



State Water Resources Control Board SURNAME FILES



Division of Water Rights

1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-5300
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • Web Site: www.waterrights.ca.gov

Arnold Schwarzenegger
Governor

erry Tamminen
Secretary for
Environmental
Protection

In Reply Refer to:
341:SMC:262.0(32-22-01)

CERTIFIED MAIL

MAY 14 2004

Robert A. Luciano
4663 Lakewood Court
Reno, NV 89509

9690 3055

Scott Shapiro
Downey Brand, Attorneys, LLP
555 Capital Mall, 10th Floor
Sacramento, CA 95814

9690 3062

Gentlemen:

NOTICE OF CEASE AND DESIST ORDER PURSUANT TO WATER RIGHT COMPLAINT 262.0 (32-22-01) WASH CREEK IN PLUMAS COUNTY

The State Water Resources Control Board (SWRCB), Division of Water Rights (Division) hereby gives notice of its intent to issue a Cease and Desist Order (CDO) consistent with the facts and required corrective actions identified in the attached draft Order. The SWRCB is authorized under the California Water Code section 1831, subdivision (a), to issue a CDO when it determines that any person is violating, or threatening to violate, any requirement described in subdivision (d). Subdivision (d) of Water Code section 1831 authorizes the SWRCB to issue a CDO in response to a violation or threatened violation of any of the following:


- (1) The prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to Division 2 (commencing with section 1000) of the Water Code.¹
- (2) Any term or condition of a permit, license, certification, or registration issued under Division 2 of the Water Code.
- (3) Any decision or order of the board issued under Part 2 (commencing with section 1200) of Division 2 of the Water Code, section 275, or Article 7 (commencing with section 13550) of Chapter 7 of Division 7 of the Water Code, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

The Division is recommending this formal enforcement action against Robert A. Luciano for the violation or threatened violation of the prohibition against unauthorized diversion and use of water.

If you disagree with the facts or time schedules for corrective actions of the attached draft CDO, you may request a hearing before the SWRCB no later than 20 days from the date you receive

¹ Water Code section 1052, subdivision (a) states that "The diversion or use of water subject to this division other than as authorized in this division is a trespass."

RNAME
2540

	3/10/04	J. Michael	3/10/04	VAW 4/15/04
California Environmental Protection Agency				
	27 3/2/04	3/10/04		

Robert A. Luciano
Scott Shapiro

2

this notice. Please note that unless a written request for hearing, signed by, or on behalf of, the licensee is delivered or received by mail by the SWRCB within 20 days after your receipt of this letter, the SWRCB may adopt the CDO, with the statements of facts and information set forth in the attached draft Order, without a hearing. (Wat. Code, § 1834, subds. (a) & (b))

This matter requires your immediate attention. California Water Code section 1845 provides that upon the failure of any person to comply with a CDO issued by the SWRCB, the Attorney General, upon the request of the SWRCB, 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. In addition, administrative liability may be imposed for a CDO violation. Water Code section 1845, subdivision (b) states:

1. Any person or entity who violates a cease and desist order issued pursuant to this chapter may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
2. Civil liability may be imposed by the superior court. The Attorney General, upon the request of the [board], shall petition the superior court to impose, assess, and recover those sums.
3. Civil liability may be imposed administratively by the [board] pursuant to section 1055.

Failure to submit the required documents in the specified time frame could result in additional enforcement actions taken by the SWRCB.

If there are any questions concerning this matter, please telephone Mr. Scott McFarland of my staff at (916) 341-5352.

Sincerely,

Victoria A. Whitney
Division Chief

SMcFarland\lfischer 3.10.2004
U:\Licdrv\SMCFARLA\luciano c&d not

Enclosure

cc: Robert Hughes
5735 Benbrook Lane
Orangevale, CA 95662

Donald Williams
P.O. Box 141
Tahoe City, CA 96145

Neil Dion and Jennifer Gladden
P.O. Box 100
Graeagle, CA 96103

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

In the Matter of Complaint 262.0 (32-22-01)

Robert A. Luciano

CEASE AND DESIST ORDER NO. 262.3 - _____

Adopted:

