

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

DIVISION OF WATER RIGHTS

ORDER WR 2009-00XX-DWR

CEASE AND DESIST ORDER

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

SOURCE: Old River

COUNTY: San Joaquin County

YOU ARE HEREBY GIVEN NOTICE THAT:

The State Water Resources Control Board (State Water Board or Board) is authorized under California Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Gallo Vineyards, Inc. (Gallo) to cease and desist their unauthorized diversion, collection and use of water in violation of section 1052 of the Water code.

Gallo is alleged to have violated or is threatening to violate Water Code section 1831, which provides:

The State Water Board is authorized to issue a Cease and Desist Order (CDO) 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.
- (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 {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 Gallo for the violation and threatened violation of the prohibition against unauthorized diversion and use of water. Pursuant to State Water Board Resolution 2007-0057, 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 Water Code section 1831 et seq. 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.

FACTS AND INFORMATION

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

1. On July 16, 2008, The State Water Board adopted a Strategic Workplan Plan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Workplan). The Workplan emphasized the State Water Board's responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the Delta. As described in the Workplan, the Division initiated an investigation of the basis of water rights of existing diverters within the Delta. The Workplan also identified that, if and when illegal diversions were found, those diversions would be subject to enforcement action and directed to cease diversions, obtain a legal water right, or pursue a contract for water supplies with Department of Water Resources, United States Bureau of Reclamation, or another party.
2. On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands within the Delta. Based on reviews of U.S. Geological Survey maps, aerial photography, and San Joaquin County Assessors maps, the Division sent letters to each property owner that was determined to have been irrigating in the last few years, and for whom the Division has no record of any basis of right for water diversion. The Division requested that each property owner either: inform the Division within 60 days as to the basis of their right by filing a Statement of Water Diversion and Use with appropriate evidence; define a contractual basis for diversion of water, or cease diversion of water until a basis of right is secured. The letter also informed the contacted property owners that a failure to respond may result in enforcement action.
3. Gallo was mailed a copy of the February 18, 2009 letter as owner of Assessor Parcels 191-050-05, 191-060-02, 191-060-03, 191-060-05 and 191-060-06. Following no response to the Division's letter, on July 30, 2009, a second letter was sent by Certified Mail (Certification # 7001 0320 0001 1831 5149) requesting the basis of right for the diversion to Gallo's parcels.
4. On August 25, 2009 a letter from Wagner & Bonsignore, the consulting firm assigned to represent Gallo, was received. The letter requested a 60-days extension to research the title and provide a Statement of Water Diversion and Use.
5. On October 27, 2009, Robert Donlan from Ellison, Schneider & Harris, attorneys representing Gallo, responded by submitting a Statement of Water Diversion and Use for all five parcels as well as a declaration from Lester James Claussen, the former owner of the subject parcels describing in very broad terms the farming operation on the property during the 1900's. The statement claims riparian and pre-1914 appropriate rights to Old River for irrigation of 377 acres. The statement claims the year of first use to be in the 1800's and a maximum diversion of 450 acre-feet pumped at a capacity of 1800 gallons per minute.
6. The San Joaquin County Assessor's Parcel maps and aerial photographs both show that parcels 191-050-05, 191-060-02 and 191-060-03 have no continuity to a surface stream. This lack of continuity indicates that a riparian basis of right typically does not exist. Gallo's parcels 191-060-05 and 191-060-06 do have continuity with Old River, so a riparian claim is likely appropriate when natural flow is available.
7. The 2007 San Joaquin County crop data layer shows that parcels 191-050-05, 191-060-02 and 191-060-03 were planted in vineyard. According to Department of Water Resources' 1980 "*Crop Water Use in California*," vineyards have an estimated annual water consumption of 2.7 acre-feet per acre. Parcels 191-050-05, 191-060-02 and 191-060-03 contain approximately 238.5 acres which correlates to an estimated 644 acre-feet of annual water consumption.
8. The Division reviewed the submitted information and accepts the claim of riparian rights for parcels 191-060-05 and 191-060-06. However, the Division finds that the information provided for parcels 191-050-05, 191-060-02 and 191-060-03, even after consideration of Mr. Lester Claussen's declaration of his knowledge of the historic use of water on the property, is insufficient to support any retention of riparian rights after severance of or the initiation and then continued beneficial use of water under a pre-1914 claim of right.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, Gallo shall immediately cease and desist from diverting water to parcels 191-050-05, 191-060-02 and 191-060-03 until the following are satisfied:

- (1) Gallo shall submit to the Division sufficient evidence establishing a basis of right or a water supply contract to serve these properties. No diversions shall be made to these parcels until Gallo receives approval from the Assistant Deputy Director for Water Rights to exercise the water right or contract.
- (2) Within 90 days of the date of this Order if no basis of rights can be established, Gallo shall submit a plan showing how and when it will permanently remove the diversion works serving parcels 191-050-05, 191-060-02 and 191-060-03. Upon approval of the plan by the Assistant Deputy Director for Water Rights, Gallo shall diligently take the actions identified in the approved plan.
- (3) Because the Gallo's diversions on Old River serve both riparian parcels and parcels 191-050-05, 191-060-02 and 191-060-03, Gallo shall install an inline flow meter at its Old River Pumping Plant within 90 days of the date of this Order. The inline flow meter shall be capable of registering instantaneous flow and total cumulative flow through the meter. Immediately after installation of the meter, Gallo shall maintain monthly records of the total amount of water diverted through the meter and records of the crop type and acreage served. Gallo shall submit these records annually as part of a reporting under its recently filed Statement of Water Diversion and Use using the new Online Reporting System available online at: <http://www.waterboards.ca.gov/waterrights/>.

Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water 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. (Wat. Code, § 1845 subd. (a).) Any person or entity that violates a CDO issued pursuant to chapter 12 may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Wat. Code, § 1845, subd. (b).) Civil liability may be imposed by the superior court or administratively by the State Water Board pursuant to Water Code section 1055.

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel
Assistant Deputy Director for Water Rights

Date: