

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

DIVISION OF WATER RIGHTS

ORDER WR 2015 –00XX-DWR

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**CEASE AND DESIST ORDER**

**In the Matter of Threat of Unauthorized Diversion and Violation of Emergency Regulations  
for Reporting Requested Information by**

**Anthony F. Cubre Jr Trustee**

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SOURCES: San Joaquin River

COUNTY: Fresno

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The State Water Resources Control Board (State Water Board or Board) is authorized under California Water Code (Water Code) section 1831 to issue a Cease and Desist Order (CDO) requiring Anthony F. Cubre Jr Trustee (hereinafter referred to as Diverter) to cease his diversion and use of water and come into compliance with Board Order WR-2014-0030-DWR.

Diverter is alleged to have violated or is threatening to violate Water Code section 1052 and/or Emergency Regulations adopted under Water Code section 1058.5. The State Water Board is authorized by Water Code section 1831 et seq. to issue a CDO when it determines that any person is violating or is 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 CDO will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or Order.
- (4) A regulation adopted under section 1058.5.

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 Diverter for the violation and threatened violation of the prohibition against unauthorized diversion 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, 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 of Water Rights. This authority has been redelegated.

**FACTUAL BASIS FOR ISSUING THE CDO**

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

1. On April 25, 2014, Governor Edmund G. Brown Jr. issued an Executive Order to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue into 2015.
2. The Executive Order refers to the Governor's Proclamation No. 1 -17-2014, issued on January 17, 2014, declaring a drought State of Emergency to exist in California due to severe drought conditions. The January Proclamation notes that the state is experiencing record dry conditions, with 2014 projected to become the driest year on record. These conditions also threaten the survival and recovery of fish, wildlife, and plants that rely on California's rivers, including many species in danger of, or threatened with, extinction. The January Proclamation also calls on all Californians to reduce their water usage by 20 percent.
3. On May 27, 2014, the State Water Resources Control Board (State Water Board) issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a Post-1914 Appropriative Right." Based upon the most recent reservoir storage and inflow projections, along with forecasts for future precipitation events, the State Water Board determined the existing water supply in the Sacramento and San Joaquin River watershed is insufficient to meet the needs of all water rights holders. With the notice, the State Water Board notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watershed of the need to immediately stop diverting under their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The condition of curtailment will continue until water conditions improve. Approximately 5,435 junior water-rights in the Sacramento River watershed and 3,116 water rights in the San Joaquin River watershed received curtailment notices.
4. On July 2, 2014, the State Water Board adopted emergency regulations for Curtailment of Water Diversions to Protect Senior Water Rights (California Code of Regulations, title 23, adding sections 875 and 878.3, and amending sections 878.1 and 879<sup>1</sup>) (Regulations) pursuant to Water Code section 1058.5. The Regulations were reviewed by the Office of Administrative Law and went into effect on July 16, 2014. The Regulations establish a drought emergency curtailment method for post-1914 water right holders and requirements for riparian and pre-1914 rights holders to provide additional information in specific circumstances.
5. Pursuant to Regulations, section 879, subdivision (c), the Deputy Director for the Division of Water Rights has delegated authority to issue an Order requiring riparian or pre-1914 water right holders to provide additional information. Section 879, subdivision (c), states:

*Upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 appropriative water right holder or upon receipt of information that indicates unlawful diversions of stored water by riparians or pre-1914 appropriative water right holders, the Deputy Director may issue an order under this article requiring such water right holders to provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year. Any water right holder receiving an order under this subdivision shall provide the requested information within five (5) days.*

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<sup>1</sup> All further section references are to California Code of Regulations, title 23 unless otherwise indicated.

