

State Water Resources Control Board

JUN 14 2012

In Reply Refer to:
JHW:A030926

PERSONAL SERVICE

Nancy K. Donovan and Stephen J. Peters
21451 Highway 128
Yorkville, CA 95494

Dear Ms. Donovan and Mr. Peters:

ENFORCEMENT ACTION ENF00099 - ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND NOTICE OF PROPOSED CEASE AND DESIST ORDER REGARDING UNAUTHORIZED DIVERSION OF WATER WITHIN THE NAVARRO WATERSHED IN MENDOCINO COUNTY

Enclosed are an Administrative Civil Liability (ACL) Complaint and a draft Cease and Desist Order (CDO). This letter serves as notice to Nancy K. Donovan and Stephen J. Peters (Diverters) of the intent of the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) to proceed with these enforcement actions. Therefore, this matter requires your immediate attention.

On August 5, 2010, the Division issued an Order canceling Application 30926 due to failure of the Diverters to submit their requested information in accordance with California Water Code section 1276. Division staff conducted an on-site inspection on September 15, 2010, and found both reservoirs, formerly included under Application 30926, still existed and were storing water that is collected annually during the rainy season from an ephemeral Unnamed Stream. Without a valid basis of right, the reservoirs constitute unauthorized diversions.

The Diverters have acknowledged receipt of the Division's Order canceling Application 30926 and were notified of the option to write a letter petitioning for reconsideration. As of the date of this letter, the Division has no record of receiving any petition for reconsideration of the Order, nor a statement or new application to appropriate water having been filed by the Diverters.

Based on these findings, I signed the enclosed ACL Complaint against the Diverters proposing a liability of **\$40,000** be imposed for unauthorized diversion and use of water. Pursuant to the enclosed ACL Complaint, the \$40,000 is due and payable within 20 days of receipt of the ACL Complaint unless the Diverters request a hearing before the State Water Board in accordance with

California Water Code section 1055, subdivision (b). To request a hearing, a **written** request for an ACL Complaint hearing must be delivered to or received by mail by the State Water Board within 20 days after receipt of the ACL Complaint. At any hearing, the State Water Board may reexamine and adjust the proposed ACL higher or lower, not to exceed the maximum allowed by statute.

Also enclosed is a draft CDO that requires the Diverters to file a Statement for the diversion in question and to cease and desist from diversion and use of water at the reservoir, or take certain corrective actions within a specified time schedule. The corrective actions required include: filing for and diligently pursuing an appropriate water right permit that would authorize the diversion and use of water at the reservoir; and submitting an interim operational plan that demonstrates how the reservoir will be operated in conformance with the requirements set forth in the State Water Board's North Coast Instream Flow Policy. In addition, the draft CDO specifies that should the State Water Board not issue a water right permit, the Diverters must render the reservoir incapable of storing water, subject to the permitting authority of the State Water Board.

If the Diverters disagree with the facts or time schedules for the corrective actions set forth in the enclosed draft CDO, the Diverters must make a written request for a CDO hearing before the State Water Board no later than 20 days from the date of receipt of this letter. A **written** request for hearing regarding the draft CDO signed by or on behalf of the Diverters must be hand-delivered to or received by mail by the State Water Board within 20 days after receipt of this letter, or the State Water Board may adopt the CDO, with the statement of facts and information set forth in the enclosed draft CDO, without a hearing. (California Water Code § 1834.)

If the Diverters request a hearing concerning the ACL Complaint and/or the draft CDO, then a hearing before the State Water Board, or before a hearing officer of the State Water Board, will be scheduled and the Diverters will be notified of the hearing date. Prior to the hearing, the Diverters will be required to submit any written testimony and other evidence the Diverters would like the State Water Board to consider.

A request for an ACL hearing and/or a CDO hearing **must be made in writing** and may be made by mailing the request to the State Water Board at the following address:

Division of Water Rights
P.O. Box 2000
Sacramento, CA 95812-2000

A written request for hearing may also be hand delivered to:

Division of Water Rights
Records Unit
1001 I Street, 2nd Floor
Sacramento, CA 95814

In summary, the Diverters should take immediate action to:

- (1) Remit payment of the ACL, or a written request for a hearing with regard to the ACL Complaint;
- (2) File a Statement of Water Diversion and Use, as required by California Water Code sections 5100-5107; and
- (3) Begin complying with the provisions of the draft CDO within 30 days or submit a written request for a hearing with regard to the draft CDO within 20 days. To begin complying with the CDO, you should submit one of the following (in accordance with the provisions of the draft CDO): (a) an appropriate water right application; or (b) a letter of intent not to pursue a water right permit and committing to develop and submit a plan to render the reservoir incapable of storing water subject to the State Water Board's authority.

Failure to respond to this letter and the issuance of the enclosed ACL Complaint and draft CDO in the time period provided will result in the State Water Board issuing a final ACL Order and CDO. Furthermore, the State Water Board may consider additional enforcement of those Orders without further notice.

If you have any questions concerning this matter or there are facts or circumstances that you would like to discuss, then please contact one of the following: John O'Hagan, Manager of the Enforcement Section, at (916) 341-5368 or via e-mail at johagan@waterboards.ca.gov; or Yvonne West, Senior Staff Counsel, Office of Enforcement, at (916) 322-3626 or via e-mail at ywest@waterboards.ca.gov.

Sincerely,



James Kassel, Assistant Deputy Director
Division of Water Rights

Enclosures:

- Administrative Civil Liability Complaint
- Draft Cease and Desist Order
- Inspection Map

ec: Andy Sawyer, Assistant Chief Counsel
State Water Resources Control Board
Office of Chief Counsel
(with enclosures)

Yvonne West, Staff Counsel
State Water Resources Control Board
Office of Enforcement
(with enclosures)

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

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Unauthorized Diversion and
Failure to File a Statement of Water Diversion and Use by

Nancy K. Donovan and Stephen J. Peters

SOURCE: Unnamed Stream tributary to Maple Creek thence Rancheria Creek thence Navarro River

COUNTY: Mendocino County

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Nancy K. Donovan and Stephen J. Peters (Diverters) are alleged to have diverted and used water in violation of California Water Code section 1052, subdivision (a), which states:
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.
2. California Water Code section 1052, subdivision (b), provides that the State Water Resources Control Board (State Water Board) may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.
3. California Water Code sections 5100–5107 establish a program requiring persons (with some limited exceptions not relevant to Diverters) who divert water from a surface stream to file a Statement of Water Diversion and Use (Statement). The Diverters are alleged to have violated California Water Code section 5101 which, states, in part:
Each person who, after December 31, 1965, diverts water shall file with the board, prior to July 1 of the succeeding year, a statement of his or her diversion and use.
4. Failure to file a Statement for each diversion that occurred after January 1, 2009 is a violation subject to civil liabilities. California Water Code section 5107, subdivision (c)(1) provides that the State Water Board may administratively impose civil liability for failure to file a Statement in an amount not to exceed \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a Statement within 30 days after the board has called the violation to the attention of that person.
5. Water Code section 1055, subdivision (a) provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom Administrative Civil Liability (ACL) may be imposed. On May 17, 1999, the Executive Director delegated to the Deputy Director for Water Rights the authority to issue a complaint to impose an ACL under California Water Code section 1055, subdivision (a). Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. State Water Board Resolution 2012-0029 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

ALLEGATIONS

6. The following facts provide the basis for the alleged trespass:
- a) On July 29, 1999 the Diverters filed Application 30926 with the State Water Board, Division of Water Rights (Division) to appropriate 30 acre-feet of water per annum through collection to storage in two reservoirs for irrigation, stock watering, frost protection, and fire protection purposes. Both reservoirs existed at the time the application was filed. In fact, the Diverters filed this application as a corrective action in response to the Division's 1998 investigation of unauthorized reservoirs in the Navarro River watershed, which identified the Diverters' reservoirs as unauthorized diversions. The source of water for the reservoirs is an Unnamed Stream tributary to Maple Creek, thence Rancheria Creek, thence the Navarro River in Mendocino County.
 - b) On May 23, 2006, the Diverters, the Division, and O'Connor Environmental, Inc. entered into a Memorandum of Understanding (MOU) to guide the processing of Application 30926 which included submittal of necessary environmental documents and public trust analyses.
 - c) By letter dated September 25, 2008, O'Connor Environmental, Inc. withdrew as the listed MOU consultant/representative for the Diverters. The withdrawal from the MOU was the result of the Applicant and Consultant not being able to reach a contractual agreement for the environmental studies that needed to be done to process Application 30926.
 - d) By letter dated October 22, 2008, the Division notified the Diverters that the MOU had been terminated based on the request of O'Connor Environmental, Inc. The Diverters were requested to provide the following information pursuant to California Water Code section 1275:
 - 1) notice that they intend to continue processing of Application 30926;
 - 2) identification of the consultants or persons that would prepare the required environmental and public trust documents, including a description of their qualifications; and
 - 3) three originals of a new fully completed MOU.

