

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

**DIVISION OF WATER RIGHTS**

**ORDER WR 2015-0029-EXEC**

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In the Matter of Unauthorized Diversion and Use of Water by  
James D. and Lyle P. Milovina Trust; James D. Milovina (Trustee);  
Lyle P. Milovina (Trustee); and Milovina Vineyards

**ORDER APPROVING SETTLEMENT AGREEMENT  
AND CEASE AND DESIST ORDER**

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**BY THE EXECUTIVE DIRECTOR<sup>1</sup>**

**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 and an Administrative Civil Liability Complaint to James D. and Lyle P. Milovina Trust; James D. Milovina (Trustee); Lyle P. Milovina (Trustee); and Milovina Vineyards (collectively, Milovina). In accordance with the attached Settlement Agreement, the State Water Board's Division of Water Rights Prosecution Team (Division Prosecution Team) and Milovina 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.

**2.0 BACKGROUND**

Milovina owns and operates three (3) reservoirs located in Hopland, Mendocino County referred to as Reservoirs A, B, and 2. All of the reservoirs are onstream reservoirs located on unnamed streams tributary to the Russian River on Assessor's Parcel Numbers (APN) owned by James D. and Lyle P. Milovina Trust,

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<sup>1</sup> State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

including: APNs 048-120-03 and 048-120-14 (Reservoir A), APN 047-350-07 (Reservoir B), and APN 048-140-03 (Reservoir 2).

The Division has no record of a water right authorizing the storage of water in Reservoirs A, B, or 2 other than pending appropriative right Applications 30553, 30554, and 31988. Milovina submitted Applications 30553 and 30554 in 1996 but did not submit Application 31988 until November 19, 2012, nearly two years after the Division discovered Reservoir 2 during a site inspection conducted on December 30, 2010.

On April 17, 2013, the Division Prosecution Team issued an Administrative Civil Liability Complaint (ALCLC) and Draft Cease and Desist Order (Draft CDO) against Milovina, alleging that Milovina unlawfully diverted water to storage in Reservoirs A, B, and 2, and alleging that Reservoir 2 constitutes an unauthorized diversion and a trespass against the State of California in violation of Water Code section 1052.

On May 3, 2013, Milovina timely requested a hearing on the ALCLC and Draft CDO. On June 3, 2015, the State Water Board issued a notice of public hearing on the ALCLC and Draft CDO for September 15, 2015. This hearing was subsequently postponed upon receipt of a settlement agreement.

Milovina and the Division Prosecution Team engaged in settlement discussions and mutually agreed to settle the matters identified in the ALCLC and Draft CDO in lieu of a hearing.

### **3.0 SETTLEMENT AGREEMENT**

On August 11, 2015, Milovina and the Division Prosecution Team executed a settlement agreement; however, there was a typographical error regarding the APNs associated with Reservoir A. Milovina and the Division Prosecution Team subsequently corrected the error and on September 11, 2015, executed the

corrected Settlement Agreement attached hereto. The general terms of the Settlement Agreement are that:

1. Milovina withdraws its request for hearing on the ACLC and Draft CDO, waives its right to reconsideration of this order, and agrees to the cease and desist provisions as described in the Settlement Agreement and incorporated herein; and
2. Milovina is subject to administrative civil liability in the amount of \$33,800, without reduction, payable within 30 days of issuance of this order, to be deposited into the Water Rights Fund pursuant to Water Code section 1054, et seq.

#### ORDER

**IT IS HEREBY ORDERED THAT** the attached Settlement Agreement between the Division Prosecution Team and Milovina is approved and is incorporated by reference into this order. All terms and conditions of the Settlement Agreement are adopted as terms and conditions of this order, including Milovina's obligations to diligently pursue securing permits and comply with the requirements, conditions, and schedule specified in paragraph 6 of the Settlement Agreement.

This order constitutes a cease and desist order for purposes of Division 2, Part 2, chapter 12 of the California Water Code (commencing with section 1825).

Violations of this Settlement Agreement and the order will be subject to further enforcement under California Water Code section 1845 at the discretion of the State Water Board.

