

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0026-EXEC

In the Matter of the Diversion and Use of Water by
Gallo Vineyards, Inc.

ORDER APPROVING SETTLEMENT AGREEMENT

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

This matter comes before the Executive Director of the State Water Resources Control Board (State Water Board or Board) following the issuance of a draft Cease and Desist Order (CDO) to Gallo Vineyards, Inc. (Gallo). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights prosecution team (Prosecution Team) and Gallo have agreed to settle this matter in lieu of proceeding to a hearing. The issuance of a decision or order pursuant to a settlement agreement is authorized under Government Code section 11415.60. The settlement is approved.

2.0 BACKGROUND

Gallo owns land in San Joaquin County identified by Assessor Parcel Nos. 191-050-05, 191-060-02, 191-060-03, 191-060-05, and 191-060-06.

On December 14, 2009, the Assistant Deputy Director for Water Rights issued a Draft Cease and Desist Order (Draft CDO) against Gallo alleging an unauthorized diversion and use of water in violation of section 1052 of the Water Code.

By letter dated December 3, 2009, Gallo timely requested a hearing on the Draft CDO. The State Water Board scheduled a hearing for the Draft CDO on May 5, 2010.

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

Gallo and the Prosecution Team agreed to settle the matters identified in the Draft CDO through this Settlement Agreement in lieu of hearings on said matters.

3.0 SETTLEMENT AGREEMENT

Gallo and the Prosecution Team engaged in settlement discussions and reached an agreement on language that is mutually acceptable and is contained in the Settlement Agreement that is attached hereto. The general terms of the settlement are that: (1) the Prosecution Team does not contest Gallo's riparian basis of right to serve San Joaquin County Assessor Parcel Nos. 191-060-02, 191-060-03, 191-060-05, 191-060-06, excepting a strip of land within the northern portion of Parcel Nos. 191-060-02 and 191-060-03 consisting of approximately 3.6 acres (hereinafter "Excluded Land") from Old River, and (2) Gallo will immediately cease any diversion or use of Old River for use on Assessors Parcel No. 191-050-05 and the Excluded Land, and will immediately: (a) file a revised Statement of Water Diversion and Use form for its Old River point of diversion, and (b) install and maintain measuring devices on (i) its Old River pumping facility, (ii) its connection to any alternative water source to be used to serve the Assessors Parcel No. 191-050-05 and the Excluded Land, and (iii) any water conveyance system delivering water to Assessors Parcel No. 191-050-05 and the Excluded Land, such that Gallo can document that water use on Assessors Parcel No. 191-050-05 and the Excluded Land comes from a source other than Old River.

4.0 DISCUSSION

The State Water Board may approve a settlement agreement and issue a decision by settlement, provided that the terms of the settlement are not contrary to statute, regulation, or public policy. (Gov. Code, § 11415.60; *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 115-116.) The Board has delegated this authority to the Executive Director. (State Water Board Resolution 2002-0104, par. 5.) I have reviewed the Settlement Agreement, and have determined that it should be approved, subject to the following clarification regarding Gallo's claimed riparian rights.

As set forth above, the Settlement Agreement provides that the Prosecution Team does not contest Gallo's riparian basis of right to use Old River water on specified parcels (or portions of parcels) of land. As a matter of law, riparian rights extend only to the natural flow in a stream. (*Bloss v. Rahilly* (1940) 16 Cal.2d 70, 74-76.) In addition, the State Water Board has found that

natural flow in the southern Sacramento-San Joaquin Delta (Delta), where Old River is located, is not adequate to satisfy all the riparian rights that may exist in the southern Delta during certain months of the year under certain hydrologic conditions. (State Water Board Decision 1641, pp. 30-33.) Under these circumstances, all riparian right holders must reduce their diversions proportionately. (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 104.) In addition, riparian right holders may be required to curtail their diversions to the extent necessary to protect instream beneficial uses. (*Id.* at pp. 105-106, 129-130.) In accordance with these principles, approval of the Settlement Agreement should not be construed as authorization or approval of Gallo's use of water from Old River to the extent that natural flow is inadequate to fully satisfy Gallo's claimed riparian rights, taking into account the reasonable needs of other riparian right holders and instream beneficial uses, during any given period of time.

ORDER

IT IS HEREBY ORDERED THAT the attached Settlement Agreement between the Division's Prosecution Team and Gallo is approved and is incorporated by reference into this Order.

