

SETTLEMENT AGREEMENT
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION
AND
EVERD MCCAIN, B.J. DEIS AND
MCCAIN AND ASSOCIATES

ACL COMPLAINT NO. R6T-2007-0007

WHEREAS,

1. The Prosecution Staff of the California Regional Water Quality Control Board – Lahontan Region (Prosecution Staff) issued an Administrative Civil Liability Complaint to Everd McCain, B. J. Deis, and McCain and Associates (collectively referred to herein as “McCain”) on November 16, 2007. The Prosecution Staff and McCain are the “Parties” to this Agreement. The Complaint alleges numerous violations of the Water Code and seeks imposition of a \$100,000 assessment for the alleged violations.
2. The violations relate to McCain’s construction and maintenance of two dams on Willow Creek, referred to as Buz Dam and Skeet Dam and failure of the dams with resulting significant sediment discharges into the creek.
3. McCain disputes the allegations of the Complaint.
4. Buz Dam was last repaired and/or rebuilt in 2002 and was damaged by storms during December 2005/January 2006. McCain has stabilized the remaining dam structure such that it is no longer a source of

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sediment to the creek, and it now provides for fish passage through the remaining structure.

5. Skeet Dam was constructed in 2005 and was also damaged by storms in December 2005/January 2006. McCain has stabilized the remaining dam structure and areas affected by dam construction such that they are no longer sources of sediment to the creek. The dam stabilization measures also provide fish passage through the remaining dam structure.
6. McCain has applied to the State Water Resources Control Board (State Water Board) for water rights authorization for the reservoirs created by Buz and Skeet Dams. Water rights issues are exclusively within the jurisdiction of the State Water Board. The Lahontan Water Board has no authority over the water rights issues. The State Water Board has recently issued a Notice indicating its intent to revoke water right authorizations for the reservoirs. McCain has requested a hearing on the Notice. Accordingly, the outcome of the water rights issues is unknown and uncertain. In the event that the issues are resolved in McCain's favor, McCain intends to rebuild Buz and Skeet Dams.
7. If McCain proposes dam reconstruction, the Lahontan Water Board retains jurisdiction over Clean Water Act Section 401 Certification and other Lahontan Water Board permitting issues related to the dam reconstruction. At such time as a proposal to repair or rebuild, if any,

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is submitted by McCain to the Lahontan Water Board, along with detailed construction design, the Lahontan Water Board will evaluate the proposal and may issue a Section 401 Water Quality Certification and/or any related orders necessary to rebuild one or both dams.

This Settlement Agreement does not in any way guarantee that the Lahontan Water Board will issue a Section 401 Water Quality Certification and/or other related orders necessary to rebuild one or both dams. The Lahontan Water Board retains its legal discretion to either issue or deny any Section 401 Water Quality Certification and/or other related orders.

8. A hearing was held regarding the Complaint before the Lahontan Water Board on March 13, 2008. At the conclusion of the hearing, the Lahontan Water Board closed the hearing record and directed the Parties (Prosecution Staff and McCain), joined by the Executive Officer and Board Counsel to explore the possibility of resolving the issues by means of a negotiated settlement.
9. In accordance with the Lahontan Water Board's directive, the Parties along with the Executive Officer and Board Counsel met in Truckee, CA on April 7, 2008 to discuss possible settlement of the Complaint.
10. The Parties met again in Susanville, CA on May 1, 2008 to discuss possible settlement.
11. The Parties met again on July 10, 2008 in Susanville, CA to discuss work needed to stabilize the site.

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12. The Prosecution Staff and McCain met on October 1, 2008 at Belfast Ranch to (1) inspect the stabilization and runoff control/treatment measures for the remaining dam structures and other areas affected by dam construction, and (2) observe the fish passage measures implemented under the guidance of Department of Fish and Game staff. The Prosecution Staff observed that the stabilization and runoff control/treatment measures identified in McCain's July 12, 2008 Modified Temporary Stabilization Plan had been satisfactorily implemented. McCain remains responsible for maintaining the effectiveness of stabilization and runoff control/treatment measures, and will submit to the Lahontan Water Board annual reports regarding maintenance activities.
13. The Parties have expressed their desire to resolve the matter through settlement in order to avoid uncertainty of result and to avoid the cost of further litigation.

WHEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Everd McCain certifies that he is authorized to act on behalf of B. J. Deis and McCain and Associates and to enter into this Agreement on their behalf.
2. The Prosecution Staff agrees to request that the Lahontan Water Board adopt an Order reducing the assessment to \$65,000, from \$100,000. McCain agrees to make an initial payment of \$23,000 to the

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State Water Resources Control Board Cleanup and Abatement Account (CAA) and \$2,000 to the State Water Resources Control Board Waste Discharge Permit Fund (WDPF) within thirty (30) days of adoption of an Order by the Lahontan Water Board effectuating this Settlement Agreement. Thereafter, the balance shall be paid in two installments. The first installment of \$20,000 shall be paid by February 16, 2010 with payment of \$18,400 to the CAA and \$1,600 to the WDPF. The final installment of \$20,000 shall be paid by February 16, 2011 with payment of \$18,400 to the CAA and \$1,600 to the WDPF.

3. McCain agrees to:
 - a. Inspect and maintain the stabilization and runoff control/treatment measures, and the fish passage measures, as described in the July 12, 2008 Modified Temporary Stabilization Plan.
 - b. McCain will submit an annual Inspection/Maintenance Report by October 15 of each year, with the first report due by October 15, 2009 and the final report due by October 15, 2011. The annual reports will at a minimum include the following elements:
 - i. Individual reports for each inspection that is conducted during the preceding 12 months (October – September). The individual inspection reports will identify (1) any conditions requiring maintenance; (2) the maintenance activities that

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- will address maintenance needs; and (3) when such maintenance activities will be completed.
- ii. A maintenance log for the preceding 12 months that identifies when maintenance activities identified in the individual inspection reports were completed.
 - c. All work on the dams, including but not limited to stabilization, maintenance, rebuilding, and/or partial or complete removal, shall be done in compliance with all applicable legal requirements, including but not limited to compliance with any water quality certification conditions that may be imposed by the Lahontan Water Board. The maintenance and stabilization measures referred to in Requirement No. 3a will not require any further permits or 401 Certification from the Lahontan Water Board unless another agency's regulatory process necessitates it.
 - d. For all future applications submitted to the Lahontan Water Board for dam reconstruction or dam removal/habitat restoration for Skeet Dam and/or Buz Dam, McCain must submit a permit application that is accompanied by design plans signed and stamped by a California registered professional engineer found to be acceptable to the Lahontan Water Board in accordance with the following procedures:

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- i. Prior to submitting any permit application and/or design plans, McCain will submit at least one candidate with supporting documentation (e.g., resume, minimum of three references, copy of current registration) that satisfies the following minimum qualification criteria:
 - California registered professional engineer.
 - For rebuilding one or both dams-Has a minimum of 10 years of experience designing and inspecting/overseeing construction of embankment dams in California.
 - For rebuilding one or both dams-Has completed design and construction inspection/oversight of a minimum of two embankment dam projects in California during the past five years.
 - For removing all or a portion of one or both dams-Has a minimum of 10 years of experience designing and inspecting/overseeing construction of stream restoration projects within California.
 - For removing all or a portion of one or both dams-Has completed design and construction inspection/oversight of a minimum of two stream restoration projects in California during the past five years.

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- ii. The Executive Officer will evaluate the candidates to verify that they satisfy the minimum qualifications criteria, above. The Executive Officer will provide McCain a written notice with the results of the verification process within 45 days of receiving McCain's candidate list.
- iii. McCain will then be able to select an engineer identified in the Executive Officer's written notice as having satisfied the minimum qualification criteria. McCain will submit a written notice to the Lahontan Water Board's South Lake Tahoe office identifying the engineer McCain has selected to comply with Requirement No. 3d, above, within 60 days of receiving the Executive Officer's written notice.
- e. If McCain is unable to rebuild one or both of the dams due to decisions rendered by the State Water Board or another entity, McCain will submit a proposal addressing the final fate of the remaining dam structures. If McCain proposes to leave any portion of the remaining dam structures in place, the proposal will include an impacts analysis of leaving the identified portions of the dam structures in place as proposed. The impacts analysis will at a minimum address actual and potential water quality impacts to the creek. The proposal will be submitted within 180 days of either: (a) written notice from the Executive Officer that no judicial challenge has been made within the time

