

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

DIVISION OF WATER RIGHTS

ORDER WR 2009-00XX-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion of Water by
Eni Menconi Trust

SOURCE: Middle River

COUNTY: San Joaquin County

YOU ARE HEREBY GIVEN NOTICE THAT:

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 Eni Menconi Trust (Menconi Trust) to cease and desist its unauthorized diversion, collection and use of water in violation of section 1052 of the Water Code.

Menconi Trust is alleged to have violated or is threatening to violate Water Code section 1831, which provides:

The State Water Board is authorized to issue a Cease and Desist Order (CDO) 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.
- (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 State Water Board, Division of Water Rights (Division) provided notice of the CDO against Menconi Trust for the violation and threatened violation of the prohibition against unauthorized diversion 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.

FACTS AND INFORMATION

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

1. On July 16, 2008, the State Water Board adopted a Strategic Workplan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Workplan). The Workplan emphasized the State Water Board's responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the Delta. As described in the Workplan, the Division initiated an investigation of the basis of water rights of existing diverters within the Delta. The Workplan also identified that, if and when illegal diversions were found, those diversions would be subject to enforcement action and directed to cease diversions, obtain a legal water right, or pursue a contract for water supplies with the Department of Water Resources, United States Bureau of Reclamation, or another party.
2. On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands within the Delta. Based on reviews of U.S. Geological Survey maps, aerial photography, and San Joaquin County Assessors Maps, the Division sent letters to each property owner that was determined to have been irrigating in the last few years, and for whom the Division has no record of any basis of right for water diversion. The Division requested that each property owner either: inform the Division within 60 days as to the basis of their right by filing a Statement of Water Diversion and Use with appropriate evidence; define a contractual basis for diversion of water; or cease diversion of water until a basis of right is secured. The letter also informed the contacted property owners that a failure to respond may result in enforcement action.
3. The Division mailed a copy of the February 18, 2009 letter to Menconi Trust, as owners of San Joaquin County Assessor Parcel Nos. 189-220-16, 189-220-17 and 189-220-18. Menconi Trust filed a Statement of Water Diversion and Use on April 17, 2009 for water diverted from Middle River to serve all three parcels. The Statement claims riparian and pre-1914 appropriative rights to irrigate various crops on all three of the subject properties. Only parcel 189-220-16 appears to have continuity with Middle River.
4. Crop data published by the San Joaquin County Agricultural Commission and aerial photographs indicate that about 160 acres of alfalfa and other crops have been grown on these parcels since the mid 1950's. According to the 1980 California Department of Water Resources publication "*Crop Water Use in California*," the annual crop consumption use for the various crops grown on the parcels is between 2.5 and 4.1 acre-feet per acre. The estimated annual consumptive use of water for irrigation by Menconi Trust on parcels 189-220-17 and 189-220-18 for the past five years has been 560 acre-feet.
5. On September 14, 2009, a certified letter (Certification #7003 0500 0003 1321 6473) was sent to Menconi Trust, c/o Ann Del Barba at 4299 Carlin Road, Stockton, CA 95206. The U.S. Postal Service confirmed delivery of the letter to Menconi Trust on September 16, 2009. The letter advised that the San Joaquin County Assessor's Parcel maps show that parcels 189-220-17 and 189-220-18 do not have continuity to a surface stream. This lack of continuity indicates that a riparian basis of right typically would not exist. The letter requested that Menconi Trust provide additional evidence to support that the riparian claim for parcels 189-220-17 and 189-220-18 has been preserved and/or documentation supporting initiation and continuous beneficial use of water under the pre-1914 claim of right. The letter warns of potential enforcement if an adequate response is not received.

6. On October 14, 2009, the Division received further documentation from Mia S. Brown of Neumiller and Beardslee, attorneys representing Menconi Trust. After review of the information, Division staff noted that about 40 percent of the western portion of the Menconi Trust property was separated from any surface stream under the original Certificate of Purchase 2322 (CP2322). Similarly, staff noted that the majority of the remaining area of the parcel is located within CP3723 and may have been separated from Middle River by later sale of the property. The separation of the majority of the property from contiguity to a surface stream, without any evidence of express or implied retention of a riparian right upon severance, is not consistent with a claim of riparian right. Additionally, development of crop fields on most or all of parcels 189-220-17 and 189-220-18 are lacking on the 1940 aerial photograph, indicating a potential lack of continuous beneficial use of water under the claimed pre-1914 appropriative right.
7. As of December 21, 2009, Menconi Trust has not provided any additional evidence to substantiate a basis of right for the diversion of water to parcels 189-220-17 and 189-220-18. Acceptable information supporting a basis of water right would include, but is not limited to: (1) a chain of title supporting riparian status for the parcels, especially those that appear originally separated by Certificate of Purchase; (2) any evidence which supports an existing or implied preservation of the riparian right established prior to severance of the parcel from the stream or other riparian parcels; (3) evidence which verifies the first year of irrigation on the parcel prior to 1914 and documents the subsequent continuous use of water; or (4) statements which provide an alternative valid basis of right for diversions of water to the parcel.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, Menconi Trust shall immediately cease and desist from diverting water to parcels 189-220-17 and 189-220-18 until the following are satisfied:

- (1) Menconi Trust shall submit to the Division sufficient evidence establishing a basis of right or a water supply contract to serve these properties. No diversions shall be made to these parcels until Menconi Trust receives approval from the Assistant Deputy Director for Water Rights to exercise the water right or contract.
- (2) Within 90 days of the date of this Order if no basis of right can be established, Menconi Trust shall submit a plan showing how and when it will permanently remove the diversion works serving parcels 189-220-17 and 189-220-18.
- (3) Because Menconi Trust's diversion on Middle River serves both apparent riparian parcel 189-220-16 and parcels 189-220-17 and 189-220-18, Menconi Trust shall install an inline flow meter at its Middle River Pumping Plant within 90 days of the date of this order. The inline flow meter shall be capable of registering instantaneous flow and total cumulative flow through the meter. Immediately after installation of the meter, Menconi Trust shall maintain monthly records of the total amount of water diverted through the meter and records of the crop type and acreage served. Menconi Trust shall submit these records annually as part of a reporting under its recently filed Statement of Water Diversion and Use using the new Online Reporting System available online at: <http://www.waterboards.ca.gov/waterrights/>.

Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water 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. (Wat. Code, § 1845 subd. (a).) Any person or entity that violates a CDO issued pursuant to chapter 12 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).) Civil liability may be imposed by the superior court or administratively by the State Water Board pursuant to Water Code section 1055.

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel
Assistant Deputy Director for Water Rights

Dated: