

## State Water Resources Control Board

MAR 23 2012

In Reply Refer to:  
JWetzel:ENF00130

CERTIFIED MAIL NO.7004-2510-0003-9152-9297  
Return Receipt Requested

Douglas K. Ivey  
3330 Paradise Drive  
Tiburon, CA 94920

Dear Mr. Ivey:

### ENFORCEMENT ACTION ENF00130 - ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND NOTICE OF PROPOSED CEASE AND DESIST ORDER REGARDING UNAUTHORIZED DIVERSION OF WATER WITHIN THE NAPA WATERSHED IN NAPA COUNTY

Enclosed are an Administrative Civil Liability (ACL) Complaint and a draft Cease and Desist Order (CDO). This letter serves as notice to Douglas K. Ivey (Ivey) 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.

By letter dated August 18, 2011, the Division notified Ivey of its investigation into the water rights for existing reservoirs within the area subject to the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Instream Flow Policy), adopted May 4, 2010 (Notice Letter). A copy of the Notice Letter is enclosed for your convenience. The Notice Letter informed Ivey that the Division identified property owned by Ivey in the Instream Flow Policy area as containing a reservoir for which no record of a valid existing water right could be found. The property in question is identified by the Napa County Assessor as Parcel Number 039-010-006.

The State Water Board considers the August 18, 2011 Notice Letter as notification of potential violations for enforcement purposes. To date, the State Water Board's records indicate that Ivey has not submitted: (1) evidence supporting an existing basis of right or explaining why the diversion is not subject to the State Water Board's permitting authority; (2) a corrective action plan describing how Ivey would prevent further unauthorized diversions from occurring; nor (3) a Statement of Water Diversion and Use (Statement) for the diversion in question.

In December 2011 the Division did a detailed review of aerial photographs and United States Geological Survey (USGS) Quadrangle maps, which clearly show that your dam and reservoir constitute a diversion of water as defined by Water Code section 5100. Furthermore, there is no record of either an appropriative water right issued by the State Water Board authorizing your water diversion facility or a Statement having been filed with the Division for the storage of water in your reservoir.

Based on these findings, I signed the enclosed ACL Complaint against Ivey proposing a liability of **\$8,000** be imposed for unauthorized diversion and use of water for the last three years. Pursuant to the enclosed ACL Complaint, the \$8,000 is due and payable within 20 days of receipt of the ACL Complaint unless Ivey request a hearing before the State Water Board in accordance with Water Code section 1055, subdivision (b). The request 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.

CHARLES R. HOPPIN, CHAIRMAN | THOMAS HOWARD, EXECUTIVE DIRECTOR

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Also enclosed is a draft CDO that requires Ivey 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: (1) submitting a registration form for a Small Domestic Use or Livestock Stockpond if applicable; or (2) filing for an appropriative water right permit that would authorize the diversion and use of water at the reservoir; and submitting an operational plan that demonstrates how the reservoir will be operated in conformance with the requirements set forth in the Instream Flow Policy. In addition, the draft CDO specifies that should the State Water Board not issue a water right permit, Ivey must render the reservoir incapable of storing water subject to the permitting authority of the State Water Board.

If Ivey disagrees with the facts or time schedules for the corrective actions set forth in the enclosed draft CDO, Ivey may request a CDO hearing before the State Water Board no later than 20 days from the date of receipt of this letter. Unless a written request for hearing regarding the draft CDO signed by or on behalf of Ivey is delivered to or received by mail by the State Water Board within 20 days after receipt of this letter, 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. (Water Code § 1834)

If Ivey requests 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 Ivey will be notified of the hearing date. Prior to the hearing Ivey will be required to submit any written testimony and other evidence Ivey would like the State Water Board to consider.

A request for an ACL hearing and/or a CDO hearing 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 request for hearing may also be hand delivered to:

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

In summary, Ivey should take immediate action to:

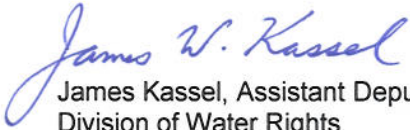
- (1) Remit payment of the ACL, or a written request for a hearing with regard to the ACL Complaint;
- (2) File a Statement of Water Diversion and Use as required by California Water Code sections 5100-5107; and
- (3) Begin complying with the provisions of the draft CDO within 30 days by submitting one of the following (in accordance with the provisions of the draft CDO): (a) evidence that a registration form for the registration of a Small Domestic Use or Livestock Stockpond has been submitted to the Department of Fish and Game; (b) an appropriative water right application; or (c) 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; or submit a written request for a hearing with regard to the draft CDO.

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.

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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 (961) 341-5368 or [JOHAGAN@waterboards.ca.gov](mailto:JOHAGAN@waterboards.ca.gov); or Yvonne West, Senior Staff Counsel, Office of Enforcement at (916) 322-3626 or [YWest@waterboards.ca.gov](mailto:YWest@waterboards.ca.gov).

Sincerely,



James Kassel, Assistant Deputy Director  
Division of Water Rights

Enclosures:

- August 18, 2011 letter
- Administrative Civil Liability Complaint
- Draft Cease and Desist Order
- Exhibit A: Aerial Photograph
- Exhibit B: USGS Topo Map

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

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

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## State Water Resources Control Board

**AUG 18 2011**

**TO: Property Owners within Napa River Watershed in Napa County**

### NOTICE OF POTENTIAL UNAUTHORIZED DIVERSION AND USE OF WATER, AND FAILURE TO FILE A STATEMENT OF WATER DIVERSION AND USE FOR DIVERSION OF WATER IN NAPA COUNTY

The State Water Resources Control Board's (State Water Board) Division of Water Rights (Division) is investigating the water rights for existing reservoirs in Marin, Mendocino, Napa, Sonoma, and portions of Humboldt counties. The Division is responsible for the administration of appropriative water rights in California initiated after 1914; commonly referred to as "post-1914 appropriative water rights." In most cases, any reservoir constructed after 1914 that collects surface water for storage requires an appropriative water right issued by the State Water Board. This investigation is being conducted as part of the State Water Board's continuing authority to protect public trust resources such as the threatened salmon and steelhead fisheries. The diversion of water to storage can lead to dewatering of stream channels and loss of gravel and woody debris critical to fishery habitat. The Division is trying to protect the fishery resources from unauthorized diversions by ensuring that all storage facilities are operating legally.

Marin, Mendocino, Napa, Sonoma and Humboldt Counties are within the area subject to the State Water Board's Policy for Maintaining Instream Flows in Northern California Coastal Streams (Policy), adopted May 4, 2010. Implementation of this Policy guides the processing of applications for new water rights within the Policy area. There are three stream class types identified in the Policy area. Class I streams are streams where fish are always or seasonally present. Class II streams are streams where fish are not present, but aquatic non-fish vertebrates (frogs, salamanders, etc.) and/or aquatic benthic macro-invertebrates (insects) exist. Class III streams do not support aquatic life. The Policy states that the State Water Board, after May 5, 2011, will no longer approve water right applications for reservoirs built with an onstream dam on streams designated as a class I or class II stream. Reservoirs built on class III streams may still file a water right application.

You are being contacted because Napa County records indicate you own property in the Policy area, identified by the assessor parcel number listed on the envelope, on which a reservoir has been identified that appears to be on either a class I, class II, or class III stream. Division staff has determined there is no record of an appropriative water right on file authorizing this water diversion facility. An unauthorized diversion of water constitutes a trespass against the State and the State Water Board may impose a civil liability in an amount not to exceed \$500 for each day that a trespass occurs. (Wat. Code, § 1052, et seq).

AUG 18 2011

In addition, Water Code section 5101 requires, with minor exceptions, that a person who diverts water from a stream in the absence of a permit, license or registration must file a Statement of Water Diversion and Use (Statement) with the State Water Board. The State Water Board may administratively impose a civil liability in the amount of \$1,000 for the failure to file a Statement for diversions that have occurred since 2009, 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. (Wat. Code, § 5107, subd. (c)(1)).

This matter requires your immediate attention, and the State Water Board will consider your prompt cooperation and corrective actions taken in response to this notice in determining whether and what civil liability is appropriate for any violations. Your response may be one of the following:

1. If you believe you have been contacted in error, recently sold the above listed property, or do not have a pond or reservoir on the identified property, please immediately contact Division staff at the number below to rectify Division records accordingly.
2. If a pond or reservoir exists on your property, but you have or are claiming an existing basis of water right, or have been filling the facility with purchased water, groundwater or other water not subject to the State Water Board's permitting authority, you should submit any information that supports these facts to the State Water Board within 30 days of the date of this letter. Division staff may schedule an inspection of the reservoir site to confirm these facts before closing the matter. For a list of frequently asked questions and additional information about water subject to the State Water Board's permitting authorities please see [http://www.waterboards.ca.gov/waterrights/board\\_info/](http://www.waterboards.ca.gov/waterrights/board_info/).
3. If the pond or reservoir on your property does collect water subject to the State Water Board's water right permitting authority, you will need to take corrective actions to prevent continued unauthorized diversions. Corrective actions may vary, depending on site location, reservoir size and use of water, stream classification and State laws and regulations. Normally, an unauthorized diversion can be stopped, removed, rendered incapable of storing water, or legalized through the appropriate water right permit process. Please note that the filing of a water right application to appropriate water does not authorize diversion of water unless and until the State Water Board issues a permit for that application. Additionally, an application for water right is subject to filing and annual fees, public notice and environmental review under the California Environmental Quality Act (CEQA). The option to file an application to appropriate water in this case may be restricted if the Policy analysis estimating the stream classification is correct. Within 60 days of the date of this letter, you should submit a corrective action that identifies the action to be taken to correct the unauthorized diversion, and a schedule for completion of the corrective actions.

You may want to consult with an attorney or consultant familiar with water right laws before selecting a corrective action or providing a response. The State Water Board maintains a list of attorneys and consultants on its website at:

[http://www.waterboards.ca.gov/waterrights/board\\_info/contacts.shtml](http://www.waterboards.ca.gov/waterrights/board_info/contacts.shtml).

AUG 18 2011

Additionally, if you have diverted water in 2009 or 2010, you should immediately file a Statement using the form available at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/diversion\\_use/docs/intl\\_stmnt\\_for\\_m.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/docs/intl_stmnt_for_m.pdf). Information relating to the filing of a Statement, a discussion of the various types of water rights that exist in California and the associated procedures for either obtaining a water right or documenting that a water right already exists is available on our website at: [www.waterboards.ca.gov/waterrights/](http://www.waterboards.ca.gov/waterrights/).

If you have any questions, please refer to our website for general water right information, or contact the Division Enforcement Section at (916) 341-5342. Written correspondences should be addressed as follows:

State Water Resources Control Board  
Division of Water Rights  
Attention: Aaron Miller  
P.O. Box 2000  
Sacramento, CA 95812-2000.

Please note that if your diversion is unauthorized, the State Water Board can initiate enforcement action at its discretion and without further notice, so timely responses are important.

Sincerely,



Aaron Miller, Chief  
Enforcement Unit 4

cc: San Francisco Bay  
Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Department of Fish and Game  
Bay Delta Region  
7329 Silverado Trail  
Napa, CA 94558

National Marine Fishery Service  
Attention PRD Division  
777 Sonoma Avenue, Room 325  
Santa Rosa CA 95404

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

DIVISION OF WATER RIGHTS

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

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

**Douglas K. Ivey**

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SOURCE: Unnamed Stream tributary to Milliken Creek thence Napa River

COUNTY: Napa

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**YOU ARE HEREBY GIVEN NOTICE THAT:**

1. Douglas K. Ivey (Ivey) is alleged to have violated California Water Code section 1052(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(b) provides that the State Water Resources Control Board (State Water Board or 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 exceptions not relevant to you) who divert water from a surface stream to file Statements of Water Diversion and Use (Statement).
4. Ivey is alleged to have violated California Water Code section 5101, which states, in pertinent 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 . . .*

5. California Water Code section 5107(c)(1) provides that the State Water Board may administratively impose civil liability in the amount of \$1,000 for the failure to file a Statement, 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.
6. California Water Code section 1055(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(a). Pursuant to State Water Board Resolution 2007-0057, 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 2007-0057 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

