



State Water Resources Control Board



Division of Water Rights

1001 Street, 14th Floor • Sacramento, California 95814 • 916-324-5300
P.O. Box 2000 • Sacramento, California 95812-0000
Fax: 916-324-3400 • www.waterrights.ca.gov

inda S. Adams
Secretary for
Environmental Protection

Arnold Schwarzenegger
Governor

MEMORANDUM

TO: Files - 262.0(23-03-06)

FROM: Charles A. Rich
Charles A. Rich, Chief
Complaint Unit
DIVISION OF WATER RIGHTS

DATE: June 1, 2007

SUBJECT: REPORT OF INVESTIGATION FOR A COMPLAINT FILED BY LEE HOWARD
REGARDING DIVERSION FROM THE EAST FORK OF THE RUSSIAN RIVER

BACKGROUND

In January 1998, Thomas Hill and Steven Gomes purchased 32 acres ± located immediately south of Lake Mendocino Drive and adjacent to the Russian River¹ near the City of Ukiah from the Robert Wood Living Trust. The Grant Deed covering this transaction indicates that all water rights and claims of title to water of the grantors associated with the land were included in the sale.

One of Mr. Wood's predecessors-in-interest, E.L. Waldteufel, recorded a water right notice on March 24, 1914. According to this notice, Mr. Waldteufel claimed a right to divert 100 miners inches under a 4-inch pressure, or 2 cubic feet per second (cfs) from the West Fork of the Russian River for domestic, culinary, and irrigation purposes on Lot #103 of the Yokayo Rancho. The land purchased by Messrs. Hill and Gomes consists of the southeastern portion of Lot #103 and contains roughly 20% of the acreage originally contained in Lot #103.

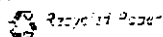
Mr. Lester Wood, Robert Wood's father, originally filed Statement of Water Diversion and Use (Statement) S000272 in 1967 which reported the diversion and use of water on the Wood property. Supplemental statements for S000272 were also filed for the years 1970-72, 1979-81, 1985-87, and 2002-04².

CreekBridge Homes L.P. (CreekBridge) bought a sizable portion of the property from Messrs. Hill and Gomes in 2001 and subsequently built 125 homes on the property. A buffer strip to provide an open space / riparian corridor approximately 100 feet wide between the West

¹ - This reach of the river is identified as the Russian River by the U.S. Geological Survey but is often called the West Fork of the Russian River by locals. It will be referred to as the West Fork in this report.

² - This supplemental statement was filed by Mr. Gomes. All of the others were filed by Lester Wood or his son, Robert Wood.

California Environmental Protection Agency



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Fork Russian River channel and the property purchased by CreekBridge was retained by Messrs. Hill and Gomes. CreekBridge Homes filed Statement S015625 in 2001. According to information contained with this statement, CreekBridge not only purchased the property but also obtained "the reservation of the proportional water right for this property which was established and recorded prior to December 1914." Only the original statement was filed. No supplemental statements have been received from CreekBridge Homes for Statement S015625.

Messrs. Hill and Gomes entered into an agreement with the Millview County Water District (Millview) in October 2002. This agreement provides for the lease and/or purchase by Millview of a pre-1914 claim of appropriative right allegedly held by Messrs. Hill and Gomes, use of which has been reported under Statement S000272. The recitals of this agreement include the following statement:

Licensors (Messrs. Hill and Gomes) is the owner of those certain water rights established by the claim of J.A. Waldteufel dated March 24, 1914, by which J.A. Waldteufel claimed the water flowing in the West Fork of the Russian River at the point of posting to the extent of 100 inches measured under a four inch pressure, (approximately 1450 acre foot), the purpose for such claim being for domestic and culinary purposes (the "Water Right").

The agreement also reserves 125,000 gallons per day (gpd) to Messrs. Hill and Gomes. The effective period of the agreement is listed as being from October 15, 2002 until October 14, 2006. Complaint Unit staff understand that the effective period of this agreement has been extended.