6. The United States Bureau of Reclamation (Reclamation) appropriates and stores water from the San Joaquin River at Friant Dam on the boundary of Fresno and Madera Counties, pursuant to License 1986 and Permits 11885, 11886, and 11887, as part of the Central Valley Project. Reclamation has obligations under various contracts between Reclamation and water right claimants along the San Joaquin River between the dam and Gravelly Ford ("Holding Contracts") to maintain at least five (5) cubic feet per second (cfs) flow at Gravelly Ford.
7. In May 2014, the Division received a complaint against Reclamation alleging that there was not 5 cfs reaching Gravelly Ford. Reclamation staff informed the Division that it suspected unauthorized diversions between Friant Dam and Gravelly Ford. In June 2014, Reclamation conducted a survey of the San Joaquin River between Friant Dam and Gravelly Ford, and on July 14, 2014, Reclamation identified 20 potentially unauthorized diversions to Division staff. Additional information regarding these 20 diversions is necessary to determine if there have been unauthorized diversions or if there is potential for unauthorized diversion.
8. On August 7, 2014, Division staff observed 13 of the 20 potentially unauthorized diversions by boat from the San Joaquin River. Subsequent investigation by Division staff revealed that some of these diversions were not associated with any post-1914 appropriative rights, nor with any Statements submitted pursuant to Water Code section 5101 (i.e., regarding riparian or pre-1914 rights). Based on observations by Reclamation and Division staff during the two surveys, eight (8) of the potentially unauthorized pumps were operating at the time of one or both inspections. These eight (8) diversions appear to be serving parcels that may claim riparian rights. Reclamation releases water based on a schedule to meet its various obligations under contracts. During the months of March, April, and May 2014, the water released pursuant to the schedule did not meet the intended obligations consistently, indicating that there may have been unauthorized diversions of water below Friant Dam.
9. Division records indicate that there are riparian and pre-1914 appropriative water right claimants on the San Joaquin River between Friant Dam and Gravelly Ford for which Statements of Water Diversion and Use (Statements) have been filed pursuant to Water Code section 5101, as determined from the State Water Board's electronic water rights information management system (eWRIMS) and Report Management System (RMS). Additional information regarding these known diversions is necessary to determine if there have been unauthorized diversions or if there is potential for unauthorized diversion.
10. On November 6, 2014, the Deputy Director for the Division of Water Rights issued Order WR 2014-0030-DWR (Information Order) affecting all existing and potential pre-1914 and riparian water right claimants along the San Joaquin River between Friant Dam and Gravelly Ford to obtain necessary information, pursuant to section 879, subdivision (c) to investigate the complaint against Reclamation and determine whether unauthorized diversions have occurred or were occurring. The recipients of the Information Order were required to provide specific information identified in the Order within five (5) days of the receipt of the Order, pursuant to section 879(c).
11. Diverter owns property identified by Fresno County Assessor as Parcel Number 016-440-50S. A potentially unauthorized diversion was identified at this site during a survey of the San Joaquin River between Friant Dam and Gravelly Ford. On November 6, 2014, the Division mailed the Information Order to Diverter notifying Diverter of the requirement to provide specific information within five (5) days of the receipt of the Order.
12. According to mail delivery tracking information available through the U.S. Postal Service's website, the Information Order was delivered certified by the U. S. Postal Service to Diverter on November 10, 2014. Diverter was required to submit the information required under the Information Order by a deadline of November 15, 2014, five (5) days following delivery of the Information Order.

13. The Division received a letter from Diverter on November 18, 2014 stating that he received the Information Order and would try to submit the required information within 30 days. In a letter dated February 19, 2015, the attorney for Diverter stated that the property is riparian. However, information subsequently received by the Division indicates that Diverter's property is actually subject to a Bureau of Reclamation Holding Contract, No. 106. In any event, the information Order applies to Diverter. As of February 28, 2015, Diverter has not submitted any of the substantive information identified in the Information Order. Thus, Diverter may be subject to a CDO pursuant to Water Code section 1831, subdivision (d)(4).
14. Water Code section 1052, subdivision (a) provides that "the diversion or use of water subject to this division other than as authorized in this division is a trespass." The circumstances described above indicate that there are or may be unauthorized diversions from the San Joaquin River between Friant Dam and Gravelly Ford, where Diverter's diversion is located. Diverter's failure to comply with the Information Order makes it impossible for the Division to determine whether Diverter's diversion and diversion amounts are valid and authorized under the Water Code. Therefore, Diverter's failure to comply with the Information Order is evidence that Diverter is violating, or is threatening to violate, the prohibition set forth in Section 1051 against the unauthorized diversion or use of water. Thus, Diverter may be subject to a CDO pursuant to Water Code section 1831, subdivision (d)(1).

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

1. Diverter shall immediately provide the information required under Board Order WR 2014-0030-DWR, summarized as follows:
  - a. The monthly amounts of water diverted and the basis of right allowing for the diversions from October 1, 2013 through February 28, 2015 under each separate claim of right. The diversion information shall include the maximum rate of diversion for each month and the method used to determine the amounts reported.
  - b. Identification and location by map of the point of diversion and place of use for each diversion of water from the San Joaquin River, the type of water right being claimed for each point of diversion, the purpose of use, and the place of use being served with acreage and crop type, if applicable. All documentation supporting the type of water right claimed, including the property patent date and patent map, if riparian right. If pre-1914 right is claimed, a copy of notice filed with the county, copy of property deed, and all other information supporting the pre-1914 right pertaining to initial diversion and continued beneficial use of water.
  - c. The monthly diversion for each month starting with March 2015 shall be submitted by the fifth (5th) of each succeeding month until the drought ends.
2. Diverter shall immediately cease diversions from the San Joaquin River until the information required under Board Order WR 2014-0030-DWR is provided to the Division.

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

In the event Diverter fails to comply with the requirements of this Order, Diverter shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to Water Code section 1845. Violation of a CDO issued during a period for which the Governor has issued a proclamation of state of emergency based on drought conditions is subject to the imposition of administrative civil liability, pursuant to Water Code section 1845, subdivision (b)(1)(A) in the amount not to exceed \$10,000 for each day in which the violations occurs, or referral to the Attorney General to take further injunctive enforcement actions as described in Water Code section 1845, subdivision (a):

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

**Reservation of Enforcement Authority and Discretion**

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

**Regulatory Changes**

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

**Compliance with Other Regulatory Requirements**

Nothing in this Order shall excuse Diverter from meeting any additional regulatory requirement that may be imposed by other local, state, or federal regulatory entities for corrective actions taken by Diverter to comply with this Order.

**Exemption from CEQA**

This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), title 14 of the California Code of Regulations.

STATE WATER RESOURCES CONTROL BOARD

*John O'Hagan, Assistant Deputy Director  
Division of Water Rights*

Dated: