Diverter also admitted that the headgate can leak around 1 cfs. When this occurs, it may contribute to a violation or threatened violation of section 875 as the diversion rate exceeds the limits expressed in section 875.3.
 2. Additionally, Division staff witnessed water flowing in the Ditch on October 26, 2021, and November 9, 2021. The Diverter submitted an information form that stated diversions were not occurring prior to December 2, 2021, a claim that cannot be supported by data, because at that time the Diverter did not have a working flow measurement device.
- ii. The total number of days of violation of the curtailment orders (Cal. Code Regs., tit. 23, § 875.) is 34 days.

- l. Due to the length and unlined nature of the Ditch, in order to reach the properties furthest from the points of diversion, the rate of diversion must be fairly high to account for seepage and infiltration. Absent changes to the structure of the Ditch, surface water diversions are more than likely to result in diversions in excess of the regulatory limit in the Emergency Regulations. Thus, the use of alternative livestock watering options is necessary to avoid noncompliance with the Emergency Regulations and future curtailment orders.
- m. Diverter has made no measurable nor significant efforts to ensure their diversions are within the acceptable regulatory ranges. Diversions continued at high rates throughout the 2021-2022 inefficient livestock watering prohibition period with no changes. No changes have been made during the dry season to improve the efficiency of the Ditch to significantly reduce the amount of water lost to seepage. While some properties periodically utilize permanent or temporary troughs attached to individual

groundwater wells, these alternative livestock watering options are not widely implemented or used often enough to assist the Diverter in meeting the regulatory limits. Other livestock watering alternatives include water hauling, use of groundwater, and the movement of livestock to areas where access to water is not conveyed with significant losses. There is no evidence of these options being used in any significant or widespread manner.

- n. Based on the history of the Diverter's diversions and the lack of significant improvements to the Ditch, and absent the more widespread and frequent use of alternative livestock watering options, there is a real concern for continued violations for the 2022-2023 inefficient livestock watering prohibition period. This season began on September 1, 2022, and will continue until March 31, 2023, unless ended earlier by the Deputy Director of the Division. Continued diversions in excess of the regulatory limits pose a serious risk to fishery populations dependent upon the Scott River. It also undermines the orderly administration of the State Water Board's regulatory program designed to protect the fish and other beneficial uses in the watershed. The limits put in place in the Emergency Regulations were carefully considered to provide at least a minimum amount of protection to fish species dependent upon a minimum flow rate and to put the least amount of regulatory harm to water right holders.

11. Measurement of Diversion Flows

- a. As shown above, the Division was significantly hampered in its investigation by the lack of data for the majority of the inefficient livestock watering prohibition period. At a minimum from September 1, 2021, through December 1, 2021, the Diverter did not have a working measurement device, in violation of the Measurement and Monitoring Regulations, as evidenced by its Information Order response. Upon reviewing the Division's reporting records, the Diverter's Statements of Water Use and Diversion show it likely did not have a measurement device for several months prior to September 1, 2021.
- b. Even once the measurement device was operating, the Diverter continued to be out of compliance with the Measurement and Monitoring Regulations due to a failure to comply with the telemetry reporting requirements. The Diverter has previously reported in its Statements of Water Diversion and Use that in some years it has diverted more than 30 cfs during June. If a Diverter diverts more than 30 cfs at any point from June 1st through September 30th in a calendar year, then they are subject to the telemetry reporting requirement of the Measurement and Monitoring Regulations. (Cal. Code Regs., tit. 23, § 933(b)(4)(A)(iii).)
- c. Telemetry data significantly improves the Division's ability to monitor larger diversions to ensure compliance. If a violation occurs, the Division

can promptly work on rectifying the issue, whether that is through discussions with the Diverter to ensure voluntary compliance, or the issuance of enforcement documents. In regard to the Emergency Regulations, this data is critical to ensure compliance with the prohibition on inefficient livestock watering that is currently in place and with future curtailment orders. Considering the Diverter's history of non-compliance, and a lack of significant efforts to ensure its diversions are within the regulatory limits, having access to telemetered data will significantly ease the Division's ability to identify and address any violations.

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

1. The Diverter shall immediately cease and desist all diversions from the Scott River in excess of their regulatory limits.
 - a) From September 1, 2022, through March 31, 2023, when curtailments are not in place, diversions shall not exceed ten times what is necessary per head of livestock. (Cal. Code Regs., tit. 23, § 875.7 (a).)
 - b) When curtailments are in place, diversions shall not exceed the amount necessary per head of livestock and must be conveyed via means that do not result in seepage losses. (Cal. Code Regs., tit. 23, § 875.3.)
2. The Diverter shall maintain, and provide to the Division upon request, records of all surface water diversions from the Scott River.
3. The Diverter shall maintain a working measurement device for the Ditch's Scott River point of diversion at all times.
4. The Diverter shall arrange for daily diversion data to be recorded and updated on at least a weekly basis to a public website as per the telemetry requirements in the Measurement and Monitoring Regulations. (Cal. Code Regs., tit. 23, § 933(b)(4)(C).)
5. Diverter shall repair or upgrade the headgate to prevent any leaking, especially leaks that cause or contribute to exceedances of the Diverter's regulatory diversion limit.

Notice and Opportunity for Hearing

This draft CDO serves as notice pursuant to Water Code section 1834 that a violation is occurring or threatening to occur. You may request a hearing not later than 20 days after receipt. Unless a written request for a hearing is delivered to or received by mail by the State Water Board within 20 days after receipt of the notice, the State Water Board may adopt the CDO, based on the statement of facts and information set forth herein, without a hearing.

Consequences of Non-Compliance

In the event the Diverter fails to comply with the requirements of this Order, it shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability. Violation of a CDO may be referred 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 [California Water Code division 2, part 2, chapter 12] 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.

Failure to comply with this Order may subject the Diverter to civil liability in an amount not to exceed \$10,000 for each day in which the violation occurs pursuant to Water Code section 1845, subdivision (b)(1)(A).

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 or other entities from exercising its authority under any statute, regulation, ordinance, or other law, including but not limited to, administrative civil liability under Water Code section 1846, the authority to bring enforcement against the Diverter for infractions under Water Code section 1058.5, subdivision (d), and Water Code section 1052.

Regulatory Changes

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

Farmers Ditch Company

STATE WATER RESOURCES CONTROL BOARD

*ORIGINAL SIGNED BY
JULE RIZZARDO, FOR*

*Julé Rizzardo, Assistant Deputy Director
Division of Water Rights*

Dated: September 16, 2022