Lee Howard filed a complaint against Thomas Hill on March 6, 2006 regarding the diversion and use of water reported pursuant to Statement S000272. Mr. Howard's complaint contains the following allegations:

- While the basis of right pursuant to S000272 claimed by Messrs. Hill and Gomes is a pre-1914 appropriative claim, any basis of this particular type of right has been lost due to nonuse between 1914 and 2001.
- All use prior to 2001 under this claim of right occurred on lands that have a valid riparian basis of right. (The implication being that any use that occurred was made under a riparian claim of right and a valid pre-1914 appropriative claim of right was never initiated or vested.)
- The point of diversion for S000272 has been moved downstream from a location on the West Fork of the Russian River to a location on the main stem Russian River.

By letter dated March 29, 2006, Messrs. Hill and Gomes, Millview, and CreekBridge Homes were asked to respond to the complaint. Only Millview responded via a letter dated April 24, 2006 which contains the following pertinent points:

- Messrs. Hill and Gomes believe they are the legal owners of a pre-1914 appropriative right. Diversions made under this claim of right are reported via Statement S000272.

- Water reported pursuant to a supplemental Statement dated June 10 2005 for the months of May through November under S000272 occurred at Millview's point of diversion located immediately downstream of the confluence of the East and West Forks of the Russian River. This water was used to supply the 125 homes constructed on the property previously owned by Mr. Woods.
- Millview understands that Messrs. Hill and Gomes via the lease agreement, "granted, conveyed, and assigned all right, title and interest to the water right S000272 to" Millview except for a collective reservation of 125,000 gpd to be applied equally to each of the 125 homes constructed by CreekBridge³.
- CreekBridge diverted water under the claimed right from July 2001 through September 2002 pursuant to S015625
- Millview currently supplies water to all of the place of use identified under S000272 and S015625, which is completely within Millview's boundaries, during the months of May through November. Water service is supplied during the months of December through April pursuant to Millview's License 492 (Application 3601), Permit 13936 (Application 17587) and a water supply agreement with the Mendocino County Russian River Flood Control and Water Conservation Improvement District (Flood Control District).
- Based on conversations between Millview's legal counsel and Robert Woods prior to his death, Millview believes that the pre-1914 claim of right was not forfeited due to non-use during Mr. Wood's ownership of the property.

FIELD INVESTIGATION

On August 30, 2006, Division staff (Charles Rich and Chuck NeSmith) conducted a field investigation regarding the subject complaint. Staff met with Messrs. Hill and Gomes, Tim Bradley (Millview's General Manager), and Christopher Neary (Millview's legal counsel). Mr. Howard was not available for the inspection. However, Complaint Unit staff met with him immediately after the inspection and provided a brief outline of the activities that occurred during the inspection.

The property formerly owned by the Wood family was visited. An old wooden crib inlet channel was observed about two hundred feet below the Lake Mendocino Drive bridge on the west bank of the West Fork Russian River. Some piping was still in place. No diversion appears to have occurred at this location in recent years. Mr. Gomes stated that some diversion of water to the Wood property for irrigation of crops including grapes continued until the land was graded for houses in 2001.

Some flow was observed in the river channel. The U.S. Geological Survey (USGS) maintains a flow monitoring station (11461000) a short distance upstream of this location. According to

³ - Apparently, 1,000 gpd was reserved from the portion of the right withheld by Messrs. Hill and Gomes for domestic purposes at each of the 125 homes built and sold by CreekBridge

records available on the internet at a later date the flow at the time of our inspection was approximately 0.93 cfs.

After leaving the property formerly owned by Mr. Wood, we visited the District's point of diversion (POD) on the main stem Russian River. This point is located about 2,000 feet downstream of the Wood POD and about 600 feet below the confluence of the East and West Forks of the Russian River. Based on outflow measurements at Lake Mendocino contained in the database at the California Data Exchange Center (CDEC) and USGS data for Gage 11461000, flows in the Russian River in the vicinity of the District's POD were about 227 cfs during our visit (226 cfs outflow + 0.93 cfs at Gage 11461000).