The Diverters were given 45 days to submit the requested information. They were also informed that if they did not provide the information within the required time frame, then pursuant to California Water Code section 1276, the Division may recommend cancellation of their application.
 - e) By letter dated May 29, 2009, the Division notified the Diverters that a response to the October 22, 2008 letter was due on December 8, 2008, and, to date, a reply had not been received. Pursuant to California Water Code section 1275, the Division again requested the same information outlined in the October 22, 2008 letter, required it to be submitted within 30 days, and informed the Diverters that failure to respond in the required time frame would result in cancellation of Application 30926, pursuant to California Water Code section 1276 without further notice. The Diverters were also notified that because their reservoirs existed and were currently not authorized by a water rights permit, they could be subject to enforcement action if the application was canceled and they did not remove the pre-existing project.
 - f) On August 5, 2010, the Division issued an Order canceling Application 30926 due to the failure of the Diverters to submit the requested information in accordance with California Water Code section 1276. The transmittal letter accompanying the Order notified the Diverters they had 30 days to petition for reconsideration of the Order. The Order and transmittal letter were sent to the Diverters via certified mail. The Order informed the Diverters of their responsibility to remove or modify any diversion works or impoundments to ensure that water is no longer

diverted, the potential liability of \$500 per day if unauthorized diversions continued, and the requirement to file a Statement of Water Diversion and Use (Statement) for water diverted under claim of riparian or pre-1914 water rights.

- g) On September 15, 2010, Division staff conducted an on-site inspection of the Diverters' property located at 21451 Highway 128 in Yorkville. During the inspection, Division staff found both reservoirs still existed and were storing water that is collected annually during the rainy season from an ephemeral Unnamed Stream. There was no inflow into the reservoirs at the time of the inspection, and the Diverters confirmed no other source of water is diverted to the reservoirs. Based on measurements taken during the inspection, Reservoir #1 was estimated to have a capacity of 16 acre-feet and Reservoir #2 was estimated to have a capacity of 15 acre-feet. The Diverters stated the uses of water at Reservoir #1 were recreation and fire protection. Reservoir #2 is used for fire protection and irrigation of 8 acres of vineyard. Division staff also notified the Diverters of the requirement to file a Statement and of the potential penalties for failure to file a Statement. The Diverters informed Division staff that they had not received the Order canceling the Application sent by certified mail and were unaware that their Application had been canceled.
- h) On September 16, 2010, Division staff called the Yorkville Post Office to follow up on delivery of the certified letter and Order canceling Application 30926. Post Office staff confirmed the letter had been received by the Post Office on August 11, 2010, and stated that the Post Office had delivered two notices to the Diverters' address that informed them they had certified mail to pick up. Post Office staff also stated they had spoken with the Diverters on September 13, 2011 and notified them of the certified mail.
- i) On September 23, 2010, Division staff followed up with the Diverters regarding the certified letter. The Diverters stated that they have had mail delivery problems from the Yorkville Post Office because of the rural location of their home, and they had still not received the letter or any notices to pick up a certified letter. The Diverters called the Yorkville Post Office and discovered the certified letter had been sent back to the Division on September 18, 2010. The Diverters requested the Division to fax or e-mail a copy of the certified letter and Order canceling Application 30926.
- j) On September 27, 2010, the Division received the returned certified letter from the Yorkville Post Office. The returned mail indicates the letter went unclaimed, and attempts to deliver were made on August 11, 2010, September 7, 2010, and September 12, 2010.
- k) On September 28, 2010, Division staff sent copies to the Diverters, via email, of the Order canceling the application and the certified letter describing the Diverters options.
- l) On October 29, 2010, Division staff spoke with the Diverters over the phone, and the Diverters confirmed their receipt of the Division's e-mail on September 28, 2010. Division staff also notified the Diverters that they may write a letter to the Division petitioning for reconsideration of the cancellation Order and stating their causes for requesting reinstatement of Application 30926. The Diverters were informed that a petition for reconsideration does not eliminate the potential for enforcement action and that having an application on file with the Division does not translate to a water right.
- m) California Water Code section 768 requires that a petition be submitted within 30 days of the date of the Order and be based on one or more of the causes listed in that section. As of the date of this complaint, the Division has no record of receiving any petition for reconsideration of the Order, nor a statement or new application to appropriate water having been filed by the Diverters.

