

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

ORDER WR 2013-0062-EXEC

In the Matter of the Diversion and Use of Water by
BRUCE, JIM AND RUSS HENNING

**ORDER APPROVING SETTLEMENT AGREEMENT
AND CEASE AND DESIST ORDER**

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

This matter comes before the Executive Director of the State Water Resources Control Board (State Water Board or Board) following the issuance of a draft Cease and Desist Order (CDO) and an Administrative Civil Liability (ACL) complaint to Bruce, Jim and Russ Henning (Henning). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Division Prosecution Team) and Henning have agreed to settle this matter in lieu of proceeding to a hearing. The issuance of a decision or order pursuant to a settlement agreement is authorized under Government Code section 11415.60.

2.0 BACKGROUND

Henning owns and operates a reservoir located at 7055 Lakeville Highway, Petaluma, Sonoma County APN 068-110-018. Henning acquired the property and began operating the reservoir in 2010. The Division has no record of a water right authorizing the storage of water in the reservoir.

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

On March 8, 2013, the Division Prosecution Team issued an Administrative Civil Liability Complaint (“ACLC”) and a Draft Cease and Desist Order (“Draft CDO”) against Henning, alleging that Henning unlawfully diverted water to storage in the reservoir, which constitutes an unauthorized diversion and a trespass against the State of California in violation of California Water Code section 1052.

On March 28, 2013, Henning timely requested hearings on the ACLC and Draft CDO. At the time of this Settlement Agreement, the State Water Board has not scheduled hearings for the ACLC and Draft CDO.

Henning and the Division Prosecution Team engaged in settlement discussions and mutually agreed to settle the matters identified in the ACLC and Draft CDO in lieu of hearings.

3.0 SETTLEMENT AGREEMENT

Henning and the Division Prosecution Team executed the Settlement Agreement attached hereto. The general terms of the settlement are that Henning: (1) withdraws its request for hearing on the ACLC and CDO, and agrees to the terms for cease and desist as described in the Settlement Agreement and incorporated herein, and (2) is subject to administrative civil liability in the amount of \$12,150, payable within 30 days of issuance of this Order, to be deposited into the Water Rights Fund pursuant to Water Code section 1054, et seq.

ORDER

IT IS HEREBY ORDERED THAT the attached Settlement Agreement between the Division’s Prosecution Team and Henning is approved and is incorporated by reference into this Order.

This Order constitutes a Cease and Desist Order for purposes of Division 2, Part 2, chapter 12 of the California Water Code (commencing with section 1825). Violations of

this Settlement Agreement and the Order will be subject to further enforcement under Water Code section 1845 at the discretion of the State Water Resources Control Board.

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

Section 1845, subdivision (b) of the Water Code provides:

- (1) Any person or entity that 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 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.

STATE WATER RESOURCES CONTROL BOARD


Thomas Howard
Executive Director

Dated: 11/26/13

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between Bruce, Jim and Russ Henning ("Henning") and the Prosecution Team of the State Water Resources Control Board's ("State Water Board") Division of Water Rights ("Division Prosecution Team") and is executed this 5th day of ~~October~~, 2013.
November,

RECITALS

1. Henning owns and operates a reservoir located at 7055 Lakeville Highway, Petaluma, Sonoma County Assessor Parcel Number (APN) 068-110-018. Henning acquired the property and began operating the reservoir in 2010. The Division has no record of a water right authorizing the storage of water in the reservoir.
2. On February 15, 2011, Division staff conducted an inspection of the Henning property, accompanied by Jim Henning. During the inspection, Division staff found that the reservoir diverts surface water to storage in the reservoir from an Unnamed Stream and concluded the diversion is subject to the permitting authority of the State Water Board. Mr. Henning disclosed that he has a domestic well but the well water is not added to the reservoir. No other sources of water were disclosed. Mr. Henning stated that the use of water is gardening (irrigation) and stockwatering.
3. By letter dated September 20, 2011, the Division notified Henning that storage of water in a reservoir without an existing water right is considered to be an unauthorized diversion of water. The letter directed Henning to: (1) provide evidence satisfactory to the State Water Board that demonstrates the reservoir does not store water, or can be operated without storing water subject to the State Water Board's permitting authority; (2) remove the reservoir or render it incapable of storing water; or (3) file an application with the State Water Board seeking permission to appropriate water. Henning was also required to file an Initial Statement of Water Diversion and Use (Statement) pursuant to Water Code section 5100, et. seq.. Henning was given 45 days to submit a response indicating the intended course of action and an implementation plan with a schedule.
4. On November 1, 2011, the Division received an initial Statement by Bruce Henning on behalf of Bruce, Jim, and Russ Henning and the Bruce, Jim and Russ Henning Ranch. The statement identifies water is used for cows and gardening and for water for 40 head of livestock and 20 head of offspring. The Division accepted the Initial Statement as Statement No. S021310 on November 1, 2011. A handwritten letter accompanied the statement in which Mr. Henning indicates the reservoir was constructed by the Army Corps over 60 years ago and is stocked with fish from the Department of Fish and Game. No application to appropriate water by storage was filed by Henning.