A small pump was diverting water from the surface flow of the Russian River into Millview's recharge basin located about 150 feet east of the river. Water seeps from this basin into the ground and is recovered by a number of wells located within 75 to 150 feet on both the north and south sides of the recharge basin. The soils in the area appeared to be quite sandy and probably act as a rapid sand filter. The production wells on the north side of the recharge basin run in a generally east / west line that extends about 600 feet from the river. Millview's wells probably draw water coming from: 1) the recharge basin, and 2) the subterranean stream channel of the Russian River.

After visiting the District's facilities, all of the participants sat down together and I asked the following questions of Messrs. Hill and Gomes as well as the Millview representatives and received the answers indicated below:

Question #1: Did the diversion pursuant to S015625 by CreekBridge Homes cease as of September 2002?

Answer #1: Yes. CreekBridge Homes no longer has any interest in water rights associated with the property formerly owned by the Woods.

Question #2: Has any diversion of water been made from the West Fork Russian River to serve the 125 homes constructed by CreekBridge Homes?

Answer #2: No. All water supplied to the 125 homes located on the former Wood property has been provided by Millview using the POD's located below the confluence of the East and West Forks.

Question #3: Do diversions to the 125 CreekBridge Homes made pursuant to the claim of right reported under S000272 occur only during the months of May to November (i.e., the historic irrigation season on the former Wood property)?

Answer #3: Yes. Diversions to serve the 125 CreekBridge Homes during the May to November period are made pursuant to the pre-14 claim of right. Diversions during the December through April period are made under either Millview's

post-1914 appropriative rights; (i.e., License 492 (Application A003601) or Permit 13936 (Application A017587)); or under the contract with the Flood Control District.

Question #4: Are any diversions reported under S000272 or claimed under the pre-1914 appropriative right originally associated with the former Wood property used to supply any place of use other than the 125 CreekBridge Homes?

Answer #4: No. All use reported under S000272 or made pursuant to a pre-1914 claim of right initiated by E.L. Waldteufel since 2001 has occurred at the 125 CreekBridge Homes.

Question #5: Is there a way of measuring the amount of water used by the 125 CreekBridge Homes under the pre-1914 claim of right?

Answer #5: Yes. Each house has a separate water meter that is read on a periodic basis.

Question #6: Is a deposition, declaration, or other written document available regarding testimony provided by Robert Wood or his predecessors in interest dealing with the use of water pursuant to the pre-1914 appropriative claim of right?

Answer #6: No. Such a document is not available.

Question #7: Is any other testimony by a party with first-hand knowledge regarding use of water pursuant to the pre-1914 appropriative claim of right available?

Answer #7: Yes. A sworn statement of Floyd Lawrence, taken by Mr. Neary, was provided.⁴

Question #8: The Millview response letter dated April 24, 2006 states that the Hill/Gomes reservation may have been deeded to the 125 CreekBridge homes @ 1,000 gpd each for a total of 125,000 gpd. Is this correct?

Answer #8: No. The 125,000 gpd allotment has been transferred to Millview pursuant to the lease agreement with Millview.

⁴ - A copy of this statement was sent to Mr. Howard via the U.S. mail on September 5, 2006

ANALYSIS

In order to fully address Mr. Howard's complaint, the following issues must be analyzed:

1. Could diversions to the parcel of land owned by Messrs. Waldtaufel, Woods, and Hill/Gomes as well as the diversions made to satisfy the 125 new homes been made under a valid riparian claim of right?
2. If the parcel in question does in fact qualify for a riparian claim of right, were the diversions that occurred between 1914 and 2001 made under a pre-1914 appropriative claim of right or a riparian claim of right?
3. If diversions were made pursuant to a pre-1914 appropriative claim of right, what is the current extent of this right (i.e., how much water can be diverted and during which season)?
4. Has the change in POD resulted in the diversion of more water pursuant to a pre-1914 appropriative claim of right than would have been available at the previous POD?
5. Did Mr. Wood abandon his basis of right at the time of the approval of the West Fork Subdivision?

Issue #1 – Riparian Claim of Right

Although the legislature has enacted few laws relating to riparian rights, several court decisions have resulted in the following general rules regarding the applicability of a riparian claim of right to a particular parcel of land:

- A property owner may have a riparian water right when a stream flows through the property or when the property borders a stream or lake.
- If such a parcel is subdivided such that one or more of the subdivided parcels no longer touches the stream, each parcel is deemed to have been "severed" and the riparian status of each parcel is terminated forever unless: 1) the riparian status is preserved via specific language in the conveyance document; or 2) clear evidence is available to demonstrate that a) use of water had been occurring on the severed parcel; and b) the new owner purchased the severed parcel with the intent of continuing use of water as if the parcel had not been severed.
- A riparian right will be lost forever if the right is legally "severed" from the parcel (i.e., if a riparian land owner via a grant, contract, title transaction, etc. either separates and abandons the riparian status or conveys the parcel to another party and specifically excludes the riparian right).
- Riparian water right holders may only divert a share of the natural flow of water in the stream. The natural streamflow is the flow that occurs in a watercourse due to accretions from rainfall, snowmelt, springs and rising groundwater. To the extent that flow in its natural state reaches or flows through their property, riparian water right holders have a

proportional right, based on need, to the use of the natural flow. In times of water shortage, riparian diverters must share the available natural flow.

- A riparian right does not allow diversion of water that is "foreign" to the stream source. Water imported to the watershed from a separate watershed, water that is seasonally stored in a reservoir and subsequently released later in time into the system, or irrigation runoff from percolating groundwater applied to upstream lands may not be diverted under a riparian claim of right.
- Water diverted under claim of riparian right may only be used on the parcel of land that abuts the stream (or on a "severed parcel" for which the riparian status has been retained as discussed above), and then only on that portion of the parcel that drains back into the stream (i.e., is within the watershed of the source stream).
- Riparian rights are not lost by nonuse of the water.
- Water may not be stored during one season for use in a later season. However, water may be retained for strictly "regulatory" purposes. "Regulation" of water means the direct diversion of water to a tank or reservoir in order that the water may be put to use shortly thereafter at a rate larger than the rate at which it could have been diverted continuously from its source.
- Water diverted pursuant to a riparian right is subject to the doctrine of reasonable use, which limits the use of water to that quantity reasonably required for beneficial purposes.

The parcel of land purchased by Messrs. Hill and Gomes touches the West Fork of the Russian River and the entire parcel drains back into this source. Complaint Unit staff are not aware of any "foreign" water in the West Fork⁵ nor has any evidence come to light indicating that a prior owner "legally severed" or abandoned the riparian claim of right. Consequently, all of the available evidence supports a claim of riparian right for the original parcel purchased by Messrs. Hill and Gomes from Robert Wood in 1998.

The land that CreekBridge purchased to construct the 125 homes does not touch the West Fork Russian River. This land was thereby physically severed from the river. However, Complaint Unit staff have not reviewed the title transactions that led to this physical severance to determine what language might have been included to preserve the riparian status. The cover document that transmitted Statement S015625 states:

"... Creekbridge Homes just recently purchased the property described on the attached form in Ukiah adjacent to the West Fork of the Russian River along with the reservation of the proportional water right for this property which was established and recorded prior to 1914." (underlining added)

⁵ - A large portion of the flows available at Millview's POD comes from the East Fork of the Russian River and are either "foreign in time" (i.e., releases from seasonal storage in Lake Mendocino) and/or "foreign in place" (i.e., imported from the Eel River watershed via the Potter Valley Project). Such flows are not available for diversion pursuant to a riparian claim of right.

While this passage refers to a pre-1914 appropriative claim of right, a court might find that this language coupled with specific language in the conveyance document is adequate to have provided a reservation of the riparian status of the parcel(s) purchased by CreekBridge.

CreekBridge subdivided this parcel(s), constructed 125 homes, and sold the homes and parcels on which the homes were constructed to individuals. Complaint Unit staff have no knowledge of the details involved in these title transactions. If adequate language was not included in the title conveyance documents, these parcels probably are no longer riparian to the stream. While Millview has always provided water to the homes, Complaint Unit staff question whether Millview could serve water to the homes under a riparian claim of right held by individual home owners³. The answer to this question is probably unnecessary as Millview has maintained that such service was provided pursuant to a pre-1914 claim of appropriative right and not pursuant to a riparian claim of right.