Upon the failure of any person or entity to comply with a cease and desist order issued by the State Water Board, and upon the request of the State Water Board, the Attorney General 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).)

Section 1845, subdivision (b) of the Water Code provides:

(1) A person or entity who violates a cease and desist order issued pursuant to this chapter may be liable in an amount not to exceed the following:

(A) If the violation occurs in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions, ten thousand dollars (\$10,000) for each day in which the violation occurs.

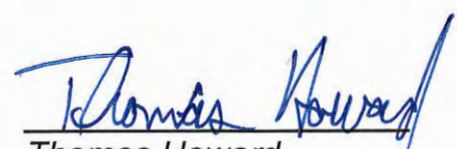
(B) If the violation is not described by subparagraph (A), one thousand dollars (\$1,000) for each day in which the violation occurs.

(2) Civil liability may be imposed by the superior court. The Attorney General, upon the request of the board, shall petition the superior court to impose, assess, and recover those sums.

(3) Civil liability may be imposed administratively by the board pursuant to Section 1055.

STATE WATER RESOURCES CONTROL BOARD

Dated: 9/23/15

  
Thomas Howard  
Executive Director

## SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between James D. and Lyle P. Milovina Trust, James D. Milovina (Trustee), Lyle P. Milovina (Trustee), and Milovina Vineyards ("Milovina" or "Milovina Vineyards") 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 on this 11 day of September, 2015.

### RECITALS

1. Milovina owns and operates three (3) reservoirs located in Mendocino County:
  - a. Mendocino County Assessor's Parcel Numbers 048-120-03 and 048-120-14 contain Reservoir A that is located onstream to an Unnamed Stream tributary to the Russian River;
  - b. Mendocino County Assessor's Parcel Number 047-350-07 contains Reservoir B that is located onstream to an Unnamed Stream tributary to the Russian River; and
  - c. Mendocino County Assessor's Parcel Number 048-140-03 contains Reservoir 2 that is located onstream to the same Unnamed Stream tributary to the Russian River as Reservoir A.
  - d. These Mendocino County Assessor's Parcel Numbers are all owned by James D. and Lyle P. Milovina Trust.
  
2. On December 30, 2010, Division staff, accompanied by James D. Milovina, conducted an inspection of Milovina's properties located in Hopland, California. Based on staff's review of interactive maps maintained by the Division (i.e. electronic water rights information management system GIS); water right records on file with the Division; aerial photographs; evidence collected during the inspection; and statements made by James D. Milovina; Division staff determined the following:
  - a. Built in 1968, Reservoir A collects surface flow from the unnamed stream on which it is located. Streamflow is held in seasonal storage within the reservoir for later beneficial use. There is no water right permit, license, or registration on file with the State Water Board authorizing this seasonal storage of water in Reservoir A. This reservoir is the subject of pending water right application 30553 (A030553) under the ownership of Milovina; who seeks a permit to seasonally store 40 acre-feet of water. At the time of the inspection it was thought that there was no Statement of Water Diversion and Use (Statement) on file for the storage of water in Reservoir A. It was later determined that Statement 21396 (S021396) had been filed on June 29, 2010 by Milovina Vineyards for the storage of 18 acre-feet of water in Reservoir A. Staff

estimated that when full, Reservoir A has a surface area of 1.2 acres and a capacity of 21 acre-feet.

- b. Built in 1983, Reservoir B collects surface flow from the unnamed stream on which it is located. Streamflow collected in Reservoir B has been held in seasonal storage within the reservoir. There is no water right permit, license, or registration on file with the State Water Board for seasonal storage of water in Reservoir B. This reservoir is the subject of pending water right application 30554 (A030554) under the ownership of Milovina Vineyards; which seeks a permit to seasonally store 45 acre-feet of water. At the time of the inspection it was thought that there was no Statement on file for the storage of water in Reservoir B. It was later determined that Statement 21395 (S021395) had been filed on June 29, 2010 by Milovina Vineyards for the storage of 25 acre-feet of water in Reservoir B. Staff estimated that when full, Reservoir B has a surface area of 3 acres and a capacity of 45 acre-feet.
  - c. Built in 1999, Reservoir 2 collects surface flow from the unnamed stream on which it is located. Streamflow collected in Reservoir 2 is held in seasonal storage within the reservoir for later beneficial use. At the time of the inspection there was no water right permit, license, or registration for seasonal storage of water in Reservoir 2 on file with the State Water Board, nor was Reservoir 2 the subject of a pending water right application. At the time of the inspection it was thought that there was no Statement on file for the storage of water in Reservoir 2, it was later determined that Statement 21397 (S021397) had been filed on June 29, 2010 by Milovina Vineyards for the storage of 18 acre-feet of water in Reservoir 2. According to a professional survey of the reservoir (Franz Engineering) provided by James P. Milovina, Reservoir 2 has a surface area of 1.4 acres and a capacity of 22.3 acre-feet. Milovina uses water from Reservoir 2 to frost protect and irrigate up to 41 acres of surrounding vineyard during the spring and summer.
3. By letter dated February 13, 2012, the Division transmitted to James D. Milovina and Lyle P. Milovina a copy of staff's report of the December 30, 2010 inspection and notified them that seasonal storage of water in a reservoir without an existing water right is considered an unauthorized diversion of water. Based on Division staff findings, Milovina Vineyards was required to either: (1) provide evidence satisfactory to the State Water Board that demonstrates Reservoir 2 does not store water, or can be operated without storing water subject to the State Water Board's permitting authority; or (2) remove Reservoir 2 or render it incapable of storing water; or (3) file an application with the State Water Board seeking permission to appropriate water. The letter incorrectly notified Milovina Vineyards that it needed to file a Statement with the Division to report the storage of water in Reservoir 2. Milovina Vineyards was given 45 days to submit a response indicating the intended course of action and an implementation plan with a schedule.
  4. Milovina filed an application for Reservoir 2 on November 19, 2012 and the Division assigned it Application 31988 (A031988).

5. On April 17, 2013, the Division Prosecution Team issued an Administrative Civil Liability Complaint (“ACLC”) and Draft Cease and Desist Order (“Draft CDO”) against Milovina, alleging that Milovina unlawfully diverted water to storage in Reservoirs A, B, and 2, which constitutes an unauthorized diversion and a trespass against the State of California in violation of California Water Code section 1052. The ACLC recommends an Administrative Civil Liability in the amount of \$33,800 for the unauthorized diversion of water to Reservoir 2 only, since there was no pending Water Rights Application on file with the Division for Reservoir 2 at the time of the December 30, 2010 inspection. The proposed liability, based on relevant circumstances, including the equivalent cost to pump groundwater to replace an estimated 22.3 acre-feet per annum (afa) of evaporative losses and water used for irrigation and frost protection during the years 2010, 2011, and 2012, plus the cost of water right filing fees.
6. On May 3, 2013, Milovina timely requested a hearing on the ACLC and Draft CDO. At the time of this Settlement Agreement, the State Water Board is scheduled to hear the ACLC and Draft CDO on September 15, 2015.
7. On July 18, 2013, Division staff, accompanied by Milovina and consultants from North Coast Resource Management (NCRM) conducted another site visit at the request of NCRM in an attempt to better understand the Division’s requirements for assessing, analyzing, and resolving any significant issues for pending Water Rights Applications 30553, 30554, and 31988. This site visit confirmed previous Division staff observations during the December 30, 2012 inspection.
8. In lieu of hearings on the matter, Milovina and the Division Prosecution Team agree to settle the matters identified in the ACLC and Draft CDO through this Settlement Agreement.
9. 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, Milovina and the Division Prosecution Team do hereby agree to settle the ACLC and 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. **Administrative Civil Liability.** Milovina shall be subject to administrative civil liability in the amount of \$33,800. This amount, without reduction, is based on the relevant circumstances, including replacement costs for evaporation losses of 22.3 afa in Reservoir 2 for the 3 year period covered in the ACLC and the estimated costs incurred by State Water Board staff to investigate and prosecute the administrative civil liability and cease and desist enforcement actions that are the subject of this Settlement Agreement.
4. **Administrative Civil Liability Payment.** Within 30 days following the State Water Board Executive Director's approval of this Settlement Agreement, Milovina shall pay \$33,800 to the State Water Board. The State Water Board will deposit said funds in the Water Rights Fund pursuant to Water code sections 1054, et seq.
5. **Satisfaction of Administrative Civil Liability Complaint.** Milovina's full payment under paragraph 3 will be a complete and final satisfaction of the administrative civil liability described in the ACLC, and the State Water Board will not bring any further administrative civil liability or other enforcement action regarding any of the alleged violations described in the ACLC.
6. **Draft Cease and Desist Order.** Milovina and the Division Prosecution Team shall resolve the alleged unauthorized diversions or threatened unauthorized diversions as follows:
  - a. Milovina shall continue to diligently pursue securing permits pursuant to Applications A030553, A030554, and A031988 by satisfying all Division requests for information, environmental documents, maps, and fees within the designated time frames, or any extension of time granted by the Division; and
  - b. Milovina shall resolve the alleged unauthorized diversions or threatened unauthorized diversions by:
    - i. Submitting a complete Diversion and Analysis Study (Study) to the Assistant Deputy Director for the Division of Water Rights for acceptance within 180 days of the settlement agreement. Milovina has already satisfied a portion of this requirement by the previous submittal of the Stream Assessment Reports. However, a determination of the upstream limit of anadromy in relation to the points of diversion, and a cumulative diversion analysis still need to be completed and submitted. The Study shall be conducted consistent with the guidelines established in the *Policy for Maintaining Instream Flows in Northern California Coastal Systems (Instream Flow Policy)*. The Study will be reviewed for acceptance by the Division's permitting staff.