PROPOSED CIVIL LIABILITY

7. The basis of this complaint is the unauthorized diversion, storage, and use of water by the Diverters since at least the year 1999 for each reservoir, and the failure to file a Statement for each reservoir. The unauthorized diversion and use of water constitutes a trespass within the meaning of California Water Code section 1052, subdivision (a), and the failure to file statements constitutes a violation within the meaning of California Water Code section 5107, subdivision (c)(1).
8. The maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water is \$500 for each day and for each trespass that occurred. Evidence demonstrates that between 1999 and the date of this complaint, the Diverters have collected water from the Unnamed Stream and continuously held water in storage for irrigation, aesthetics, and recreational uses for at least 11 years (4015 days). Therefore, a civil liability of \$2,007,500 could be considered (\$500 per day x 4015 days) for the diversion and/or use of water at each reservoir. Accordingly, the maximum civil liability that could be imposed for trespass is over \$4,000,000 (\$2,007,500 per reservoir).
9. In addition, Diverters failed to file a Statement for the diversions and uses that occurred at each reservoir after January 1, 2009. The California Water Code section 5107(c)(1) provides that the State Water Board may administratively impose civil liability pursuant to section 1055 in an amount not to exceed \$1,000, plus \$500 per day for each additional day on which the violation continues if the person fails to file a Statement within 30 days after the State Water Board has called the violation to the attention of that person. The maximum civil liability that can be considered at this time for failure to file Statements is \$1,000 per reservoir, or \$2,000.
10. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider 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 the violation occurs, and any corrective action taken by the violator. In this case, the Diverters collected and stored water from unnamed tributaries to Maple Creek and subsequently used that water for recreation, aesthetics, and irrigation of vineyards. The Diverters have failed to pursue corrective action by not diligently pursuing the processing of Application 30926. They were made aware of actions they needed to take to continue processing of Application 30926, given ample time to take those actions, and failed to taken any corrective action.
11. The Diverters' continued unauthorized diversions have reduced the amount of water available for the Northern California Coastal steelhead trout fishery and other riparian habitat. While adverse impacts of unauthorized water diversions on the steelhead trout fishery have not been quantified for this case, unauthorized diversions of water have been shown to contribute to the cumulative impact of reducing habitat for steelhead trout. The State of California lists the Northern California Coastal steelhead as a species of special concern, and the National Marine Fisheries Service, on February 6, 2006, listed the steelhead trout as threatened under the Federal Endangered Species Act.
12. The Diverters received an economic advantage over other legitimate water diverters in the area by foregoing the costs of buying the water or pumping groundwater from a well, forgoing the cost of acquiring an appropriative water right, and forgoing the cost of annual water right fees. The Diverters own and operate two reservoirs with a combined capacity of about 31 acre-feet. The annual use of water is estimated at 13.5 acre-feet, which includes the requirements for irrigating 8 acres of wine grapes and evaporation and seepage losses. The Meadow Estates Mutual Water Company, a water provider within approximately 7 miles of the Diverters, sells potable water for \$650 an acre-foot. Assuming an initial fill for both reservoirs of 31 acre-feet in the first year and at least 10 years of collecting approximately 13.5 acre-feet annually to replace water used for irrigation, evaporation, and seepage losses, the Diverters avoided paying an estimated \$107,900 for purchased water.

13. Alternatively, the Diverters could have obtained water by pumping groundwater from a well. The University of California Cooperative Extension has produced cost studies for various crops and commodities for different regions of California. Studies produced for the North Coast region for production of wine grapes and olive oil from 2009 through 2011 all indicate the typical cost of pumping groundwater from a 120 foot deep well with a 10 horsepower motor is approximately \$198 per acre-foot. Assuming an initial fill for both reservoirs of 31 acre-feet in the first year and at least 10 years of collecting approximately 13.5 acre-feet annually to replace water used for irrigation, evaporation, and seepage losses, the Diverters avoided paying an estimated \$32,868 to pump groundwater.
14. In determining a proposed liability amount, the Division has also considered an estimated number of days water may have been diverted to storage from the Unnamed Stream as an indicator of potential for impacts to downstream users and instream beneficial use. Assuming an initial fill for both reservoirs of 31 acre-feet, it is estimated that it would take approximately 69 days on average to collect 31 acre-feet of water. It has also been estimated that it would take 42 days on average to collect 13.5 acre-feet of water to replace water used for irrigation, evaporation, and seepage losses, using 69 days of diversion in the first year and 42 days of diversion annually for the next 10 years, for a total of 489 days of diversion.
15. Additionally, the Division estimates that its staff cost to review the existing project and develop the enforcement documents to be \$ 5,511. If this matter goes to hearing, it is estimated that the additional staff cost to prosecute this case would be approximately \$10,000. The water right filing fee for 31 acre-feet of water would be \$1,315, and the annual water right fee avoided was \$100 for last year and \$150 for this year.
16. Having taken into consideration the factors described above, the Assistant Deputy Director for Water Rights recommends an ACL in the amount of **\$40,000**. This liability amount includes a proposed \$2,000 for failure to file the required Statements of Diversion and Use and is the minimum liability recommended by the Division Prosecution Team should the matter go to hearing. The Division Prosecution Team reserves the right to seek an increase in the civil liability amount to cover the costs of enforcement incurred subsequent to the issuance of this Complaint through the hearing process.