Henning Settlement Agreement

5. As of March 8, 2013, Henning had not complied with any of the directives set forth in the September 20, 2011, letter, other than filing the initial statement of water diversion and use.
6. On March 8, 2013, the Division Prosecution Team issued an Administrative Civil Liability Complaint ("ACLC") and a Draft Cease and Desist Order ("Draft CDO") against Henning, alleging that Henning unlawfully diverted water to storage in the reservoir, which constitutes an unauthorized diversion and a trespass against the State of California in violation of California Water Code section 1052. The ACLC recommends an Administrative Civil Liability in the amount of \$18,000, based on the relevant circumstances, including the equivalent cost to pump groundwater to replace an estimated 5.7 acre-feet per year of evaporative losses during the years 2010, 2011 and 2012, plus the costs of water right filing fees, staff costs to bring the matter to hearing and, in accordance with Water Code section 1055.3, an additional amount based on the continued diversion and storage without corrective action following the September 20, 2011, notification.
7. On March 28, 2013, Henning timely requested hearings on the ACLC and Draft CDO. At the time of this Settlement Agreement, the State Water Board has not scheduled hearings for the ACLC and Draft CDO.
8. The ACLC and Draft CDO use Division staff calculations that the reservoir has a surface area of 1.9 acres and a capacity of 16 acre-feet. Henning subsequently provided evidence of a reservoir survey by a registered civil engineer that established the reservoir has a surface area of 2.08 acres and a capacity of 9.6 acre-feet. Consumptive use by evaporation is estimated by Henning's consulting engineer to be 6.24 acre-feet annually. Division staff accepts these new calculations to be reliable.
9. On July 24, 2013, Henning filed with the State Water Board applications for a Small Domestic Use Registration and a Livestock Stockpond Registration for its 9.6 acre-foot reservoir. The water right filings fee for each registration was \$250.
10. In lieu of hearings on the matter, Henning and the Division Prosecution Team agree to settle the matters identified in the ACLC and Draft CDO through this Settlement Agreement.
11. This Settlement Agreement will be submitted to the State Water Board's Executive Director for approval and adoption pursuant to Government Code section 11415.60 as a decision by settlement and will become effective when the State Water Board's Executive Director issues an order approving the settlement.

NOW, THEREFORE, in consideration of these Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, Henning and the Division Prosecution Team do hereby agree to settle the ACLC and Draft CDO as follows:

1. **Recitals Incorporated.** The preceding Recitals are incorporated herein.

