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6 Attorneys for Respondents THOMAS P.
HILL, STEVEN L. GOMES
7

8 **BEFORE THE CALIFORNIA**
9 **STATE WATER RESOURCES CONTROL BOARD**

10
11 In the Matter of Draft Cease) Ref. No. 363:JO:262.0(23-03-06)
and Desist Order No.)
12 2009-00XX-DWR against Thomas) DECLARATION OF JARED G. CARTER
Hill, Steven Gomes and) IN SUPPORT OF HILL, GOMES
13 Millview County Water) OPPOSITION TO DRAFT CDO
District.)
14)
15) Hearing: January 26, 2010
Time: 9:00 a.m.
16) Location: Coastal Hearing Room,
1001 I Street, Second Floor,
Sacramento
17

18 I, Jared G. Carter, declare:
19

20 1. I am an attorney, duly licensed to practice law in all
21 of the Courts of the State of California. My law firm and I
22 are counsel of record in this matter for respondents Tom Hill
23 and Steve Gomes. We were also counsel of record for Hill and
24 Gomes in the recently-concluded civil lawsuits in Mendocino
25 County Superior Court, cases number SCWL-CVPT '08 51448 and
26 SCWL-CVG '08 51450, regarding the same water right that is at
27 issue in this proceeding. The following is based upon my
28 personal knowledge, except for those matters stated on

Ex - B

1 information and belief, and as to those matters I am informed
2 and believe them to be true. If called as a witness I could
3 and would competently testify to the following.
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5 2. The water right at issue in this proceeding as well as
6 in the two above-referenced Superior Court cases is known as
7 the "Waldteufel Right" and is embodied in a notice generated by
8 Mr. J.A. Waldteufel, as of March 24, 1914, and recorded in the
9 official records of Mendocino County at Book 3 of Deeds, Page
10 17, on or about March 24, 1914 ("**Waldteufel Right**"). A true
11 and correct copy , a copy of which is attached hereto as
12 Exhibit C.
13

14 3. I am informed and believe that the 'investigation' by
15 Charles Rich, upon which the proposed cease and desist order at
16 issue in this proceeding is based, was conducted in response to
17 a February 27, 2006, letter ("**Howard Complaint**") from Lee
18 Howard to Victoria Whitney ("**Whitney**"), Division Chief of the
19 State Water Resources Control Board ("**SWRCB**"), Division of
20 Water Rights ("**DWR**"). I am informed and believe that a true
21 and correct copy of the entire Howard Complaint is attached
22 hereto as Exhibit G.
23

24 4. I received a copy of Charles Rich's ("**Rich**") June 1,
25 2007, "Report of Investigation" ("**Report**") regarding
26 the Howard Complaint, a true and correct copy of which report
27 is attached hereto as Exhibit M.
28

1 5. On July 24, 2007, I wrote a letter to Rich on behalf of
2 Hill and Gomes, giving him some of the reasons why the
3 conclusions in the Report are in error. A true and correct
4 copy of my July 24 letter to Rich is attached hereto as Exhibit
5 N (AR 10074-78, Tab 23; see also 10256-60).
6

7 6. On November 15, 2007, I wrote a letter and public
8 records request to James Kassel of SWRCB, DWR. A true and
9 correct copy of my November 15 letter to Kassel is attached
10 hereto as Exhibit Q (AR 10046-47, Tab 18).
11

12 7. On March 6, 2008, Chris Neary (who represents Millview
13 County Water District) and I wrote a joint letter to Whitney
14 regarding the Howard Complaint and the Report. A true and
15 correct copy of that joint letter is attached hereto as Exhibit
16 R (AR 10226-32).
17

18 8. On or about April 17, 2008, I received from Whitney a
19 letter denying reconsideration of the Report. A true and
20 correct copy of the letter I received from Whitney is attached
21 hereto as Exhibit S.
22

23 9. On or about April 17, 2008, I received from Whitney a
24 letter purporting to close DWR's and SWRCB's handling of the
25 Howard Complaint. A true and correct copy of that letter from
26 Whitney is attached hereto as Exhibit T.
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1 10. On April 24, 2008, Neary and I caused to be filed in
2 the Superior Court of the County of Mendocino, case number
3 SCWL-CVPT '08 51448 (entitled Millview County Water District,
4 Tom Hill, Steve Gomes v. California State Water Resources
5 Control Board, et al.; hereafter, the "**Lawsuit**"), a petition
6 for writ of mandate against SWRCB.

7
8 11. On April 28, 2008, Neary and I filed in the Lawsuit an
9 application for an alternative writ of mandate and a stay of
10 any prosecution of Millview, Hill and/or Gomes by SWRCB with
11 respect to the Waldteufel Right. In connection with that
12 motion, I caused the documents that I had received from DWR in
13 response to my November 2007 public records request to be filed
14 as the 'administrative record' of the SWRCB's action with
15 respect to the Waldteufel Right. A true and correct copy of my
16 "Notice of Lodging of the Administrative Record", which
17 includes the documents received from DWR, is attached hereto or
18 filed concurrently herewith as Exhibit U, except that all of
19 the documents under Tab 39 (10226 to 10270) were added by me
20 after receipt of the AR from DWR, and are therefore not
21 technically part of the AR, and page 10147a was inadvertently
22 omitted but has been added as the second page of Exhibit L (see
23 Tab 31 of AR).