Issue #2 – Existence Of A Pre-1914 Appropriative Right On A Riparian Parcel

This question is important because diversions of water made first by Mr. Waldteufel in 1914 and later on by the Wood family, could have been made pursuant to a riparian claim of right. Such a right cannot be separated from the parcel, except to permanently terminate the right. If the diversions were made under a riparian basis of right, a pre-1914 appropriative right (which can be separated from the parcel on which the right was originated) would not have accrued and there would be no right to transfer to Millview.

Wells Hutchins addresses this issue beginning on page 208 of his book, The California Law of Water Rights. Complaint Unit staff have also conferred with legal counsel from the State Water Resources Control Board's Office of Chief Counsel. Based on this research, Complaint Unit staff believe that a pre-1914 appropriative right can be initiated and perfected on a riparian parcel. Consequently, the October 2002 agreement appears to have conveyed or transferred a valid pre-1914 appropriative claim of right from Messrs. Hill and Gomes to Millview -- at least on a temporary basis.

According to Section 1706 of the Water Code:

"The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code (i.e., a pre-1914 appropriative claim of right)

³ - A governmental entity such as a municipality or water district can possess a riparian claim of right. However, the governmental entity can only use the water under this basis of right on parcels of land that are owned by the entity and that are riparian to the source of supply (see page 207 of Wells Hutchins' California Law of Water Rights). Riparian right holders, by entering into a specific agreement, can make a water company their agent for the purpose of distributing the waters to which the riparian right holders are entitled (see page 255 of Wells Hutchins' California Law of Water Rights). Complaint Unit staff are not aware of a similar precedent that would enable a governmental entity, such as Millview, to serve in the same capacity as a water company; i.e., as an agent for the individual riparian right holders who merely delivers water to the parcel but holds no water rights.

may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made." (Underlining and bolding added)

Millview changed the POD to a location downstream of the confluence of the East and West Forks of the Russian River. Based on the information provided by Millview representatives during the field investigation, the place of use has remained the same. However, Millview could change the place of use as well.

The permissibility of changes such as these pursuant to California water law are all predicated on the condition that such changes do not result in injury to others. If diversions were resumed on the property formerly owned by Messrs. Waldteufel and Wood under a riparian claim of right⁷, the transfer of the right to Millview could result in injury to other downstream right holders such as the Flood Control District, City of Ukiah, Willow County Water District, Sonoma County Water Agency, etc. unless Millview were to reduce diversions by an equivalent amount. Any right holder (including post-1914 appropriative right holders) that is adversely impacted, could ask a court to require that Millview reduce or eliminate diversions under the pre-1914 appropriative claim of right until such time as the injury is alleviated.

Insuring that the use of water under a riparian claim on the property formerly owned by Messrs. Waldteufel and Wood does not begin again could be achieved by either terminating the riparian status of the property via a title transaction (i.e., "strip" the riparian status of the property) or via a contractual obligation with Millview whereby diversions under the riparian claim of right would have to be reduced or terminated in the event another right holder could demonstrate injury.

Issue #3 – Extent Of The Pre-1914 Appropriative Right

Prior to 1914 appropriative water rights could be acquired by simply diverting and putting water to beneficial use pursuant to common law. These rights are often referred to as "common law" or "nonstatutory" pre-1914 appropriative rights. The priority of the right relates back to the date when the first substantial act toward putting the water to beneficial use was undertaken; provided the appropriation was completed with reasonable diligence. If the project was not commenced with reasonable diligence, the priority of the right did not attach until beneficial use commenced.

