

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

DIVISION OF WATER RIGHTS

ORDER WR 2013-0080-DWR

CEASE AND DESIST ORDER

In the Matter of
Threatened Unauthorized Diversion of Water and
Threatened Violation of Terms and Conditions for License 6965 (Application 4413)

Benbow Water Company

SOURCE: South Fork Eel River and East Branch of the South Fork Eel River

COUNTY: Humboldt 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 Benbow Water Company (referred to herein as BWC) to cease and/or abate a threatened or ongoing violation of one or more conditions of License 6965 (Application 4413) and Statement S016147.

BWC is alleged to have violated or is threatening to violate California Water Code section 1052 and/or license terms issued in accordance with California Water Code Division 2. California Water Code section 1831 et seq. authorizes the State Water Board 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 unauthorized diversion or use of water subject to this division.*
- (2) *Any term or condition of a permit, license, certification, or registration issued under this division.*
- (3) *Any decision or Order of the Board issued under part 2 of Division 2 of the California Water Code (commencing with section 1200), section 275, or Article 7 (commencing with section 13550) of Chapter 7 of Division 7, 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 November 22, 2013, 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 BWC for the violation of the terms and conditions of its license and the unauthorized diversion or 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 CDO 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.

FACTUAL BASIS FOR ISSUING THE CDO

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

1. On January 2, 1964, the Division issued License 6965 (Application 4413) in part to Benbow Trust and in part to the State of California, Department of Parks and Recreation (DPR). License 6965 authorized Benbow Trust to divert 0.52 cubic foot per second (cfs) of water by direct diversion from April 1 to October 31 of each year from the East Branch of the South Fork Eel River for the purposes of domestic and irrigation uses within an area commonly known as Benbow Subdivision, Hotel, and Golf Course. License 6965 also authorized DPR to divert 502 acre-feet per annum to storage to be collected from about May 1 to June 30 of each year from the South Fork Eel River for irrigation and recreational use at Benbow Lake State Recreation Area. The place of use for all purposes under License 6965 is located within Section 31, T4S, R4E, HB&M, Section 36, T4S, R3E, HB&M, and Section 1, T5S, R3E, HB&M, as shown on map filed with the State Water Board (Exhibit A).
2. On May 21, 1976, the owners of record for License 6965 changed to BWC and DPR, as requested by the authorized representative of Benbow Trust.
3. BWC submitted a Statement of Water Diversion and Use (Statement) (S016147) on August 6, 2008, reporting a riparian claim for domestic and irrigation uses within the subdivision, park, and resort during the wet season. Water diverted under a riparian claim must be used on property that is contiguous to the source being diverted and cannot be used outside of the watershed of the source.
4. The Division received a confidential complaint on September 11, 2012, alleging that BWC is selling water to commercial water delivery companies which deliver the water to customers outside BWC's licensed place of use and the East Branch of the South Fork Eel River watershed. The complainant also alleges that the diversion injures public trust resources. The Division notified BWC of the complaint by letter dated November 14, 2012. Mr. Winston Benbow responded on behalf of BWC in an e-mail dated January 25, 2013. The January 25, 2013 response indicates that BWC sells water to commercial water haulers through a metered fill station. The third-party water haulers provide BWC information regarding the date and amount of each individual load purchased, but BWC does not maintain records about the purpose and location of the use of this water. BWC summarized bulk water sales for 2012 as 2,357,247 gallons (7.24 acre-feet), generating \$14,007 in revenue for the utility. Division staff's investigation found that the sale of water to water delivery companies is conducted solely by BWC and that DPR does not receive any revenue from BWC's bulk water sales. Mr. Winston Benbow confirmed by letter dated April 8, 2013 that bulk water sales were delivered outside the place of use covered by License 6965.
5. The Division sent a follow-up letter to BWC dated March 12, 2013, notifying BWC that water diverted under License 6965 and under riparian claims must be put to use within the licensed place of use and/or on riparian parcels. Division staff determined that any bulk water sales by BWC, except to recipients within its limited places of use, is a violation of the terms and conditions of the license and/or are unauthorized diversions under a riparian claim. The Division's letter also requested that BWC respond and notify the Division of its intent with regard to terminating or continuing bulk water sales. Mr. Winston Benbow responded on behalf of BWC in a letter dated April 8, 2013. In the April 8th response, Mr. Winston Benbow states that BWC had terminated all bulk water sales outside the licensed place of use, other than for emergency services, and requests that the State Water Board allow BWC to continue bulk water sales for local community sponsored events within seven miles of the licensed place of use.
6. BWC currently provides water service to 120 residential connections and 5 commercial connections under License 6965. Through the course of the complaint investigation, Division staff became aware that approximately 20 of the residential connections are outside of BWC's licensed place of use. It is the Division's understanding that BWC intends to petition to expand the place of use under License 6965 to include the approximately 20 residential connections while continuing to provide water service to those residences. License 6965 has a limited diversion season from April 1 to October 31; therefore, petitioning to expand the place of use under License 6965 to include the residential connections currently served outside the licensed place of use will not authorize year-round service under the license. In order to provide water service to the residential connections outside the licensed service area between November 1 and March 31, BWC must demonstrate a

valid basis of water right or apply for an appropriative water right to cover the unauthorized season. Providing water service outside of the place of use and outside the season of diversion, however, will continue to be unauthorized until the State Water Board approves the Petition for Change, if ever, and/or issues an appropriative water right, if necessary. Continued delivery of water to parcels outside the authorized place of use covered by BWC's license constitutes an unauthorized diversion of water in violation of California Water Code section 1052.

7. BWC claims riparian water rights for domestic and irrigation uses within their existing service area boundaries during November 1 of each year through March 31 of the succeeding year. Division staff's complaint investigation did not include an evaluation of the validity of BWC's riparian claim and did not include a determination whether water service provided by BWC to parcels within the licensed place of use has a basis of water right outside of the licensed season of diversion of April 1 through October 31.
8. Based on self-reported water usage, BWC's monthly maximum diversion rate prior to 2004 has not been greater than 57% of the maximum rate authorized under License 6965 for the purposes of use and place of use authorized by that license. The potential impacts from using water outside of the place of use designated in License 6965 were not considered at the time that License 6965 was issued because such use is not authorized. Furthermore, the delivery and use of water outside of the designated place of use has the potential to adversely impact source water flows because of the potential for increased demand above and beyond historical use and loss of flows to the watershed when water is put to use outside the watershed.
9. The East Branch of the South Fork Eel River supports steelhead trout and other aquatic resources and contributes flow to the South Fork Eel River. The South Fork Eel River is designated as a California Wild and Scenic River and is a regionally important fish-bearing stream that currently supports three threatened salmonid species. Coho salmon is listed as "threatened" by the California and federal Endangered Species Act. Chinook salmon and steelhead trout are federally-listed as "threatened". While the adverse impacts of unauthorized water diversions on fisheries and riparian habitat have not been quantified in this case, the unauthorized diversion of water reduces the amount of water available for fisheries and other riparian habitat.
10. Division staff consulted with Department of Fish and Wildlife (DFW) staff regarding the allegation of threat to public trust resources resulting from BWC's bulk water sales outside of the licensed place of use. DFW staff stated that continued bulk water sales by BWC pose a threat to public trust resources and fisheries. DFW staff has observed changes in conditions in the South Fork Eel River watershed due to low flow conditions. Thus, additional demands on the South Fork Eel River watershed would further exacerbate the current impaired flow conditions of a Wild and Scenic River, which have already resulted in diminished flows, algae growth, warmer water, and food supply impacts.
11. Based on the information collected by the Division during the complaint investigation, continued bulk water sales would pose a threat of unauthorized diversion and use of water outside the authorized place of use covered by BWC's license.
12. California Water Code section 106 declares that the use of water for domestic purposes is the highest use of water. The Division has the discretion to determine under what conditions water may be taken and used. For the purpose of this CDO, the Division has determined that emergency domestic use is limited to temporary circumstances where such deliveries are necessary to sustain human and animal life, including sanitary use. Irrigation of lawns, gardens, and landscaping is not an emergency need of water.
13. California Water Code section 1701 allows a water right applicant, permittee, or licensee to modify water right permits and licenses for changes in point of diversion, place of use, or purpose of use upon permission of the State Water Board. BWC may file a Petition for Change with the Division to modify its license to include areas outside of the licensed place of use. Before approving any change petition, California Water Code section 1701.2 requires the Division to determine that the change will not injure any legal water user and that the change will not harm fish or wildlife.