Dated: 7-2-10



Dorothy Rice
Executive Director

Attachment

**CONFIDENTIAL AND PRIVILEGED
SETTLEMENT COMMUNICATION
SUBJECT TO EVIDENCE CODE §§ 1152 and 1154
AND GOVERNMENT CODE § 11415.60**

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between the Gallo Vineyards, Inc. ("Gallo") and the Prosecution Team of the State Water Resources Control Board's ("State Water Board") Division of Water Rights ("Division Prosecution Team") and is executed this 23 day of March 2010.

RECITALS

- A. Gallo owns land in San Joaquin County identified by Assessor Parcels Nos. 191-050-05, 191-060-02, 191-060-03, 191-060-05, and 191-060-06.
- B. On December 14, 2009, the Assistant Deputy Director for Water Rights issued a Draft Cease and Desist Order ("Draft CDO") against Gallo alleging an unauthorized diversion and use of water in violation of section 1052 of the Water Code.
- C. By letter dated December 3, 2009, Gallo timely requested a hearing on the Draft CDO. The State Water Board scheduled a hearing for the Draft CDO on May 5, 2010.
- D. In lieu of said hearing, Gallo and the Division Prosecution Team agree to settle the matters identified in the Draft CDO through this Settlement Agreement.
- E. This Settlement Agreement will be submitted to the State Water Board's Executive Director for approval and adoption pursuant to Government Code section 11415.60 as a decision by settlement and will become effective when the State Water Board's Executive Director issues an order approving the settlement.

NOW, THEREFORE, in consideration of these Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, Gallo and the Division Prosecution Team do hereby agree to settle the Draft CDO as follows:

1. **Recitals Incorporated.** The preceding Recitals are incorporated herein.
2. **Settlement Conditionally Confidential.** Unless and until the State Water Board's Executive Director issues an order approving this Settlement Agreement, this Settlement Agreement is a confidential settlement document subject to all of the limitations on admissibility set forth in California Evidence Code sections 1152 and 1154. Furthermore, pursuant to Government Code section 11415.60, this Settlement Agreement is not admissible in an adjudicative proceeding or civil action for any purpose.
3. **Stipulations.** Gallo and the Division Prosecution Team do hereby jointly stipulate and agree as follows:

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a. Riparian Rights For Diversion and Use of Water on Assessor Parcel Nos. 191-060-02, 191-060-03, 191-060-05, 191-060-06, excepting the Excluded Land

- i. Gallo has submitted written evidence to the Division regarding Gallo's claim of a riparian basis of water right to serve San Joaquin County Assessor Parcel Nos. 191-060-02, 191-060-03, 191-060-05, 191-060-06, excepting a strip of land within the northern portion of Parcel Nos. 191-060-02 and 191-060-03, consisting of approximately 3.6 acres (hereinafter referred to as the "Excluded Land"). At this time it appears to Division's Prosecution Team that these parcels, less the Excluded Land, have a riparian basis of right to water from Old River. The riparian parcels, Excluded Land and Assessor's Parcel No. 191-050-05 are depicted on the map attached hereto as Exhibit A. At this time the Division Prosecution Team is satisfied that Gallo appears to be exercising valid riparian rights with regard to the riparian parcels or portions of parcels, and therefore the Division Prosecution Team does not contest Gallo's use of Old River water on these riparian parcels or portions of parcels.
- ii. Nothing in paragraph 3.a.i. is intended to limit or expand any other basis of water right that Gallo may now possess, or in the future obtain, for diversion and use of water on Assessor Parcel Nos. 191-060-02, 191-060-03, 191-060-05, 191-060-06, excepting the Excluded Land.
- iii. Nothing in paragraph 3.a.i. is intended to restrict the Division of Water Rights' (Division) authority to limit or condition Gallo's diversion and use of water on Assessor Parcel Nos. 191-060-02, 191-060-03, 191-060-05, 191-060-06 pursuant to the Division's reasonable exercise of its regulatory and statutory authorities.

b. Assessors Parcel No. 191-050-05, and Excluded Land

- i. Gallo will immediately cease any diversion or use of Old River for use on Assessors Parcel No. 191-050-05 and the Excluded Land. Gallo will immediately: (1) file a revised Statement of Water Diversion and Use form for its Old River point of diversion, and (2) install and maintain measuring devices on (a) its Old River pumping facility, (b) its connection to any alternative water source to be used to serve the Assessors Parcel No. 191-050-05 and the Excluded Land, and (c) any water conveyance system delivering water to Assessors Parcel No. 191-050-05 and the Excluded Land, such that Gallo can document that water use on Assessors Parcel No. 191-050-05 and the Excluded Land comes from a source other than Old River. Gallo will maintain

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- monthly records of its diversion and use of water under riparian claim to the riparian parcels, and from other sources for use on Assessors Parcel No. 191-050-05 and the Excluded Land, and will submit that information to the Division upon request or when required by law.
- ii. Notwithstanding the stipulation in paragraph 3.b.i, this stipulation does not limit or restrict Gallo's right to divert and use water on Assessors Parcel No. 191-050-05 and the Excluded Land from sources that are not subject to the State Water Board's permitting authority, or that do not require State Water Board or Division approval. For example, but not as a limitation, this stipulation does not limit or restrict Gallo's right to use percolating groundwater, recycled water, or water acquired from another party by transfer, sale or lease. To the extent applicable, Gallo will comply with all permitting and approval requirements for the use of such waters, including any petitions for change or transfer required by the State Water Board.
 - iii. Notwithstanding the stipulation in paragraph 3.b.i, Gallo does not waive, limit or forfeit any water rights that Gallo may now have, or in the future obtain, for diversion and use of surface water on Assessors Parcel No. 191-050-05 and the Excluded Land; provided that, Gallo will first submit additional evidence to the State Water Board or Division as to the existence of surface water rights for use on Assessors Parcel No. 191-050-05 and the Excluded Land, including but not limited to riparian and/or pre-1914 appropriative rights. Upon the submission of such additional evidence, Gallo will not divert surface water under riparian or pre-1914 appropriative claim of right to Assessors Parcel No. 191-050-05 and the Excluded Land, unless its evidence is first accepted by the State Water Board or Division. The State Water Board or Division shall not unreasonably withhold acceptance of such evidence to support the claimed riparian and/or pre-1914 appropriative rights, and Gallo preserves all rights to seek review of any finding or determination with respect riparian and/or pre-1914 appropriative rights claims.
 - iv. Nothing in paragraphs 3.b.ii or 3.b.iii is intended to restrict the State Water Board's or Division's authority to limit or condition Gallo's diversion and use of water on Assessor Parcel Nos. 191-050-05 and the Excluded Land pursuant to the State Water Board's Division's reasonable exercise of its regulatory or statutory authorities.
4. **Postpone Hearing.** Gallo and the Division Prosecution Team have requested that the hearing in this matter, scheduled for May 5, 2010, be indefinitely postponed pending approval of this Settlement Agreement by the Executive Director.
 5. **Waiver of Reconsideration.** Gallo waives its right to request reconsideration of the State Water Board Executive Director's order approving this Settlement Agreement,

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provided no material modifications to this Settlement Agreement or additional requirements beyond the requirements of this Settlement Agreement are included in that order.

6. **Successors.** This Settlement Agreement is binding on any successors or assigns of Gallo and the State Water Board.
7. **Independent Judgment.** Each party represents and declares that in executing this Settlement Agreement it is relying solely on its own judgment, knowledge and belief concerning the nature, extent and duration of its rights and claims, and that it has not been influenced to any extent whatsoever in the execution of this Settlement Agreement by any representations or statements regarding any matters made by other parties hereto or by any person representing them.
8. **No Precedent.** This Settlement Agreement involves unique facts and legal issues and shall not be used as a precedent decision of the State Water Board. This Settlement Agreement also shall not be construed to be an admission by Gallo of the liability or of any of the allegations set forth in the Draft CDO.
9. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
10. **Entire Agreement.** This Settlement Agreement reflects and represents the entire agreement between and among the parties and supersedes any and all prior understandings, representations, and agreements whether written or unwritten. Each party represents that it has not relied on any inducements, promises or representations made by the other party other than those contained in this Settlement Agreement.
11. **Mutual Agreement.** The parties have agreed to the particular language in this Settlement Agreement, and this Settlement Agreement shall not be construed against the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.
12. **Counterparts.** This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.
13. **Reasonableness of Settlement.** The parties represent and warrant that this Settlement Agreement is made in good faith and in full recognition of the implications of such agreement.
14. **Section Headings.** The parties intend that the paragraph headings of this Settlement Agreement be used solely as a convenient reference and that they shall not in any

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manner amplify, limit, modify or otherwise aid in the interpretation of this Settlement Agreement.

15. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving Settlement Agreement.
16. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
17. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
18. **State Water Board Is Not Liable.** Neither the State Water Board members nor the Board's staff, attorneys or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by Gallo, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement, nor shall the State Water Board, its members or staff be held as parties to or guarantors of any contract entered into by Gallo, its directors, officers, employees, agents, representatives or contractors in carrying out activities pursuant to this Settlement Agreement.