Between 1872 and 1914, a "statutory" appropriative right could also be initiated by complying with Civil Code Sections 1410 et seq. Under these procedures, a person wishing to initiate an appropriation of water could post a written notice at the point of intended diversion and record a

⁷ - Mr. Gomes mentioned during the field investigation the possibility of using some water to control dust and/or maintain landscaping in the future on the strip of land still owned by Messrs. Hill and Gomes. If the 125 homes constructed by CreekBridge still possess a valid riparian claim of right, the owners could also divert water under such a claim. However, Millview could not exercise this right on their behalf. In view of the need for a treated water supply, there is little potential for these homeowners to divert water on their own.

copy of the notice with the County Recorders Office within 10 days. The notice was required to include information regarding the amount of water appropriated, the purpose for which the appropriated water would be used, the place of use, and the means by which the water would be diverted and conveyed to the place of use. Commencement of construction was also required within 60 days after the notice was posted and must have been prosecuted diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain. If these procedures were followed and the diversion and use of water was commenced with reasonable diligence, the priority of the right was the date that the notice was posted. Failure to do this meant that the priority of the right did not attach until beneficial use occurred. However, since the effective date of the Water Commission Act (i.e., December 19, 1914), the only method of initiating an appropriative right has been to file an application with the State Water Resources Control Board (State Water Board) or one of its predecessors in interest (Water Code Sections 1200 et seq.).

Once a pre-1914 appropriation has been perfected, the right can be maintained only by continuous beneficial use. Therefore, regardless of the amount claimed in the original notice of appropriation, or at the time diversion and use first began, the amount which can now be rightfully claimed under a pre-1914 appropriative right, has in general become fixed by actual beneficial use, as to both amount and season of diversion.

There are two methods by which a pre-1914 appropriative right may be lost, abandonment and nonuse. To constitute abandonment of an appropriative right, there must be concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use, so that abandonment is always voluntary, and a question of fact. Nonuse is distinguished from abandonment. Nonuse (or forfeiture) means failure to put water to beneficial use for a sufficient period of time when the water was available. The courts have held that pre-1914 rights can be lost as the result of five years' nonuse.

Successful assertion of a pre-1914 appropriative right, where the validity of the right is disputed, requires evidence of both the initial appropriation and the subsequent maintenance of the right by continuous and diligent application of water to beneficial use. Frequently such evidence consists of oral testimony of persons who have actual knowledge of the relevant facts. As the years pass, such testimony, dependent upon the recollection of individuals, may become difficult or impossible to secure. At least a partial remedy for this situation may be found in the procedure for perpetuation of testimony set forth in Section 2035 of the Code of Civil Procedure. A record on water use under any pre-1914 appropriative right should be established and maintained by filing a Statement unless such a filing is exempted pursuant to the requirements of Section 5101 of the Water Code.

The notice recorded by E.L. Waldteufel in 1914 clearly demonstrates an intent to initiate diversion pursuant to a pre-1914 appropriative right. However, very little evidence exists to substantiate how much water was actually placed to beneficial use prior to December 14, 1914³

³ - This is the effective date of the Water Commission Act. Initiation of appropriative rights after this date, including increasing diversions under rights already established, other than by filing an application with the State Water Board (or a predecessor in interest) is prohibited by California water law

or shortly thereafter in a diligent fashion. Only two sources of information are currently available to Complaint Unit staff that provide evidence regarding diversion and use of water made on the property formerly owned by Messrs. Waldteufel and Wood between 1914 and 1998 when Messrs. Hill and Gomes purchased the property. The first source of information includes Statements filed by the Woods, CreekBridge Homes, and Mr. Gomes on behalf of Millview. The second source is a "Sworn Statement of Floyd Lawrence" taken on August 2, 2006 and provided by Millview's legal counsel.

Table 1, on the following page, provides a summary of the information reported pursuant to Statements S000272 and S015625. Diversion and use reported by the Woods did not exceed an instantaneous diversion rate of 500 gallons per minute (gpm) or 1.1 cfs with a total annual diversion of 15 acre-feet (ac-ft). Diversion and use reported by CreekBridge Homes did not exceed 36 gpm with a total annual diversion of about 22 ac-ft. Millview's reported diversion and use did not exceed 60 gpm with a total annual diversion pursuant to the pre-1914 appropriative claim of right of about 44 ac-ft.