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

1. BWC must immediately cease and desist the bulk sale and delivery of water under License 6965 to local community-sponsored events outside the authorized place of use until a Petition for Change for such deliveries is approved by the State Water Board, if ever. BWC must include the areas of the event locations where BWC would like to be able to provide bulk water deliveries in the Petition for Change for the place of use under License 6965 that must be filed in accordance with requirement 3 below.
2. Within 30 days of the date of this Order, BWC must:
 - a. Cease and desist all other bulk sale and delivery of water under License 6965 to areas outside the authorized place of use or outside of the licensed season of diversion and/or under Statement S016147 to areas not allowed under a riparian claim, unless it is needed for emergency domestic water supply. BWC shall determine the need for emergency water supply in a manner satisfactory to the State Water Board.
 - b. If bulk water sales continue, as authorized under License 6965, Statement S016147, or this CDO, then BWC shall keep accurate records of each sale, including the volume of water sold, the date of the sale, the name of the commercial water hauler purchasing the water, and the final purpose of use and place of use. Records of such bulk sales of water, including place of use of water, shall be made available to the Division upon request so that the Division can assess compliance with applicable license terms and this Order.
 - c. BWC shall maintain separate records of the amount of bulk water sales provided for emergency domestic water supply service needs served to areas: (1) outside of the authorized place of use under License 6965; (2) outside the licensed season of diversion under License 6965; and (3) without a riparian claim under Statement S016147. BWC shall report the monthly total amounts of such bulk water sales separately from the amounts reported on its annual license report and as an attachment to its annual license report.
3. Within 60 days of the date of this Order, BWC must:
 - a. File a Petition for Change in place of use under License 6965 that includes all areas currently receiving water service from BWC with water diverted under this license. BWC shall diligently pursue the processing of the petition by submitting all necessary fees, environmental documents, and other information required by the State Water Board within the time schedules specified. If and until the State Water Board approves the change petition, BWC shall maintain monthly records of the amount of water served to areas outside the authorized places of use and report the monthly amounts separately from the amounts reported on its annual license report. The monthly record of amount served outside the authorized place of use shall be submitted as an attachment to the annual license report.
 - b. Demonstrate a valid basis of right for delivery of water from November 1 of each year to March 31 of the succeeding year to the approximately 20 residential connections outside the place of use under License 6965. If BWC does not demonstrate a valid basis of right for the unauthorized season, BWC must file an appropriative water right to cover the diversion and use of water during the season not currently authorized by License 6965.
4. BWC must immediately discontinue adding new residential or commercial water service connections to parcels outside of the place of use under License 6965 and/or parcels without a riparian claim of right under Statement S016147 until such time that a year-round valid basis of right is demonstrated.

Consequences of Non-Compliance

In the event BWC fails to comply with the requirements of this Order, BWC shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability, pursuant to California Water Code section 1845, subdivision (b)(1) of up to \$1,000 for each day in which the violation occurs or referral to the Attorney General to take further enforcement action, as described in California Water Code section 1845, subdivision (a):

Upon the failure of any person to comply with a cease and desist order issued by the board pursuant to this chapter, the Attorney General, upon the request of the board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

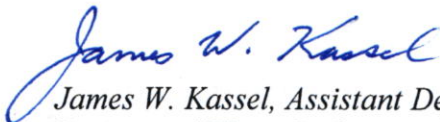
Reservation of Enforcement Authority and Discretion

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

Regulatory Changes

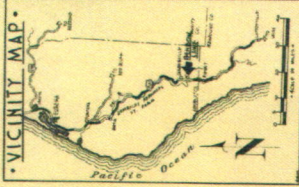
Nothing in this Order shall excuse BWC from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right license requirements.

STATE WATER RESOURCES CONTROL BOARD



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

Dated: **DEC 31 2013**



⊗ = POINTS OF INTEREST RE APPLICATION #4413.
 (C) = CONVEYANCE TO COUNTY # 9-27-59

1. SALEM J. STEWART, A LICENSED LAND SURVEYOR OF THE STATE OF CALIFORNIA, BY WHOM CERTAIN PARTS OF THE BENCH MAP WERE PREPARED IN THE MONTH OF JANUARY OF 1959, HAS ADVISED THAT HE HAS REVIEWED THE ABOVE APPLICATION AND THAT HE HAS RECORDED THE SAME IN HIS OFFICE.

