

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

DIVISION OF WATER RIGHTS

ORDER WR 2004-0006-DWR

In the Matter of Complaint No. 54-15-02

Cease and Desist No. 262.31-06

**Phillips against Diversions by David Cosart and
Janet Cosart, and David Hunt and Opal Hunt**

SOURCE: Bear Creek tributary to North Fork Tule River

COUNTY: Tulare County

The State Water Resources Control Board (SWRCB) is authorized under California Water Code section 1831, subdivision (a), to issue a Cease and Desist Order (CDO) when it determines that any person is violating or threatening to violate any requirement described in subdivision (d). Under section 1831, subdivision (d) of the Water Code, the SWRCB may issue a CDO in response to a violation or threatened violation of any of the following:

- (1) The prohibition set forth in section 1052 against the unauthorized diversion or use of water subject to Division 2 (commencing with section 1000) of the Water Code.¹
- (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 January 21, 2004, and in accordance with the provisions of section 1834 of the California Water Code, the SWRCB, Division of Water Rights (Division) provided notice of the proposed CDO against David Cosart and Janet Cosart, and David Hunt and Opal Hunt (Respondents) for the threatened violation and violation of the prohibition against unauthorized diversion and use of water.

FACTS AND INFORMATION

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

1. On September 18, 2002, a complaint was filed by Douglas Phillips and Margaret Phillips (Complainants) against the Respondents concerning their diversion of water from Bear Creek, tributary to North Fork Tule River. The complaint alleged that the Respondents' diversion was interfering with Complainants' pre-1914 appropriative right and causing adverse impacts to public trust resources. The Complainants filed Statement of Water Diversion and Use No. 14508 on

¹ Water Code section 1052, subdivision (a) states that "The diversion or use of water subject to this division other than as authorized in this division is a trespass."

2. November 6, 1995 with the Division for 0.75 cubic foot per second and 164 acre-feet per annum under claim of a pre-1914 appropriative right for the purposes of fire protection and irrigation of 50 acres of pasture and produce.
3. On October 28, 2002, the Division received a response to the complaint from Dennis Keller, the Respondents' consulting engineer. The response disputed the alleged impacts to the Complainants' use of water and to the public trust resources. The response identified that the Respondents' diversion is made under riparian and pre-1914 appropriative water rights. The response also indicated that the parcel on which the diversion takes place is riparian to Bear Creek and that documentation exists of continuous diversion from Bear Creek under claim of pre-1914 right for the purposes of irrigation of 4.5 acres of orchards, stock watering, fire protection and recreation. However, no Statement of Water Diversion and Use is on file with the Division for the Respondents' diversions.
4. In a letter dated November 5, 2002, Complainants contested Respondents' claim of pre-1914 appropriative rights, but Complainants provided no substantial evidence to support their contest.
5. On December 17, 2002, Division staff, accompanied by Respondents, conducted a complaint inspection of Respondents' property. The inspection found that the Respondents use a small diversion dam across one braided section of Bear Creek to divert water through a 12-inch pipe to a sand separator box. Upon exiting the box, the flow of water is split such that it can be directly diverted through a filter and into an underground piping system for irrigation, or it can be diverted to offstream storage in a small reservoir that is used for recreation and fire protection. An inoperable hydroelectric generation facility was also observed, which Respondents stated they have no intention of re-activating.
6. At the time of the inspection, Division staff determined that the Respondents' direct diversion was made under an apparent valid riparian right. However, no evidence was presented of a right to divert water from Bear Creek to storage in the reservoir. The Respondents' consultant stated that he was attempting to locate documents that he believed would support the existence of a pre-1914 appropriative claim of right. The Respondents' consultant also indicated that in the event he was unable to locate this documentation, he would attempt to negotiate an agreement with an existing Tule River water right holder for a supplemental water supply. The Tule River system is fully-appropriated year-round. A supplemental supply could allow the filing of an application to appropriate water in conjunction with an exception to the fully appropriated stream designation for the Tule River watershed. The Respondents' consultant requested an extended period of time to provide documentation of a pre-1914 appropriative right or an agreement with an existing water right holder.
7. In a letter dated January 17, 2003, Division staff notified Respondents' consultant that water should not be diverted to storage at the reservoir from Bear Creek until such time as a valid basis of right to store water can be demonstrated. If the Respondents were unable to reach an agreement or provide evidence of a basis of right to store water in the reservoir by April 1, 2003, they needed to submit a plan that indicates how storage of water in the reservoir will be prevented. The letter warned that an unauthorized diversion of water constitutes a trespass against the State and is subject to various enforcement actions including the imposition of an Administrative Civil Liability of up to \$500 per day.

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8. The Division received a letter dated April 9, 2003, which requested an extension of time until May 1, 2003 to provide a final response. The letter identified the efforts that had been undertaken to obtain evidence of a pre-1914 right and to obtain an agreement with an existing water right holder. The letter also indicated that in the event adequate documentation of a pre-1914 appropriative right could not be provided, the purchase of a pre-1914 appropriative right from a party who receives water from Success Reservoir would be pursued. The letter also indicated that the Respondents' reservoir is currently full, and included a commitment not to divert water until the documents (proof of pre-1914 right) have been submitted to the Division.
9. On August 22, 2003, the Respondents' consultant informed the Division, in writing, that he had obtained evidence of an initiation of a pre-1914 right to appropriate water from Bear Creek in the form of a patent deed based on documented homestead activity, including consumption of water for household purposes, prior to 1914.
10. On September 19, 2003, Mr. Schafer, Watermaster and Secretary of the Tule River Association, informed Complaint Unit staff that no administrative process is available for the transfer and exchange of water rights within Success Reservoir to upstream diversions. Consequently, the Cosarts and Hunts will not be able to obtain authorization from the Tule River Association for any diversion from Bear Creek to storage in their reservoir via a transfer of existing Tule River water rights.
11. On October 3, 2003, Complaint Unit staff informed the Respondents' consultant, in writing, that the Complaint Unit disagreed with his assertion that a patent deed, based on a documented homestead established a pre-1914 right to use the water from Bear Creek. A patent deed (dated December 11, 1919) does not definitively establish that water was used prior to 1914 at the rate and during the season it is currently diverted to storage. Nor does it establish that if a pre-1914 right was initiated, the right has not been forfeited due to a sufficient period of non-use.
12. Water Code section 1052, subdivision (a) states that "The diversion or use of water subject to this division other than as authorized in this division is a trespass." While the Respondents' consultant stated that no diversion to storage is currently taking place, the existence of a serviceable diversion pipeline from the creek to the reservoir constitutes a threat of unauthorized diversion to storage, and therefore a threatened trespass.
13. On February 3, 2004, the Respondents submitted to the Division photographs showing that the diversion pipeline from the creek to the reservoir was cut and capped such that Bear Creek water cannot be delivered to the reservoir. A written statement, signed by all four Respondents under penalty of perjury, accompanied the photographs stating that the pipeline was capped on February 2, 2004, and that the Respondents will not divert water from Bear Creek to the reservoir.

ORDER

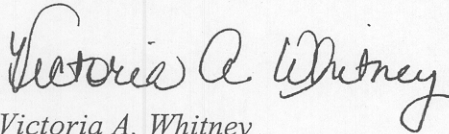
IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, that the Respondents shall comply with the following directive:

Respondents shall not transport water from Bear Creek to the reservoir located on the east side of the creek until such time as the Chief of the Division of Water Rights determines, in writing, that adequate evidence is available to support a valid claim of right to justify diversion of water to storage in the reservoir.

Upon the failure of any person to comply with a Cease and Desist Order issued by the SWRCB pursuant to this chapter, the Attorney General, upon the request of the SWRCB, 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 (Water Code, § 1845 subdivision (a)). Any person or entity who violates a CDO issued pursuant to this chapter may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Water Code, § 1845 subdivision (b)). Subdivision (b) of section 1845 of the Water Code provides:

- (1) Any person or entity who violates a Cease and Desist Order issued pursuant to this chapter may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.
- (2) Civil liability may be imposed by the superior court. The Attorney General, upon request of the SWRCB, shall petition the superior court to impose, assess, and recover those sums.
- (3) Civil liability may be imposed administratively by the SWRCB pursuant to section 1055.

STATE WATER RESOURCES CONTROL BOARD



Victoria A. Whitney
Division Chief

Dated: **MAR 24 2004**