SOURCE: Wash Creek
 COUNTY: Plumas County

The State Water Resources Control Board (SWRCB) is authorized under California Water Code section 1831, subdivision (a), to issue a cease and desist order (CDO) when it determines that any person is violating or threatening to violate any requirement described in subdivision (d). Under section 1831, subdivision (d) of the Water Code, the SWRCB may issue a CDO in response to a violation or threatened violation of any of the following:

- (1) The prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to Division 2 (commencing with section 1000) of the Water Code.¹
- (2) Any term or condition of a permit, license, certification, or registration issued under Division 2 of the Water Code.
- (3) Any decision or order of the board issued under Part 2 (commencing with section 1200) of Division 2 of the Water Code, Section 275, or Article 7 (commencing with section 13550) of Chapter 7 of Division 7 of the Water Code, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

On {DATE} and in accordance with the provisions of section 1834 of the California Water Code, the SWRCB provided notice of the proposed Cease and Desist Order against Robert A. Luciano, for the threatened violation and violation of the prohibition against unauthorized diversion and use of water.

FACTS AND INFORMATION

The facts and information upon which this Notice of Cease and Desist Order is based are the following:

1. On June 27 and 29, 2001, complaints were filed against Robert A. Luciano by Bob Hughes, Neil Dione, and Donald Williams. The complainants allege that Mr. Luciano was over irrigating his property, irrigating land without a water right to do so, and had constructed reservoirs without an appropriative right.
2. Scott Shapiro, attorney for Mr. Luciano, submitted a response to the complaints. The response stated that the reservoir was filled from groundwater captured by a French drain system; and all other water diverted through the reservoir from Wash Creek was regulated under claim of riparian or pre-1914 appropriative water right. The response also stated that all other irrigation on the property was occurring under riparian and pre-1914 water rights. As such, Mr. Shapiro claims that no appropriative right permit is necessary. The Division of Water Rights (Division) records show that Mr. Luciano filed *Statement of Water Diversion and Use No. 14833* on August 4, 1997 claiming a pre-1914 appropriative right of 51 acre-feet.

¹ Water Code section 1052, subdivision (a) states that "The diversion or use of water subject to this division other than as authorized in this division is a trespass."

[Handwritten signatures and dates]
 3/7/04 3/9/04 3/9/04 3/19/04 3/24/04

3. Division staff inspected Mr. Luciano's property on June 27 and 28, 2001. The following observations and conclusions were made as a result of that inspection:
 - (1) A ditch system on Mr. Luciano's property conveys water from Wash Creek to various points throughout the property. The point of diversion on Wash Creek consists of large boulders loosely placed to direct flow into the ditch. On the day of the inspection, the ditch had a measured flow of 1.8 cubic feet per second (cfs) just below the point of diversion and Wash Creek had a measured flow of 5.0 cfs below the point of diversion. Therefore, Mr. Luciano was diverting about 26 percent of the flow in Wash Creek.
 - (2) Three reservoirs were observed on Mr. Luciano's property. Mr. Luciano reportedly built two of them. Division staff conducted surveys of two reservoirs and determined their capacities are 1 and 15 acre-feet. The third reservoir is located on the eastern edge of the property. It appeared much older and had an estimated capacity of approximately 0.5 acre-foot. The previous owner confirmed that the small reservoir on the east end of the property existed when he purchased the land. The ditch system continually feeds water from Wash Creek into the uppermost reservoir (1 acre-foot capacity) which then spills immediately into the second reservoir (15 acre-foot capacity). Water spilling out of the 15 acre-foot capacity reservoir fills the low lying contour in the meadow below and collects in the older 0.5 acre-foot reservoir at the edge of the property. Water spilling from this reservoir leaves the property and flows into Carmichael Creek. On the days of the inspection, the ditch flowing into the uppermost reservoir was measured at 1.3 cfs. No additional measurable flow could be attributed to the French drain system described by Mr. Luciano.
 - (3) Mr. Luciano's property consists of Lots 1, 2, and 3 within the Mohawk Valley Properties Unit No. 2, Phase One. The three lots correspond to Placer County Assessor's Parcel Numbers 133-120-09, 133-120-11 and 133-120-10, respectively. Lot 3 appears to be physically contiguous to Wash Creek while Lots 1 and 2 no longer have physical continuity with the stream. Mr. Luciano was flood-irrigating portions of Lots 2 and 3 via the ditch system on both days of the inspection. Mr. Williams, one of the complainants and former owner of the Luciano property, informed Division staff that the area being irrigated by Mr. Luciano on Lot 2 was never irrigated during his ownership, which spanned from 1969 to 1995.
4. On August 21, 2002, Division staff issued a Report of Complaint Investigation. This report concluded that: (1) Mr. Luciano had not demonstrated the ability to fill the reservoirs with groundwater; (2) Mr. Luciano did not appear to have a valid basis of right to irrigate Lots 1 and 2 that no longer had physical continuity with Wash Creek; and (3) Mr. Luciano appeared to be diverting water in excess of standard irrigation practices.
5. On September 20, 2002, Mr. Shapiro submitted a response to the report. The response indicated that Mr. Luciano intended to install measuring devices and collect 12 months of uninterrupted data. The data would be necessary to verify that groundwater was used to fill the reservoir and address the issue of excess diversions. Further, the response indicated that evidence would be collected to verify continued use under pre-1914 rights for irrigation.
6. On August 14, 2003, Mr. Shapiro sent the Division a letter summarizing the status of the actions taken by his client. The letter indicated that several weirs were constructed to obtain accurate flow data. However, due to weather delays, they were unable to have an accurate monitoring system in place before winter.
7. The Division finds that: (1) Mr. Luciano has not submitted evidence to document a pre-1914 right to irrigate parcels that are not physically riparian to Wash Creek (Parcels 133-120-09 and 133-120-11); and (2) Mr. Luciano has not submitted any documentation of the steps taken to collect data, summary of data collected, or proposed steps needed to verify groundwater sources used to fill the storage reservoirs or regulate and monitor the flow of water through those reservoirs.

In the absence of evidence of an alternative basis of right to divert and irrigate the property, the diversion, storage and use of water constitutes an unauthorized diversion and use of water subject to enforcement action.

IT IS HEREBY ORDERED, pursuant to section 1831 through 1836 of the Water Code, that Robert A. Luciano shall take the following corrective actions and satisfy the following time schedule:

1. By {30 days from issuance of Order}, Mr. Luciano shall immediately cease and desist irrigating parcels with water from Wash Creek that are no longer physically contiguous to Wash Creek until and unless evidence satisfactory to the Division establishes another valid basis of right.
2. By {30 days from issuance of Order}, Mr. Luciano shall submit monitoring results of his diversions that show the amount of groundwater and surface water beneficially used to irrigate his property and the amount of groundwater diverted to storage in his reservoirs. Said documentation shall describe the method used to establish the records and include photos, maps, and drawings of measuring devices.
3. If Mr. Luciano cannot submit records satisfactory to the Division, as required by Paragraph 1 and 2, he shall submit an application to appropriate water by permit for storage and direct diversion of water within 60 days of being informed of the Division's findings. After submittal, Mr. Luciano must diligently pursue an appropriative water right permit by submitting all requested information deemed necessary by the Division, including fees, maps, environmental documents pursuant to the California Environmental Quality Act and responses to protests.

Upon the failure of any person to comply with a cease and desist order issued by the SWRCB pursuant to this chapter, the Attorney General, upon the request of the SWRCB, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a)) Any person or entity who violates a cease and desist order issued pursuant to this chapter may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Wat. Code, § 1845, subd. (b)) Subdivision (b) of Water Code section 1845 provides:

- (1) Any person or entity who violates a cease and desist order issued pursuant to this chapter may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
- (2) Civil liability may be imposed by the superior court. The Attorney General, upon the request of the SWRCB, shall petition the superior court to impose, assess, and recover those sums.
- (3) Civil liability may be imposed administratively by the SWRCB pursuant to section 1055.

STATE WATER RESOURCES CONTROL BOARD

Victoria A. Whitney, Chief
Division of Water Rights

Dated:

SMcFarland\lfischer 12.18.2003
U:\Licdrv\SMCFARLA\lucianoCDO-ORD