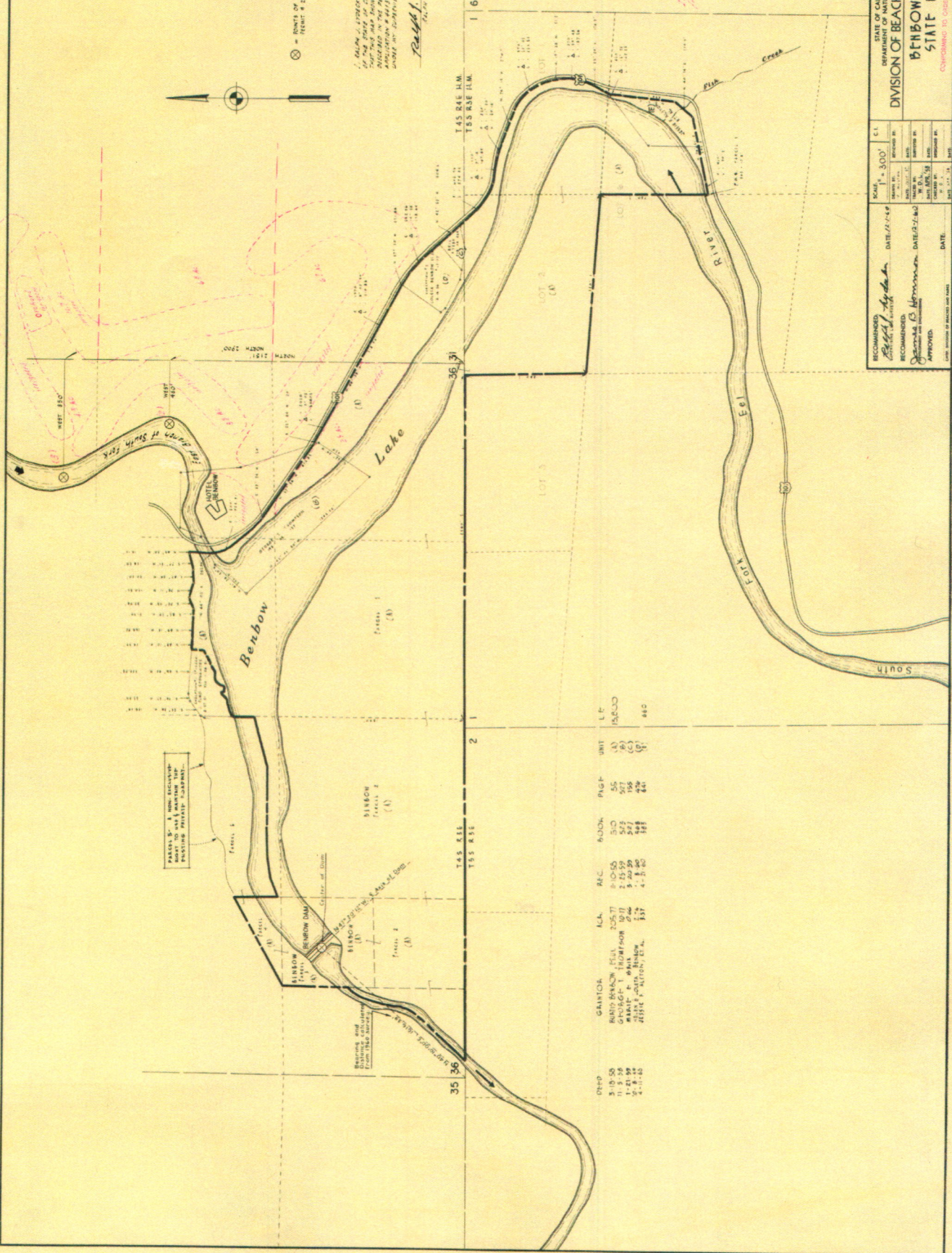
Ralph J. Hyden
 Surveyor
 L.S. 1317

SECTION MAP
 FOR RECORDS REQUIRED
 ON 7-2-59
 A 4413

STATE OF CALIFORNIA
 DEPARTMENT OF NATURAL RESOURCES
 DIVISION OF BEACHES AND PARKS
BENBOW LAKE STATE PARK

RECOMMENDED BY: *Ralph J. Hyden* DATE: 12-17-59
 RECOMMENDED BY: *W. B. ...* DATE: 12-17-59
 APPROVED BY: *W. B. ...* DATE: 12-17-59

SCALE: 1" = 300'
 SHEET NO. 1 OF ONE
 44-40
 44-40



PARCELS 5 & 6 ARE EXCLUDED FROM THE BENCH MAP.

DATE	GRANTOR	CLA.	REC.	BOOK	PAGE	UNIT	LF
3-10-50	RAUL RANON	FSU	25571	5/0	55	(A)	183-00
11-3-56	GEORGE T. TRUMPFOR	1211	2-25-59	543	577	(B)	
2-1-59	MAINT. DIST. BENBOW	2nd	9-20-59	247	156	(C)	
2-11-45	JERIE F. NATION, ET AL.	157	4-3-60	144	44	(D)	440

EXHIBIT A