RIGHT TO HEARING

17. The Diverters may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date this notice is received. (California Water Code, § 1055, subd. (b).)
18. If the Diverters request a hearing, it will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
19. If the Diverters request a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and, if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the California Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.

Nancy K. Donovan and Stephen J. Peters
Enforcement Action ENF00099

- 20. If the Diverters do not wish to request a hearing, please remit a cashier's check or money order within 20 days of the date of this Complaint for the amount of the ACL set forth in paragraph 16 above to:

State Water Resources Control Board
 Division of Water Rights
 Enforcement Section
 P.O. Box 2000
 Sacramento, CA 95812-2000

- 21. If the Diverters do not request a hearing and do not remit the ACL amount, the State Water Board may seek recovery of the ACL amount as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD



*James W. Kassel, Assistant Deputy Director
 Division of Water Rights*

Dated: JUN 14 2012

RIGHT TO HEARING

The Diverters may request a hearing on this matter before the State Water Board. Any request for hearing must be received by the Board within 20 days of the date this notice is received. (California Water Code § 1055.4(a))

If the Diverters request a hearing, it will have an opportunity to be heard and to present its arguments in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, written notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.

If the Diverters request a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence presented at the hearing, the State Water Board may take any appropriate action in accordance with sections 105.315 and 105.316 of the California Water Code and its regulations under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.

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

DIVISION OF WATER RIGHTS

ORDER WR 2010 -00XX-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion by the

by

Nancy K. Donovan and Stephen J. Peters

SOURCE: Unnamed Stream tributary to Maple Creek thence Rancheria Creek thence Navarro River

COUNTY: Mendocino County

The State Water Resources Control Board (State Water Board or Board) is authorized under California Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Nancy K. Donovan and Stephen J. Peters (Diverters) to cease their unauthorized diversion, storage, and use of water in violation of California Water Code section 1052.

The Diverters are alleged to have violated or are threatening to violate California Water Code section 1052 for which section 1831 (d) provides, in part:

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 any of the following:

- (1) *The prohibition set forth in section 1052 against the diversion or use of water subject to division 2 (commencing with section 1000) of the Water Code other than as authorized by division 2.*

On {DATE}, and in accordance with the provisions of section 1834 of the California Water Code, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against the Diverters for the violation and threatened violation of the prohibition against unauthorized diversion, storage, and use of water. Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a Cease and Desist Order in accordance with California Water Code section 1831 et seq. State Water Board Resolution 2012-0029 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

The State Water Board or its delegee, the Assistant Deputy Director for Water Rights, finds that:

1. Diverters own property that includes two reservoirs on an Unnamed Stream tributary to Maple Creek, thence Rancheria Creek, thence the Navarro River in Mendocino County. Any water diverted to storage in the reservoirs from the Unnamed Stream is subject to the State Water Board's permitting and licensing authority as detailed in division 2 (commencing with section 1000) of the California Water Code.
2. Diverters do not have a water right permit or license to store surface water in said reservoirs.

3. Diverters have violated California Water Code section 1052 in the past by diverting surface water from the Unnamed Stream to storage in the reservoirs for later use without a basis of right.
4. The reservoirs also present a threat of future unauthorized diversion and use of water in violation of California Water Code section 1052.

FACTS AND INFORMATION

The facts and information upon which this CDO is based are as follows:

1. On July 29, 1999, the Diverters filed Application 30926 with the State Water Board, Division of Water Rights (Division) to appropriate 30 acre-feet of water per annum through collection to storage in two reservoirs for irrigation, stock watering, frost protection, and fire protection purposes. Both reservoirs existed at the time the application was filed. In fact, the Diverters filed this Application as a corrective action in response to the Division's 1998 investigation of unauthorized reservoirs in the Navarro River watershed which identified the Diverters' reservoirs as unauthorized diversions. The source of water for the reservoirs is an Unnamed Stream tributary to Maple Creek, thence Rancheria Creek, thence the Navarro River in Mendocino County.
2. On May 23, 2006, the Diverters, the Division, and O'Connor Environmental, Inc. entered into a Memorandum of Understanding (MOU) to guide the processing of Application 30926, which included submittal of necessary environmental documents and public trust analyses.
3. By letter dated September 25, 2008, O'Connor Environmental, Inc. withdrew as the listed MOU consultant/representative for the Diverters. The withdrawal from the MOU was the result of the Applicant and Consultant not being able to reach a contractual agreement for the environmental studies that needed to be done to process Application 30926.
4. By letter dated October 22, 2008, the Division notified the Diverters that the MOU had been terminated based on the request of O'Connor Environmental, Inc. The Diverters were requested to provide the following information pursuant to California Water Code section 1275:
 - 1) notice that they intend to continue processing of Application 30926;
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 - 3) three originals of a new fully completed MOU.