Henning Settlement Agreement

2. **Settlement Conditionally Confidential.** Unless and until the State Water Board's Executive Director issues an order approving this Settlement Agreement, this Settlement Agreement is a confidential settlement document subject to all of the limitations on admissibility set forth in California Evidence Code sections 1152 and 1154. Furthermore, pursuant to Government Code section 11415.60, this Settlement Agreement is not admissible in an adjudicative proceeding or civil action for any purpose.
3. **Administrative Civil Liability.** Henning shall be subject to administrative civil liability in the amount of \$12,150. This amount is based on the relevant circumstances, including consumptive use by livestock and replacement costs for evaporation losses of 6.24 acre-feet per year for the 3 year period covered in the ACLC plus an additional amount based on the continued diversion and storage without corrective action following the September 20, 2011, notification, and the estimated costs incurred by State Water Board staff to investigate and prosecute the administrative civil liability and cease and desist enforcement actions that are the subject of this Settlement Agreement.
4. **Administrative Civil Liability Payment.** Within 30 days following the State Water Board Executive Director's approval of this Settlement Agreement, Henning shall pay \$12,150 to the State Water Board. The State Water Board will deposit said funds in the Water Rights Fund pursuant to Water code sections 1054, et seq.
5. **Satisfaction of Administrative Civil Liability Complaint.** Henning's full payment under paragraph 4 will be a complete and final satisfaction of the administrative civil liability described in the ACLC, and the State Water Board will not bring any further administrative civil liability or other enforcement action regarding any of the alleged violations described in the ACLC.
6. **Draft Cease and Desist Order.** Henning and the Division Prosecution Team agree to settle the Draft CDO as follows:
 - a. Henning shall diligently pursue the registrations of the applications filed for Small Domestic Use (D032167) and Livestock Stockpond (L032168) for its 9.6 acre-foot reservoir and shall accept the terms and conditions required by the State Water Board, and terms that may be imposed by the Department of Fish and Wildlife. Henning shall pay the required renewal fees for these registrations whenever required. The State Water Board may determine that one of these registrations is unnecessary because the stated use of water is incidental to the uses being made under the primary registration use; Henning and the Division Prosecution Team agree that such a later determination by the State Water Board does not affect the terms and conditions of this settlement.

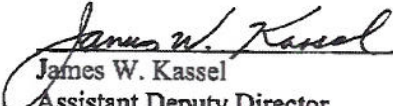
Henning Settlement Agreement

7. **Enforcement of this Settlement Agreement.** The terms and conditions of the Settlement Agreement and this Order shall be treated as a final cease and desist order issued by the State Water Board pursuant to chapter 12 of the California Water Code (commencing with section 1825). Violations of this Settlement Agreement and the Order will be subject to further enforcement under Water Code section 1845 at the discretion of the State Water Resources Control Board.
8. **Hearing.** Upon execution of this Settlement Agreement by both parties, Henning and the Division Prosecution Team shall request that the hearing in this matter be indefinitely postponed pending approval of this Settlement Agreement by the Executive Director. Upon approval of this Settlement Agreement by the State Water Board's Executive Director, Henning's request for hearing on the ACLC and Draft CDO is withdrawn.
9. **Waiver of Reconsideration.** Henning waives its right to request reconsideration of the State Water Board Executive Director's order approving this Settlement Agreement, provided no material modifications to this Settlement Agreement or additional requirements beyond the requirements of this Settlement Agreement are included in that order.
10. **Successors.** This Settlement Agreement is binding on any successors or assigns of Henning and the State Water Board.
11. **Independent Judgment.** Each party represents and declares that in executing this Settlement Agreement it is relying solely on its own judgment, knowledge and belief concerning the nature, extent and duration of its rights and claims, and that it has not been influenced to any extent whatsoever in the execution of this Settlement Agreement by any representations or statements regarding any matters made by other parties hereto or by any person representing them.
12. **No Precedent.** This Settlement Agreement involves unique facts and legal issues and shall not be used as a precedent decision of the State Water Board.
13. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
14. **Entire Agreement.** This Settlement Agreement reflects and represents the entire agreement between and among the parties and supersedes any and all prior understandings, representations, and agreements whether written or unwritten. Each party represents that it has not relied on any inducements, promises or representations made by the other party other than those contained in this Settlement Agreement.
15. **Mutual Agreement.** The parties have agreed to the particular language in this Settlement Agreement, and this Settlement Agreement shall not be construed against the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.

Henning Settlement Agreement

16. **Counterparts.** This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.
17. **Reasonableness of Settlement.** The parties represent and warrant that this Settlement Agreement is made in good faith and in full recognition of the implications of such agreement.
18. **Section Headings.** The parties intend that the paragraph headings of this Settlement Agreement be used solely as a convenient reference and that they shall not in any manner amplify, limit, modify or otherwise aid in the interpretation of this Settlement Agreement.
19. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving Settlement Agreement.
20. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
21. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
22. **State Water Board Is Not Liable.** Neither the State Water Board members nor the Board's staff, attorneys or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by Henning, or its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement, nor shall the State Water Board, its members or staff be held as parties to or guarantors of any contract entered into by Henning's directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement.

Dated: 11/5/ 2013


James W. Kassel
Assistant Deputy Director
State Water Board, Division of Water Rights
Prosecution Team

Dated: 10-29 2013


Bruce, Jim or Russ Henning
Henning Ranch