- A. If Milovina is unable to submit an acceptable Study to the Assistant Deputy Director for the Division of Water Rights within 180 days of the settlement agreement despite their timely good faith efforts due to circumstances beyond their control, Milovina shall promptly inform the Assistant Deputy Director for Water Rights of the events or circumstances that caused or could cause a violation of this provision of the Settlement Agreement.
- B. The notice shall describe the reason for the delay and shall describe the anticipated length of time the delay may persist, the cause or causes of the delay, the measures taken or to be taken by Milovina to prevent or minimize the delay, and the anticipated date of compliance.
- C. Where the Assistant Deputy Director for the Division of Water Rights concurs that, despite the timely good faith efforts of Milovina, the delay in submitting an acceptable Study is due to circumstances beyond their control, the Assistant Deputy Director may extend the deadline for the Study to an agreed upon future date. Where the Assistant Deputy Director for the Division of Water Rights does not concur that the delay in submitting the Study is reasonable or with good cause, the failure to submit the Study by the required deadline shall be a violation of this Settlement Agreement.
- ii. If Milovina timely submits a complete Study for review and the Division's Permitting staff has not responded nor reviewed the Study within 180 days after submittal, Milovina may contact the Assistant Deputy Director for Water Rights notifying him or her regarding their compliance with this term of the Settlement Agreement. The Assistant Deputy Director shall take into consideration Milovina's timely submittal prior to considering any potential violations of this Settlement Agreement.
- c. If Milovina intends to continue to divert and store water subject to the State Water Board's permitting authority while pursuing Applications A030553, A030554, and A031988, then Milovina must demonstrate that interim operations are consistent with section 2.2 of the *Instream Flow Policy* until the permits are issued. Specifically, Milovina agrees to submit a Reservoir Operations Plan<sup>1</sup>, within 180 days of this Settlement Agreement, that describes how they will bypass all water outside the *Instream Flow Policy's* diversion season of December 15<sup>th</sup> to March 31<sup>st</sup>, provide for an appropriate minimum bypass flow during the diversion season, and keep hourly records of the diversion of water. The Reservoir Operations Plan must be

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<sup>1</sup> The Division Prosecution Team recognizes that NCRM previously submitted an "Interim Operations Plan", however, submission of this plan is dependent upon what is ultimately determined in the Study, which was incomplete at the time of submission. The Reservoir Operation Plan must be amended pending a complete Diversion Analysis Study.

implemented within one year following the State Water Board Executive Director's approval of this Settlement Agreement, or six months from the date of the Assistant Deputy Director approval of the Plan, whichever is later.