The Diverters were given 45 days to submit the requested information. They were also informed that if they did not provide the information within the required time frame, then pursuant to California Water Code section 1276, the Division may recommend cancellation of their application.

5. By letter dated May 29, 2009, the Division notified the Diverters that a response to the October 22, 2008 letter was due on December 8, 2008, and to date a reply had not been received. Pursuant to California Water Code section 1275, the Division again requested the same information outlined in the October 22, 2008 letter, required it to be submitted within 30 days, and informed the Diverters that failure to respond in the required time frame would result in cancellation of Application 30926 pursuant to California Water Code section 1276 without further notice. The Diverters were also

- notified that because their reservoirs existed and were currently not authorized by a water right permit, they could be subject to enforcement action if the application was canceled and they did not remove the pre-existing project.
6. On August 5, 2010, the Division issued an Order canceling Application 30926 due to the failure of the Diverters to submit the requested information in accordance with California Water Code section 1276. The transmittal letter accompanying the Order notified the Diverters they had 30 days to petition for reconsideration of the Order. The Order and transmittal letter were sent to the Diverters via certified mail. The Order informed the Diverters of their responsibility to remove or modify any diversion works or impoundments to ensure that water is no longer diverted, the potential liability of \$500 per day if unauthorized diversions continued, and the requirement to file a Statement of Water Diversion and Use (Statement) for water diverted under claim of riparian or pre-1914 water rights.
 7. On September 15, 2010, Division staff conducted an on-site inspection of the Diverters' property located at 21451 Highway 128 in Yorkville. During the inspection, Division staff found both reservoirs still existed and were storing water that is collected annually during the rainy season from an ephemeral Unnamed Stream. There was no inflow into the reservoirs at the time of the inspection, and the Diverters confirmed no other source of water is diverted to the reservoirs. Based on measurements taken during the inspection, Reservoir #1 was estimated to have a capacity of 16 acre-feet and Reservoir #2 was estimated to have a capacity of 15 acre-feet. The Diverters stated the uses of water at Reservoir #1 were recreation and fire protection. Reservoir #2 is used for fire protection and irrigation of 8 acres of vineyard. Division staff also notified the Diverters of the requirement to file a Statement and of the potential penalties for failure to file a Statement. The Diverters informed Division staff that they had not received the Order canceling the Application sent by certified mail and were unaware that their Application had been canceled.
 8. On September 16, 2010, Division staff called the Yorkville Post Office to follow up on delivery of the certified letter and Order canceling Application 30926. Post Office staff confirmed the letter had been received by the Post Office on August 11, 2010, and stated that the Post Office had delivered two notices to the Diverters' address that informed them they had certified mail to pick up. Post Office staff also stated they had spoken with the Diverters on September 13, 2011 and notified them of the certified mail.
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 11. On September 28, 2010, Division staff sent copies to the Diverters, via e-mail, of the Order canceling the application and the certified letter describing the Diverters options.
 12. On October 29, 2010, Division staff spoke with the Diverters over the phone and the Diverters confirmed their receipt of the Division's e-mail on September 28, 2010. Division staff also notified the Diverters that they may write a letter to the Division

petitioning for reconsideration of the cancellation Order and stating their causes for requesting reinstatement of Application 30926. The Diverters were informed that a petition for reconsideration does not eliminate the potential for enforcement action and that having an application on file with the Division does not translate to a water right.

13. California Water Code section 768 requires that a petition be submitted within 30 days of the date of the Order, and be based on one or more of the causes listed in that section. As of the date of this complaint, the Division has no record of receiving any petition for reconsideration of the Order, nor a statement or new application to appropriate water having been filed by the Diverters.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the California Water Code, that Diverters shall cease the unauthorized diversion of water from the Unnamed Stream tributary to Maple Creek, file a Statement of Water Diversion and Use for the diversion of water at each of the reservoirs, and pursue one of the following corrective action options and satisfy the appropriate time schedules outlined herein:

Corrective Action Options

Option 1:

1. Within 30 days of the date of this order, Diverters shall file an appropriate water right application with the Division for storage and use of water in their reservoirs, and diligently pursue securing a permit by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division. It is noted that pursuant to the Instream Flow Policy, applications for the diversion of water to storage on a Class I or Class II stream can no longer be accepted unless an exception to the provisions of the Instream Flow Policy is obtained from the State Water Board; and
2. After the appropriate water right application is received, the State Water Board will make a stream class determination for the project. If it is determined the project is on a Class III stream, or if the State Water Board grants an exception to the Class I or Class II stream provisions, then within 90 days of the date of the application being accepted, Diverters shall submit a reservoir operation plan (Operation Plan) for acceptance by the Assistant Deputy Director for Water Rights. The Operation Plan must demonstrate how the reservoir will be operated without storing additional water subject to the State Water Board's permitting authority, or alternatively how it will be operated in compliance with the State Water Board's Instream Flow Policy. If the Diverters intend to continue to divert and store water subject to the State Water Board's permitting authority while pursuing a water rights permit through the application process, then the operation plan must at a minimum detail interim operating conditions consistent with Section 2.2 of the Instream Flow Policy. Specifically, the reservoir operation plan shall describe how Diverters will bypass all water outside the Instream Flow Policy's diversion season of December 15th to March 31st, provide for an appropriate minimum bypass flow (MBF) during the diversion season, and keep hourly records of the diversion of water. The MBF should be based on the criteria outlined in Instream Flow Policy. If it is determined that the point of diversion for the project is on a Class I stream, Instream Flow Policy Table 2.1 should be used to determine the appropriate MBF. If it is determined that the point of diversion is on a Class II or Class III stream, then the interim MBF should be based on the February median flow. The reservoir operation plan shall include the installation of measuring devices and bypass facilities, a monitoring and reporting schedule for those facilities that complies with Section 10 of the Instream Flow Policy, and a schedule detailing the completion date for the construction of those facilities. The Diverters shall implement the

Operation Plan in accordance with the schedule contained therein. No additional water shall be collected to storage unless consistent with the Operation Plan as accepted by the Assistant Deputy Director for Water Rights, if and until a permit is issued pursuant to the Diverters' water right application submitted in accordance with paragraph 1 of this option.

3. If the State Water Board denies or cancels the Diverters' water right application, then within 150 days of the State Board issuing that decision, the Diverters shall submit a plan to the Assistant Deputy Director for Water Rights for permanently rendering the reservoir incapable of storing water subject to the permitting authority of the State Water Board. The plan must satisfy the same requirements and is subject to the same acceptance criteria that are detailed below in option 2.

Or,

Option 2:

4. Within 30 days of the date of this Order, the Diverters shall inform the State Water Board that they will not pursue a water right permit to authorize the collection of water to storage from the Unnamed Stream. Thereafter, within 150 days of the date of this Order, the Diverters shall submit a plan to the Assistant Deputy Director for Water Rights to permanently render the reservoir incapable of storing water subject to the State Water Board's permitting authority. The plan shall include a time schedule not to exceed 2 years for completion of the proposed alteration and the identification of any permits or agreements necessary from other federal, state, and local agencies to complete the work. Upon acceptance of the plan by the Assistant Deputy Director as sufficient to render the reservoir incapable of being an unauthorized diversion or threat of future diversion in violation of Water Code section 1052, the Diverters shall diligently comply with all provisions and time schedules of the plan. If the Diverters are unable to comply fully with the plan due to other federal, state, or local agencies with authority over the work required, the Diverters shall immediately alert the Assistant Deputy Director for Water Rights of the reason for delay and any problems with fully complying with the provisions of the plan and diligently work to overcome such obstacles.

Consequences of Non-Compliance

In the event the Diverters fail to comply with the requirements, they shall be in violation of this CDO and subject to administrative civil liability and further enforcement actions as described in California Water Code section 1845(a):

Failure of any person to comply with a CDO issued by the State Water Board pursuant to this chapter may subject that person to further enforcement action, including assessment of civil liability of up to one thousand dollars a day and referral to the Attorney General 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 Diverters for unauthorized diversion or use in violation of California Water Code section 1052.