7. In December 2007 the State Water Board produced a draft Substitute Environmental Document (SED) as part of its development of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Instream Flow Policy). Appendix E of the SED contains the report Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams produced by Stetson Engineers in December 2007. In order to complete this report, Stetson Engineers produced a Geographic Information System (GIS) layer which identified the locations of the existing potential unauthorized dams. In June and July of 2011, a review of the GIS layer, aerial photographs, and United States Geological Survey (USGS) topographic maps of the Napa River watershed was undertaken by the State Water Board's, Division of Water Rights (Division). The review provided evidence that Napa County Assessor's Parcel Number (APN) 039-010-006 contained a reservoir that appears to collect surface flow from an Unnamed Stream and is subject to the permitting authority of the State Water Board. According to Napa County Records, Douglas K. Ivey is the current owner of parcel 039-010-006. From a review of water rights filed with the Division, the Division concluded that there was no record of a Statement having been filed in accordance with Water Code section 5101 et seq. for the reservoir on this parcel.
8. On August 18, 2011, the Division mailed Ivey a letter which notified Ivey that a reservoir had been identified on APN 039-010-006 (Notice Letter). The Notice Letter informed Ivey that the State Water Board does not have any record of a Statement or an appropriative water right authorizing the diversion of water for the subject property and that he needs to file for a water right if the reservoir is collecting water to storage from a surface stream. The Notice Letter explains that unauthorized diversions are considered a trespass against the State for which the State Water Board may issue a civil liability in the amount of \$500 per day for each day that the trespass occurs. Additionally, the Notice Letter advised Ivey of the requirements to file a Statement and potential penalties for failure to file a Statement pursuant to Water Code section 5100 et seq. Lastly, the Notice Letter requested that Ivey take one of the following actions: (1) if Ivey is claiming an existing basis of right or diverting water not subject to the State Water Board's permitting authority, then he should submit evidence supporting those facts within 30 days of the receipt of the Notice Letter; or (2) Ivey agrees that the diversion was subject to the permitting authority of the State Water Board, then the Notice Letter gave Ivey 60 days to develop and submit a corrective action plan to prevent the unauthorized diversion of water.
9. As of February 24, 2012, Ivey has not responded in any manner to the Notice Letter. The Notice Letter was sent regular mail via the U.S. Postal Service to the address of record with the Napa County Tax Assessor's office for Ivey and is presumed to have been delivered because it has not been returned by the U.S. Postal Service as undeliverable. Ivey has not submitted any of the following: (1) evidence supporting an existing basis of right or demonstrating that the diversion is not subject to the State Water Board's permitting authority; (2) a corrective action plan describing how Ivey would prevent further unauthorized diversions from occurring; nor (3) a Statement for the diversion in question.
10. In December 2011 the Division did a detailed review of National Agriculture Imagery Program aerial photographs dated 2010 available from United States Department of Agriculture (USDA) (Exhibit A) and the Capell Valley USGS Quadrangle map, dated 1968 (Exhibit B). These aerial images and maps clearly show that the reservoir is formed by a single axis dam that has been



constructed across an ephemeral stream channel. Division staff estimates the watershed area above the dam is 5.25 acres and the reservoir surface area when full is approximately 0.34 acres. Assuming an average depth of 15 feet, Division staff estimates that the reservoir could store approximately 3.6 acre-feet. Using precipitation data from USGS Digital Line Graphs and the watershed area Division staff estimates an average annual runoff of 3.1 acre-feet. The location of the reservoir, area of the watershed, capacity of the reservoir, and average annual runoff, demonstrate that any reduction in water stored in the reservoir due to consumptive use, evaporation, and/or seepage would be refilled annually. Therefore, the dam and reservoir constitute a diversion of water as defined by Water Code section 5100. Furthermore, the reservoir is a post-1914 diversion and use because it was not included on the original 1951 USGS Quadrangle map (Exhibit B) and is first documented on the map in 1968 as a photo revision. Therefore, the reservoir is a diversion and use subject to the State Water Board's permitting authority (division 2 of the Water Code) for which Ivey has not applied, or obtained a water right permit.

### PROPOSED CIVIL LIABILITY

11. The basis of this complaint is the unauthorized diversion, storage, and use of water by Ivey since at least 2004, and the failure to file a Statement for the diversion of water at the reservoir. The unauthorized diversion and use of water constitutes a trespass subject to liability under California Water Code section 1052 and the failure to file a Statement constitutes a violation subject to liability in accordance with California Water Code section 5107.
12. The maximum civil liability that can be imposed by the State Water Board in the matter of the unauthorized diversion and use of the water is \$500 for each day in which the trespass occurred. Evidence demonstrates that the reservoir has been in existence and continuously holding water since 1968. Ivey has owned the property since 2004 and has collected water from the Unnamed Stream and continuously held some water in storage for at least 7 years. Considering only the last three years of unauthorized diversion and use a civil liability of at least \$547,500 could be considered (\$500 per day 1095 days) for the trespass in this case.
13. In addition, Ivey failed to file a Statement for their diversion and use of water from the Unnamed Stream for either 2009 or 2010 by the deadline of July 1 of either year. 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. Such notice was provided by the Notice Letter on August 18, 2011. By February 24, 2012, Ivey has been on notice of the requirements for filing a Statement for 190 days, therefore the maximum civil liability that can be considered at this time is \$1,000 plus 160 days (\$500), or \$81,000.
14. In total the State Water Board could consider a penalty of \$628,500 (\$547,500 plus \$81,000) for both the unauthorized diversion and the failure to file a Statement. 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.
15. In this case, Ivey has collected and stored water from the Unnamed Stream. These diversions have annually reduced the amount of water available for legitimate downstream water right holders and for the Central California Coastal steelhead trout fishery and other riparian habitat. While the adverse impacts of unauthorized water diversions on prior right holders and 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 water supplies and habitat for steelhead trout. The State of California lists the Central California Coastal steelhead as a species of special concern, and on August 18, 1997, the National Marine Fisheries Service listed the steelhead trout as threatened under the Federal Endangered Species Act. As of this date, Ivey has failed to take any corrective action.

16. Ivey 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, foregoing the cost of acquiring an appropriative water right, and foregoing the cost of annual water right fees. The Ivey property contains a reservoir with an estimated capacity of 3.6 acre-feet. 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. The reservoir has existed since at least 1968 and Ivey has owned the property since 2004. Evaporation losses for the 3.6 acre-foot reservoir have been estimated at 1.02 acre-feet per year. Not considering consumptive use of water or seepage loss from the reservoir, Ivey has replaced at least evaporation losses in each of the last three years that Ivey has owned the property. Accordingly, Ivey has avoided paying an estimated \$606.

Additionally, the Division estimates that its staff cost to review the existing project and develop the enforcement documents to be \$ 2,200. If this matter goes to hearing, the additional staff cost to prosecute this case would be \$10,000. The water right filing fee for 3.6 acre-feet of water would be \$1,000 and the annual water right fees since fiscal year 2009-10 would be \$350.

17. Having taken into consideration the factors described above, and the enforcement goal of deterrence, the Assistant Deputy Director for Water Rights recommends an ACL for the past three years of violation in the amount of **\$8,000**. This liability amount includes a proposed \$1,000 for failure to file the required Statement and is the minimum liability recommended by the Division's Prosecution Team in order to recover staff costs incurred and to impose a disincentive for continued unauthorized diversions and violations of the new Statement law. Should the matter go to hearing, the State Water Board may consider a different liability, including additional staff costs incurred, up to the maximum amount provided by law.

#### RIGHT TO HEARING

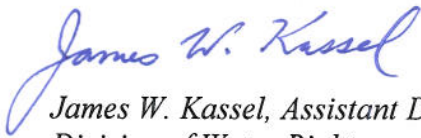
18. Ivey may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date this complaint is received. (Water Code, sec. 1055, subd. (b).)
19. If Ivey requests a hearing, Ivey will have an opportunity to be heard and to contest the allegations in this complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, a separate notice setting the time and place for the hearing will be mailed no later than 10 days before the hearing date.
20. If Ivey requests 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 Water Code and its responsibilities under the public trust doctrine. Any State Water Board Order imposing an ACL shall be final and effective upon issuance.

21. If Ivey does not wish to request a hearing, then within 20 days of the date of this complaint Ivey shall file a Statement, waive his rights to hearing and reconsideration of this matter, and remit a cashier's check or money order for the amount of the ACL set forth in paragraph 17 above, to:

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

22. If Ivey does not request a hearing and does not remit the ACL, the State Water Board will issue a final ACL Order and seek recovery of the full amount of the ACL as authorized by Water Code section 1055.4

STATE WATER RESOURCES CONTROL BOARD



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

Dated: **MAR 23 2012**

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

DIVISION OF WATER RIGHTS

ORDER WR 2012 -00XX-DWR

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**CEASE AND DESIST ORDER**

In the Matter of Unauthorized Diversion by

Douglas K. Ivey

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SOURCE: Unnamed Stream tributary to Milliken Creek thence Napa River

COUNTY: Napa

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The State Water Resources Control Board (State Water Board or board) is authorized under Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Douglas K. Ivey (Ivey) to cease and/or abate a threatened, unauthorized diversion, storage, and use of water in violation of California Water Code section 1052.

Ivey is alleged to have violated or is 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 Ivey for the violation and threatened violation of the prohibition against unauthorized diversion, storage, and use of water. Pursuant to State Water Board Resolution 2007-0057, 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 Water Code section 1831 et seq. State Water Board Resolution 2007-0057 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. Douglas K. Ivey owns property that includes a reservoir on an Unnamed Stream tributary to Milliken Creek. Any water diverted to storage in the reservoir 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. Ivey does not have a water right permit or license to store surface water in said reservoir.

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

#### **FACTUAL BASIS FOR ISSUING A CDO**

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

1. In December 2007 the State Water Board produced a draft Substitute Environmental Document (SED) as part of its development of the Policy for Maintaining Instream Flows in Northern California Coastal Streams (Instream Flow Policy). Appendix E of the SED contains the report Potential Indirect Environmental Impacts of Modification or Removal of Existing Unauthorized Dams produced by Stetson Engineers in December 2007. In order to complete this report, Stetson Engineers produced a Geographic Information System (GIS) layer which identified the locations of the existing potential unauthorized dams. In June and July of 2011, a review of the GIS layer, aerial photographs, and United States Geological Survey (USGS) topographic maps of the Napa River watershed was undertaken by Division staff. The review provided evidence that Napa County Assessor's Parcel Number (APN) 039-010-006 contained a reservoir that appears to collect surface flow from an Unnamed Stream and is subject to the permitting authority of the State Water Board. According to Napa County records, Ivey is the current owner of parcel 039-010-006. From a review of water rights filed with the Division, the Division concluded that there was no record of an Initial Statement of Water Diversion and Use (Statement) having been filed in accordance with Water Code section 5101 et seq. for the reservoir on this parcel.
2. On August 18, 2011, the Division mailed Ivey a letter which notified Ivey that a reservoir had been identified on APN 039-010-006 (Notice Letter). The Notice Letter informed Ivey that the State Water Board does not have any record of a Statement or an appropriate water right authorizing the diversion of water for the subject property and that he needs to file for a water right if the reservoir is collecting water to storage from a surface stream. The Notice Letter explains that unauthorized diversions are considered a trespass against the State for which the State Water Board may issue a civil liability in the amount of \$500 per day for each day that the trespass occurs. Additionally, the Notice Letter advised him of the requirements to file a Statement and potential penalties for failure to file a Statement pursuant to Water Code section 5100, et seq. Lastly, the Notice Letter requested that Ivey take one of the following actions: (1) if Ivey is claiming an existing basis of right or diverting water not subject to the State Water Board's permitting authority, then he should submit evidence supporting those facts within 30 days of receipt of the Notice Letter; or (2) Ivey agrees that the diversion was subject to the permitting authority of the State Water Board, then the Notice Letter gave Ivey 60 days to develop and submit a corrective action plan to prevent the unauthorized diversion of water.
3. As of February 24, 2012, Ivey has not responded in any manner to the Notice Letter. The Notice Letter was sent regular mail via the U.S. Postal Service to the address of record with the Napa County Tax Assessor's office for Ivey and is presumed to have been delivered because it has not been returned as undeliverable. Ivey has not submitted any of the following: (1) evidence supporting an existing basis of right or demonstrating that the diversion is not subject to the State Water Board's permitting authority; (2) a corrective action plan describing how Ivey would prevent further unauthorized diversions from occurring; nor (3) a Statement for the diversion in question.

4. In December 2011 the Division did a detailed review of National Agriculture Imagery Program aerial photographs dated 2010 available from United States Department of Agriculture (USDA) (Exhibit A) and the Capell Valley USGS Quadrangle map, dated 1968 (Exhibit B). These aerial images and maps clearly show that the reservoir is formed by a single axis dam that has been constructed across an ephemeral stream channel. Division staff estimates the watershed area above the dam is 5.25 acres and the reservoir surface area when full is approximately 0.34 acres. Assuming an average depth of 15 feet, Division staff estimates that the reservoir could store approximately 3.6 acre-feet. Using precipitation data from USGS Digital Line Graphs and the watershed area, Division staff estimates an average annual runoff of 3.1 acre-feet. The location of the reservoir, area of the watershed, capacity of the reservoir, and average annual runoff, demonstrate that any reduction in water stored in the reservoir due to consumptive use, evaporation, and/or seepage would be refilled annually. Therefore, the dam and reservoir constitute a diversion of water as defined by Water Code section 5100. Furthermore, the reservoir is a post-1914 diversion and use because it was not included on the original 1951 USGS Quadrangle map (Exhibit B) and is instead documented for the first time in 1968 as a photo revision to the map. Accordingly, the reservoir is a diversion and use subject to the State Water Board's permitting authority (division 2 of the Water Code) for which Ivey has not applied, or obtained a water right permit.

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

#### **Corrective Action Options**

##### **Option 1:**

1. If the reservoir in question qualifies for a Small Domestic Use or Livestock Stockpond Registration in accordance with Water Code sections 1228 and forward, then within 30 days of the date of this Order, Ivey shall provide evidence to the Assistant Deputy Director for Water Rights that a Small Domestic Use or Livestock Stockpond Registration form has been completed and submitted to the Water Rights Coordinator for the Department of Fish and Game (DFG) in the Region 3 Office in Napa, and Ivey must diligently pursue that registration.
2. If DFG or the State Water Board rejects Ivey's registration request on the grounds that the reservoir in question is not eligible for registration, then within 30 days of DFG or the State Water Board issuing that decision Ivey shall: (1) file an appropriative water right application with the Division and comply with Option 2 below; or (2) inform the State Water Board that he will not pursue a water right permit and will comply with Option 3 below.

##### **Option 2:**

1. Within 30 days of the date of this Order, Ivey shall file an appropriative water right application with the Division for storage and use of water in their reservoir, 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; and

2. Within 90 days of the date of this Order, Ivey 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 Ivey intends to continue to divert and store water subject to the State Water Board's permitting authority while pursuing a water right 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 Ivey will bypass all water outside the Instream Flow Policy's diversion season of December 15<sup>th</sup> to March 31<sup>st</sup>, 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 in Instream Flow Policy Table 2.1 with the assumption that the point of diversion is below anadromy until it is demonstrated to the Divisions satisfaction that the point of diversion is on a Class II or Class III stream. 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. Ivey 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 Ivey's water right application submitted in accordance with paragraph 1 of this option.
3. If the State Water Board denies or cancels Ivey's water right application, then within 150 days of the State Water Board issuing that decision Ivey 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 3.

Or,

**Option 3:**

1. Within 30 days of the date of this Order, Ivey shall inform the State Water Board that he 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, Ivey 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 two 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, Ivey shall diligently comply with all provisions and time schedules of the plan. If Ivey is unable to comply fully with the plan due to other federal, state, or local agencies with authority over the work required, Ivey 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.

**Compliance with Future Directives of Division**

Whichever corrective action option is taken, Ivey shall comply with any written directive of the Assistant Deputy Director for Water Rights regarding that corrective action plan option until such time as the State Water Board issues a water right permit or the reservoir is rendered incapable of storing water subject to State Water Board's permitting authority.

### **Consequences of Non-Compliance**

In the event Ivey fails to comply with the requirements of this Order, he shall be in violation of this draft CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to Water Code section 1845 (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(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 Ivey for unauthorized diversion or use in violation of Water Code section 1052 regardless of Ivey's compliance with an Operation Plan or other corrective action plan accepted in accordance with a corrective action option described above.

### **Regulatory Changes**

Nothing in this Order shall excuse Ivey 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  
Division of Water Rights*

Dated:





OWNER **DOUGLAS K IVEY**

APN **039-010-006**

RESERVOIR ID No. **399**

IMAGERY SOURCE

**UNITED STATES DEPARTMENT OF AGRICULTURE  
NATIONAL AGRICULTURE IMAGERY PROGRAM**

IMAGERY DATE **2010**

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
**STATE WATER RESOURCES CONTROL BOARD  
DIVISION OF WATER RIGHTS**

**EXHIBIT A**

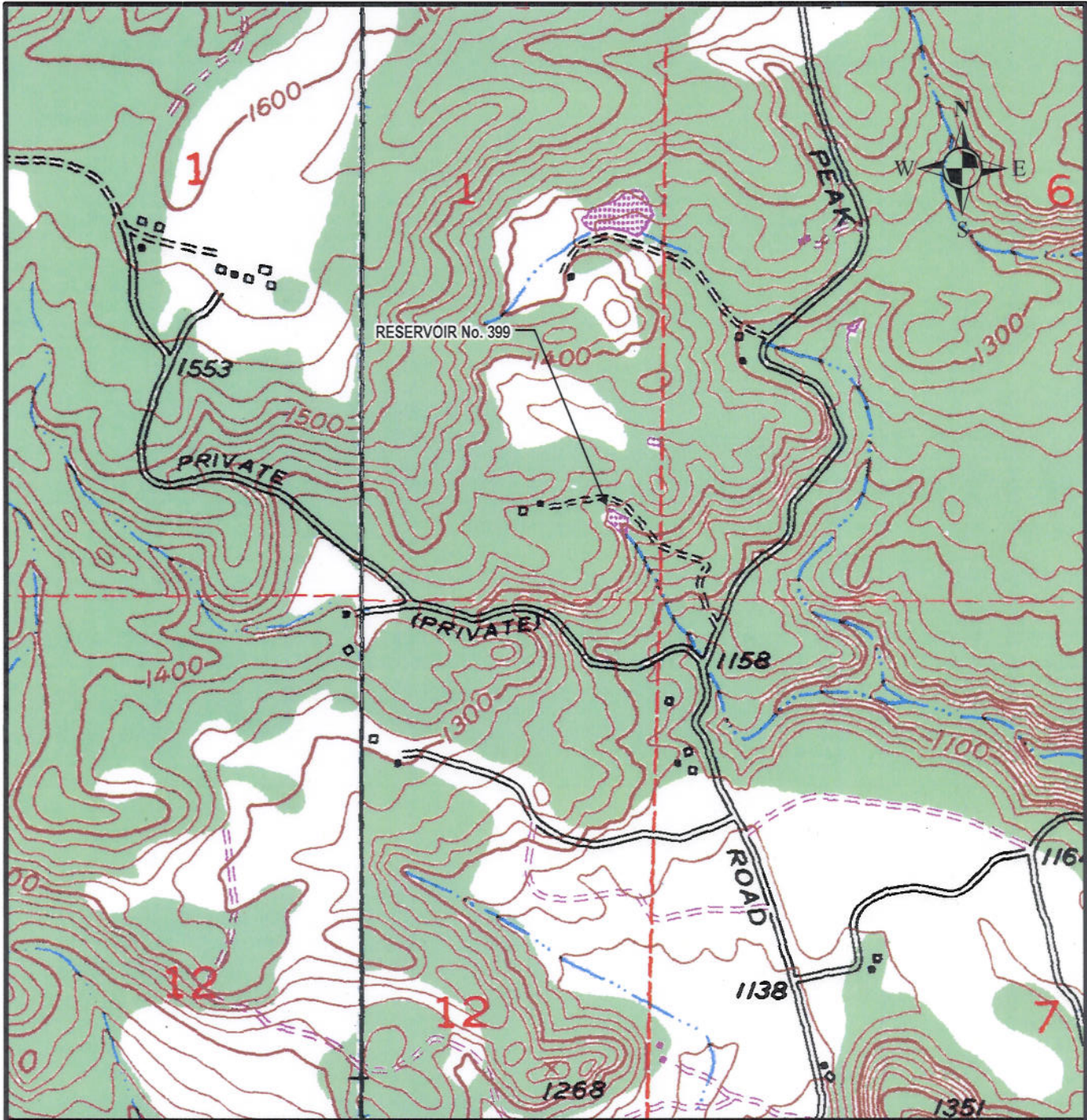
SCALE: **1:12,000**

DATE: **2-28-2012**

DRAWN: **JW**

CHECKED:

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.



OWNER DOUGLAS K IVEY

APN 039-010-006

RESERVOIR ID No. 399

U.S.G.S. QUAD CAPELL VALLEY

DATE PHOTO REVISED 1968

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

EXHIBIT B

SCALE: 1:12,000

DATE: 2-28-2012

DRAWN: JW

CHECKED:

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.