- d. Milovina shall submit a plan to permanently render the reservoir(s) incapable of storing water to the Assistant Deputy Director for the Division of Water Rights if the State Water Board denies or cancels the applications. The plan shall be submitted within 150 days of the final disposition of such a decision. This provision shall not supplant or alter any due process or appeal process available to an applicant following State Water Board denial or cancellation of the application(s).
  - e. If the Division finds there is insufficient flow to meet the requested diversions in Applications A030553, A030554, and A031988, as determined by the cumulative diversion analysis, the Division may require Milovina to immediately cease and desist all diversions or specify that the diversions must be scaled back from the amount sought in the applications to correspond to what water is available for appropriation.
  - f. If the State Water Resources Control Board issues a notice or order of water unavailability to post-1914 water rights at any priority in the Russian River watershed and its tributaries where Reservoirs A, B, and 2 are located, Milovina agrees that the diversions under pending Applications A030553, A030554, and A031988 shall cease.
  - g. Milovina agrees that no new construction of any storage or diversion facilities prior to obtaining all necessary regulatory permits for such facilities, including preparatory grading, instream work or other activities associated with construction of new facilities. For the purposes of this term, enlargement of existing facilities shall be deemed new construction.
7. **Enforcement of this Settlement Agreement.** The terms and conditions of the Settlement Agreement and this Order shall be treated as a final cease and desist order issued by the State Water Board pursuant to chapter 12 of the California Water Code (commencing with section 1825). Violations of this Settlement Agreement and the Order will be subject to further enforcement under Water Code section 1845 at the discretion of the State Water Resources Control Board.
8. **Board Authority.** This Settlement Agreement is not intended to and shall not be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law. Nothing in this Settlement Agreement shall excuse Milovina from meeting any other requirements that may be imposed hereafter by applicable legally binding legislation, regulation, or other authority.
9. **Hearing.** Upon execution of this Settlement Agreement by both parties, Milovina and the Division Prosecution Team shall request that the hearing in this matter be indefinitely

postponed pending approval of this Settlement Agreement by the Executive Director. Upon approval of this Settlement Agreement by the State Water Board's Executive Director, Milovina's request for hearing on the ACLC and Draft CDO is withdrawn.

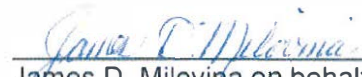
10. **Time is of the Essence.** The State Water Board is scheduled to hear this matter on September 15, 2015. Therefore, time is of the essence and the parties shall submit this Settlement Agreement and proposed implementing order to the Executive Director as soon as possible.
11. **Waiver of Reconsideration.** Milovina waives its rights to request reconsideration of the State Water Board Executive Directors' order approving this Settlement Agreement, provided no material modifications to this Settlement Agreement or additional requirements beyond the requirements of this Settlement Agreement are included in that order.
12. **Successors.** This Settlement Agreement is binding on any successors or assigns of Milovina and the State Water Board.
13. **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. The parties are represented by counsel.
14. **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.
15. **Additional Documents.** Each party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
16. **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.
17. **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.
18. **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.

19. **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.
20. **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 manner amplify, limit, modify or otherwise aid in the interpretation of this Settlement Agreement.
21. **Effective Date.** This Settlement Agreement shall become effective immediately upon the State Water Board Executive Director's Order Approving the Settlement Agreement.
22. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the laws of the State of California.
23. **Authorization.** Each party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
24. **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 Milovina, or 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 Milovina's directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Settlement Agreement.

Dated: Sept 11, 2015

  
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John O'Hagan  
Assistant Deputy Director  
State Water Board, Division of Water Rights  
Prosecution Team

Dated: Sept 9, 2015

  
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James D. Milovina on behalf of  
James D. and Lyle P. Milovina Trust,  
James D. Milovina (Trustee), Lyle P. Milovina  
(Trustee), and Milovina Vineyards