Regulatory Changes

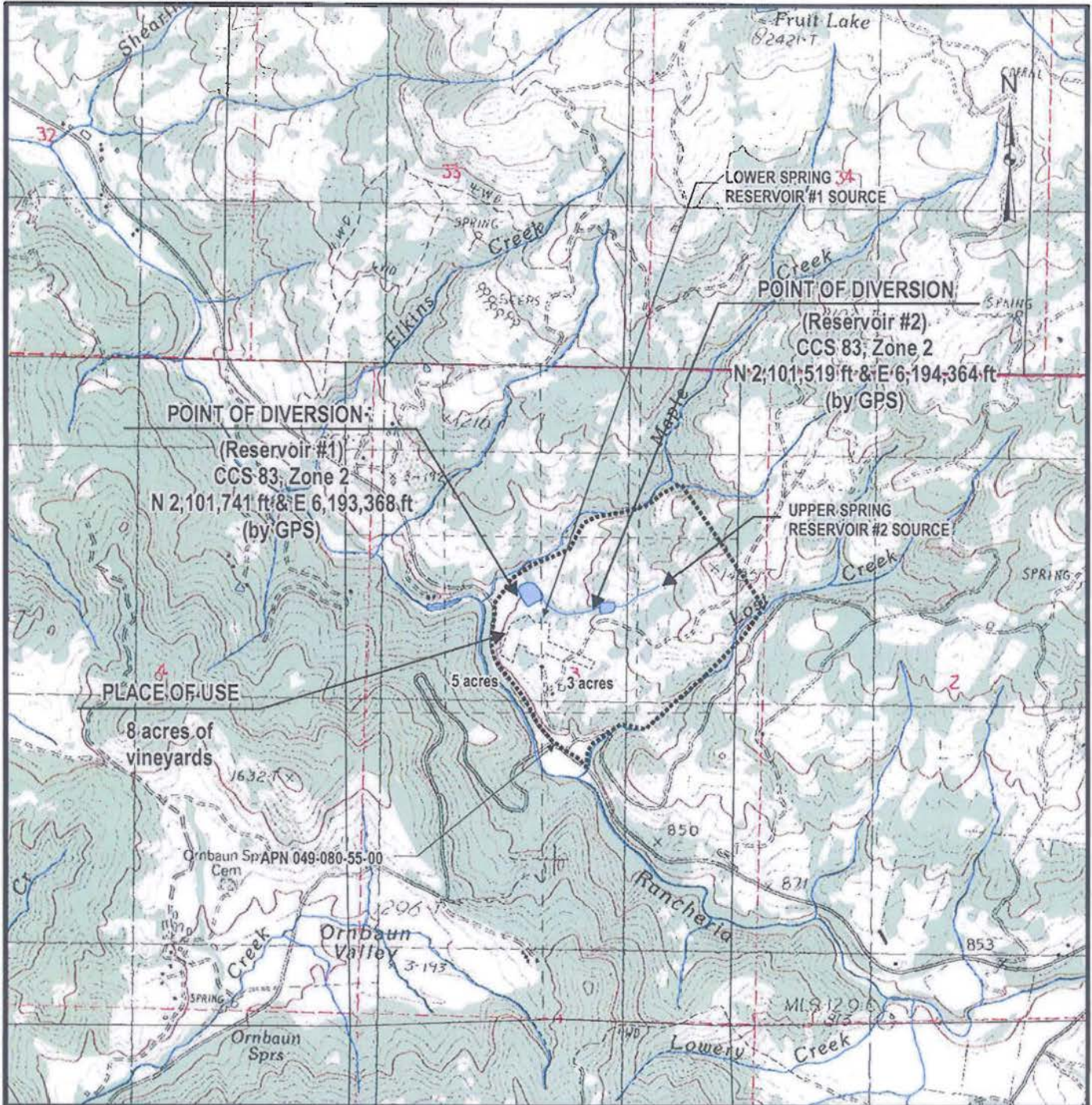
Nothing in this Order shall excuse the Diverters from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

STATE WATER RESOURCES CONTROL BOARD

*James W. Kassel, Assistant Deputy
Director for Water Rights*

Dated:

DRAFT



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|-----------------------|--|--|---------|
| OWNER | NANCY K DONOVAN & STEPHEN J PETERS | STATE OF CALIFORNIA CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY STATE WATER RESOURCES CONTROL BOARD DIVISION OF WATER RIGHTS | |
| SOURCE | UNNAMED STREAM & 2 UNNAMED SPRINGS | | |
| POINT(S) OF DIVERSION | SE 1/4 OF NW 1/4 & SW 1/4 OF NE 1/4 OF | APPLICATION NO. | A030926 |
| SECTION(S) | 3, T12N, R13W, MDB&M | LICENSE NO. | NA |
| COUNTY OF | MENDOCINO | ENFORCEMENT | |
| U.S.G.S. QUAD: | ORNBAUN VALLEY | DATE: | 9/30/10 |
| | SCALE: 1:24,000 | DRAWN: | JW |
| | | CHECKED: | AM |

Note: This map does not constitute a public land survey as defined by California Business & Professions Code section 8726. It has been prepared for descriptive purposes only