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provided by statute for such challenge, or that such challenges were filed but all claims contained therein have been resolved denying McCain water rights or other permits and approvals necessary to rebuild the dams and operate the reservoirs, or (b) five years from the date that this Settlement Agreement is accepted by the Lahontan Water Board, whichever occurs first.

4. McCain's failure to satisfy the obligations as described by Requirements No. 2 and 3a – 3d, will result in any remaining unpaid liability becoming due and payable within 30 days upon receipt of written notice (payment notice) by the Lahontan Water Board Executive Officer. A payment notice will not be issued until the following procedures have been completed:
 - a. The Executive Officer issues McCain a letter identifying the alleged violations that would be the basis for issuing a payment notice. The letter will offer McCain an opportunity to meet with the Executive Officer and Assistant Executive Officer within 30 days of receiving the letter identifying the alleged violations. The meeting will allow McCain an opportunity to address the alleged violations and explain why issuing a payment notice is not justified because of events beyond McCain's control.
 - b. McCain must submit to the Executive Officer and Assistant Executive Officer a written description/explanation of the events McCain believes prevented McCain from satisfying the relevant

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obligation(s) described by Requirements No. 2 or 3a – 3d, above. The written explanation will include, but not be limited to, how the events caused the alleged violation(s) and were beyond McCain's control, the duration of the relevant events and associated alleged violation(s), a description of all actions McCain has taken and will take to minimize the duration of the relevant events and associated alleged violation(s), and a schedule of such actions. The written explanation must be received at the Lahontan Water Board's South Lake Tahoe office a minimum of five (5) days prior to McCain's meeting with the Executive Officer and Assistant Executive Officer.

- c. Within two weeks of the above-referenced meeting, the Executive Officer will issue either (1) a letter explaining why there will be no payment notice in response to the alleged violations, or (2) a payment notice that provides the basis for such a notice.

If McCain does not comply with the payment notice upon its receipt, the Executive Officer will apply for a judgment to the appropriate court pursuant to Water Code section 13328. Additionally, the failure to comply with permit and other legal requirements or to obtain permits may also subject McCain to separate enforcement actions.

5. The Parties agree that they will not contest the proposed Administrative Civil Liability Order before the Lahontan Water Board, the State Water

Board, or any court. The Proposed Administrative Civil Liability Order is included hereto as Attachment A.

6. In the event that this Agreement does not take effect because it is not accepted by the Lahontan Water Board or its delegate, or is vacated in whole or in part by the State Water Board or a court, the Parties acknowledge that they expect the Lahontan Water Board will render a decision regarding adoption of, rejection of, or modification of, the proposed Administrative Civil Order presented to the Lahontan Water Board at the March 13, 2008 hearing, or referral of the matter to the California Attorney General. The Parties acknowledge that the Lahontan Water Board's decision will be based upon the evidence and testimony contained in the hearing record. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence into the hearing record. The Parties also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to:
 - 1) objections related to prejudice or bias of any of the Lahontan Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Lahontan Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of information provided through status reports at Lahontan Water Board meetings and/or reviewing this Agreement, and therefore may have formed

impressions or conclusions, prior to making a decision on the
Complaint in this matter.

B. J. DEIS, MCCAIN AND ASSOCIATES
AND EVERD MCCAIN

By *Everd A. McCain*
Everd McCain

Date: *Nov. 13, 2008*

APPROVED AS TO FORM

By *Jorge A. Leon*
Jorge A. Leon, Counsel for
The Prosecution Team

Date: *November 14, 2008*

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD, LAHONTAN REGION

By *Robert Dodds*
Robert Dodds, Assistant
Executive Officer

Date: *November 13, 2008*