Dated: 23 March 2010

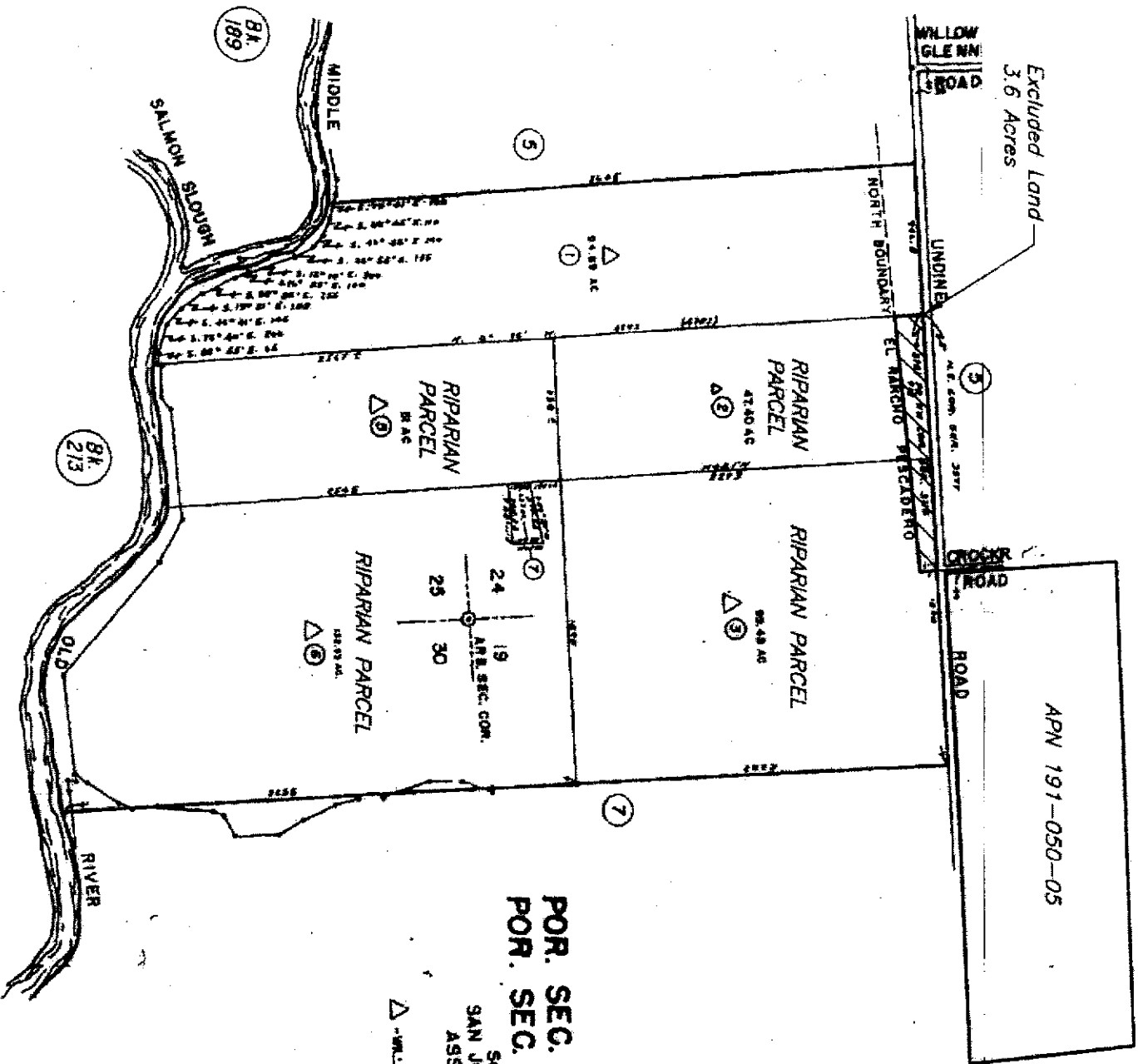
State Water Board Division of Water Rights
Prosecution Team

By: James W. Kassel
James W. Kassel
Assistant Deputy Director

Dated: 18 March 2010

Gallo Vineyards, Inc.

By: Tom Smith
Tom Smith
Vice President



APN 191-050-05

191-06

THIS MAP FOR
 ASSESSMENT USE ONLY



POR. SEC. 24 8 25 T.1S.R.5E.1
 POR. SEC. 19 8 30 T.1S.R.6E.1

SCALE 1" = 600'
 SAN JOAQUIN COUNTY
 ASSESSOR MAPS

WILLIAMSON & SINGELS

EXHIBIT A