

State Water Resources Control Board

SEP 18 2012

In Reply Refer to:
JWetzel:ENF00130

Mr. Douglas K. Ivey
3330 Paradise Drive
Tiburon, CA 94920

Dear Mr. Ivey:

ENFORCEMENT ACTION ENF00130 – FINAL CEASE AND DESIST ORDER AND
ADMINISTRATIVE CIVIL LIABILITY REGARDING UNAUTHORIZED DIVERSION OF
WATER WITHIN THE NAPA WATERSHED IN NAPA COUNTY

Enclosed is a final Cease and Desist Order WR 2012-0021-DWR (CDO) and an Administrative Civil Liability Order WR 2012-0022-DWR (ACL) issued to Douglas K. Ivey (Ivey) that I have issued in accordance with California Water Code sections 1831 and 1052 et seq. and the authority delegated to me by State Water Board Resolution 2012-0029. Notice and opportunity to request a hearing on the draft CDO and ACL Complaint was provided to Ivey by letter dated March 23, 2012.

A request for a hearing on the draft CDO and the ACL Complaint was not made, nor was payment submitted. Therefore, Ivey should take immediate action to:

- (1) Remit full payment of \$8,000 within 30 days from the date of the ACL Order; and
- (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 final CDO within 30 days by submitting one of the following (in accordance with the provisions of the final 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 appropriate water right application; or (c) a letter of intent not to pursue a water right permit and commit to develop and submit a plan to render the reservoir incapable of storing water subject to the State Water Board's authority.

If you have any questions concerning this matter or there are facts or circumstances that you would like to discuss, please contact one of the following: Mr. John O'Hagan, Manager, Enforcement Section, at (916) 341-5368 or via e-mail at johagan@waterboards.ca.gov; or Ms. Yvonne West, Senior Staff Counsel, Office of Enforcement, at (916) 322-3626 or via e-mail at YWest@waterboards.ca.gov.

Sincerely,

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

Mr. Douglas K. Ivey
3330 Paradise Drive
Tiburon, CA 94920

Enclosures:

- Final Cease and Desist Order
- Administrative Civil Liability
- Exhibit A: Aerial Photograph
- Exhibit B: USGS Topographical Map

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

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

- (1) Remit full payment of \$8,000 within 30 days from the date of the final CDO.
- (2) File a Statement of Water Diversion and Use, as required by California Water Code section 8100-8107, and
- (3) Begin complying with the provisions of the final CDO within 30 days by submitting one of the following (in accordance with the provisions of the final CDO): (a) evidence that a registration form for the registration of a Small Domestic Use or Livestock Stocking has been submitted to the Department of Fish and Game; (b) an appropriate water right application; or (c) a letter of intent not to pursue a water right permit and commit to develop and submit a plan to control the reservoir incapable of storing water subject to the State Water Board's authority.

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

DIVISION OF WATER RIGHTS

ORDER WR 2012 -0021-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion by

Douglas K. Ivey

SOURCE: Unnamed Stream tributary to Milliken Creek thence Napa River

COUNTY: Napa

The State Water Resources Control Board (State Water Board) is authorized under California 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 March 23, 2012, 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 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,¹ 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.

The State Water Board or its delegee, the Assistant Deputy Director for Water Rights, finds that:

1. 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.

¹ Ivey did not request a hearing on the CDO.

3. Ivey has violated California 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 California Water Code section 1052.

FACTUAL BASIS FOR ISSUING A CDO

The facts and information upon which this 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 California 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 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 him of the requirements to file a Statement and potential penalties for failure to file a Statement pursuant to California 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) If 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 California 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 California 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 California 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.

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 until a permit is issued, pursuant to Ivey's water right application submitted in accordance with paragraph 1 of this option.²
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 in Option 3.

² Since notice of this CDO was provided to Ivey, the Alameda County Superior Court in *Living Rivers Council v. State Water Resources Control Board* (2012, No. RG10-543923) has ordered that State Board's Resolution 2010-0021 adopting the Instream Flow Policy be vacated. Accordingly, provisions of this order calling for compliance with the Instream Flow Policy are struck in compliance with the *Living Rivers* decision.

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 California 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 CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to California 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 California 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: SEP 18 2012



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

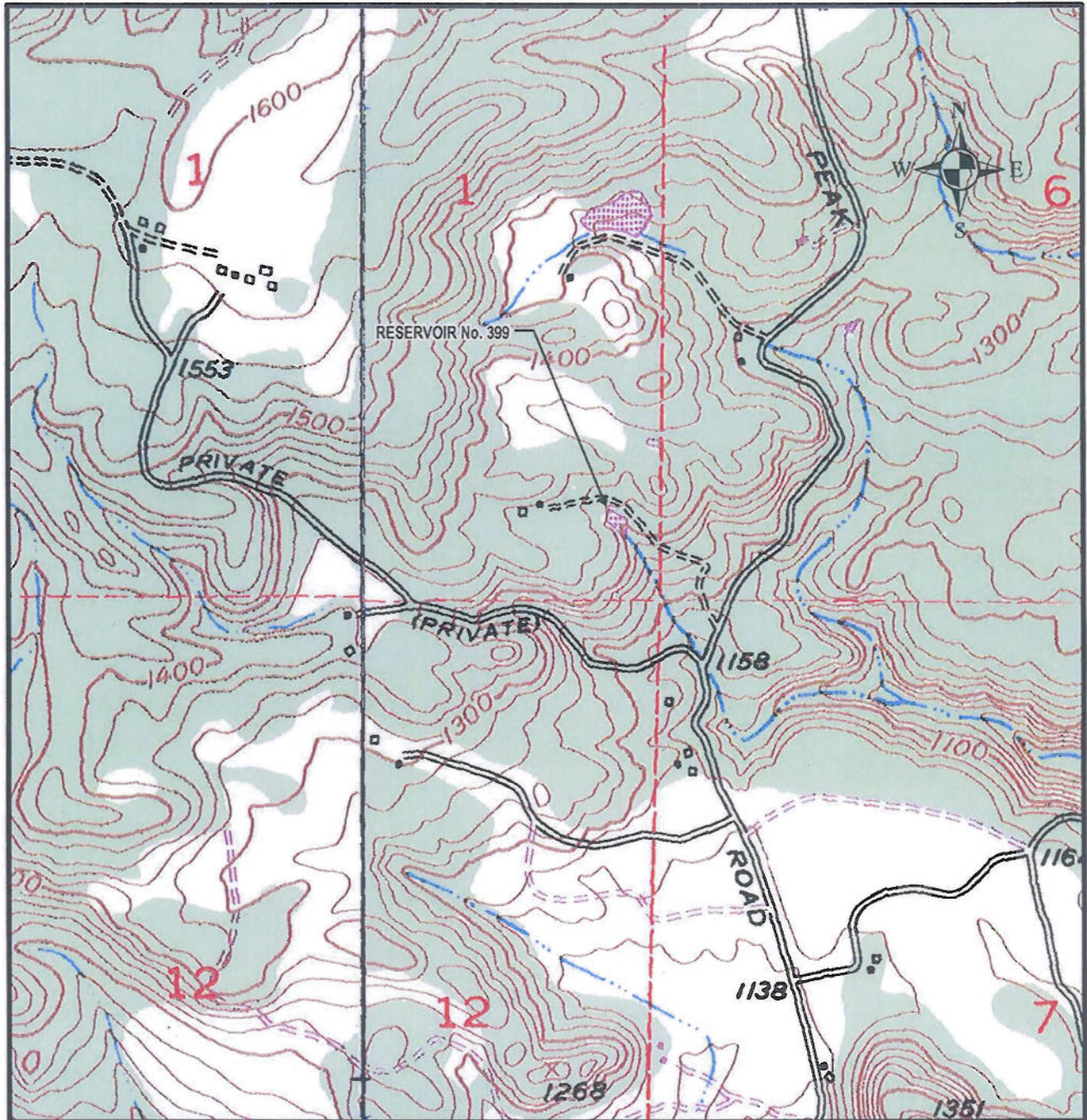
SCALE: 1:12,000

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 KIVEY

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.

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

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

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

Douglas K. Ivey

SOURCE: Unnamed Stream tributary to Milliken Creek thence Napa River

COUNTY: Napa

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 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 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

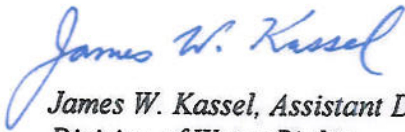
18. Ivey may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date this complaint is received. (Water Code, sec. 1055, subd. (b).)
19. If Ivey requests a hearing, Ivey will have an opportunity to be heard 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