24
25 12. On January 14, 2009, in the course of his handling of
26 the Lawsuit, and after having become familiar with the Howard
27 Complaint, the Report and the Waldteufel Right, the Honorable
28 Philip Schafer did issue an order ("**Order**") in the Lawsuit. A

1 true and correct copy of the Order is attached hereto as
2 Exhibit V. On page two of the Order, Judge Schafer stated that
3 DWR's and/or SWRCB's "proposed inaction", i.e., its stated
4 intention of simply closing the Howard Complaint with taking
5 final and formal action thereon, "would be an abuse of
6 discretion".

7
8 13. SWRCB shortly thereafter (on April 10, 2009) issued a
9 notice of a draft cease and desist order ("**CDO**") against
10 Millview, Hill and Gomes. The CDO is based entirely upon the
11 Report. Attached hereto as Exhibit W is a true and correct
12 copy of the notice I received regarding the CDO.

13
14 14. I timely requested a hearing on the CDO on Hill's and
15 Gomes' behalf. Attached hereto as Exhibit X is a true and
16 correct copy of my April 28, 2009, letter to Kassell requesting
17 a hearing on the CDO.

18
19 15. The months of May, June, July and August 2009 passed
20 without any action by or notice from SWRCB regarding the
21 hearing on the CDO. Then, on September 3, 2009, one week
22 before a September 10 hearing before Judge Schafer in the
23 Lawsuit, SWRCB issued a notice of hearing on the CDO, setting
24 the hearing for January 26, 2009.

25
26 16. I have on several occasions asked the DWR staff and/or
27 its counsel what volume of water SWRCB attributed to the
28 Waldteufel Right when SWRCB has concluded, in its "Decision

1 1610" and otherwise, that the Russian River above Cloverdale is
2 fully appropriated in the summer months. I have never been
3 able to receive an answer from SWRCB or its agents to that
4 question. To the extent SWRCB has attributed the full volume
5 of water claimed by Waldteufel in making prior decisions
6 regarding appropriation of the Russian River, it is
7 inconsistent and inequitable - and in my opinion unlawful - for
8 SWRCB to now attribute a lesser volume of water to the
9 Waldteufel Right.

10
11 17. At the present time I know of no other documents or
12 materials that were generated or produced by the Board or DWR
13 in their handling of the Howard Complaint. The Board did not
14 conduct a hearing regarding the Howard Complaint or the
15 conclusion in the Report that the Waldteufel Right had been
16 diminished by forfeiture. The instant proceeding is
17 nevertheless based upon the SWRCB's apparent conclusion that
18 there has been a forfeiture of the large majority of the volume
19 of the Waldteufel Right.

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21 18. It is unlawful for SWRCB to purport to reach such a
22 conclusion without a hearing, and it is unlawful for SWRCB to
23 purport to require Hill and Gomes, or Millview, to prove that
24 the Waldteufel has not been forfeited. These positions are
25 also inconsistent with SWRCB's own literature.

26
27 19. Attached hereto as Exhibit AA is a true and correct
28 copy of a document entitled "State Water Resources Control

1 Board Information Pertaining To Water Rights In California -
2 1990". At pages 7 and 8 of that pamphlet, which I am informed
3 and believe was published by SWRCB (apparently in May 1999; see
4 lower left of first page), it is stated that "The SWRCB does
5 not have the authority to determine the validity of vested
6 rights other than appropriative rights initiated December 19,
7 1914 or later."

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9 20. Attached hereto as Exhibit BB is a true and correct
10 copy of a document entitled "Information Pertaining to
11 Investigating Water Rights Complaints in California - February
12 2005", which purports to have been published by the DWR. SWRCB
13 and/or DWR therein state, on page three, as follows:

14 "In some case, the SWRCB may decide not to process
15 a complaint because of lack of information or a
16 determination that the issues more appropriately fall
17 under the jurisdiction of the court system. This
18 situation is most common for major operations involving
19 claimed riparian and/or pre-1914 water rights or for
20 allegations of waste or unreasonable use of water or
21 adverse impacts to public trust uses."

22 21. I am informed and believe that in the case that
23 resulted in the published decision in California Farm Bureau
24 Federation v. California State Water Resources Board (2007) 146
25 Cal.App.4th 1126, 1152,¹ SWRCB took the position that it has no
26 jurisdiction over pre-1914 water rights. The Waldteufel Right

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¹ The California Supreme Court has granted review of that case, so it is no longer precedential.

1 is a pre-1914 water right within the meaning of that phrase.

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3 I declare under penalty of perjury under the laws of the
4 State of California that the foregoing is true and correct.

5 Executed on January 4, 2010, at Ukiah, California.

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Jared G. Carter