Mr. Lawrence's sworn statement provides very little quantifiable information. He lived in the immediate vicinity of the Waldteufel/Wood/Hill/Gomes property for almost the entire period between 1914 and 2006 when his statement was taken. His earliest recollections would have been around 1920. He recalls that alfalfa, oat hay, pears, string beans, and vineyard crops were the only crops grown on the property but did not provide any evidence regarding the amount of water that might have been diverted to grow these crops. He estimated that the fruit tree orchard was no more than four acres in size. The Woods only reported diversion for vineyard and trees (either fruit or walnut) and made no mention of irrigation for alfalfa or oat hay in the statements they filed. While Mr. Lawrence's sworn statement does not provide much quantitative data, he does state that agricultural operations continued right up until CreekBridge Homes began construction of new homes on the property, or around 2001-02. This indicates that at least some amount of use continued in a fairly uninterrupted fashion from the early 1920's to today.

Members of the Wood family first purchased the property in April 1945 and owned the land until Messrs. Hill and Gomes purchased the property in January 1998, a period of more than 50 years. The original Statement and Supplemental Statements filed by the Wood family indicate that the maximum diversion rate did not exceed 1.1 cfs and the annual depletion from the stream was less than 15 ac-ft. Consequently, a logical conclusion based on the currently available evidence would be that considerably more than 5-years passed without diversions exceeding these amounts. Pursuant to California water law, the Woods would have forfeited that portion of the pre-1914 appropriative right to any diversions in excess of these amounts. The maximum diversion rate reported for the years 2001 through 2004 has been under 68 gpm or 0.15 cfs. Consequently, the maximum rate of diversion authorized pursuant to this right may have further degraded to this rate.

TABLE 1
WATER USE REPORTED UNDER STATEMENTS S000272 AND S015625

Year	Party Diverting	Months water was diverted	Diversion Rate	Volume Diverted	Purpose
1966	Wood	JUL JUL	175 gpm "	annual amount = 15 ac-ft ¹	irrigation of 15 acres of grapes & walnuts
1970 1971 1972	Wood " "	MAY JUL SEP of each year	500 gpm " "	2.3 ac-ft 9.2 ac-ft 2.2 ac-ft annual total = 13.7 ac-ft	frost protection (May) irrigation (Jul) irrigation (Sep)
1979 1980 1981	Wood " "	APR thru SEP	not specified	not specified	irrigation of grapes and walnuts
1985 1986 1987	Wood " "	APR thru SEP	not specified	not specified	irrigation of 30 acres
2001	CreekBridge Homes	JUN JUL AUG SEP OCT NOV DEC	7.7 gpm 7.45 gpm 7.45 gpm 35.42 gpm 34.27 gpm 35.42 gpm 34.27 gpm	1.02 ac-ft 1.02 ac-ft 1.02 ac-ft 4.70 ac-ft 4.70 ac-ft 4.70 ac-ft 4.70 ac-ft annual total = 21.85 ac-ft	irrigation on 10.5 acres of fruit trees, home construction, dust control & domestic use for 51 homes
2002	Millview County Water District	MAY JUN JUL AUG SEP OCT NOV	12.90 gpm 17.27 gpm 21.44 gpm 16.20 gpm 15.12 gpm 17.32 gpm 10.01 gpm	1.77 ac-ft 2.37 ac-ft 2.94 ac-ft 2.22 ac-ft 2.07 ac-ft 2.37 ac-ft 1.37 ac-ft annual total = 15.11 ac-ft	Domestic use for 350 people
2003	Millview County Water District	MAY JUN JUL AUG SEP OCT NOV	28.00 gpm 30.91 gpm 30.02 gpm 53.54 gpm 34.27 gpm 35.93 gpm 18.88 gpm	3.84 ac-ft 4.24 ac-ft 4.11 ac-ft 7.34 ac-ft 4.70 ac-ft 4.92 ac-ft 2.59 ac-ft annual total = 31.73 ac-ft	Domestic use for 350 people
2004	Millview County Water District	MAY JUN JUL AUG SEP OCT NOV	47.27 gpm 42.90 gpm 67.43 gpm 58.87 gpm 55.94 gpm 31.56 gpm 16.04 gpm	6.48 ac-ft 5.88 ac-ft 9.24 ac-ft 9.07 ac-ft 7.66 ac-ft 4.32 ac-ft 2.20 ac-ft annual total = 43.84 ac-ft	Domestic use for 350 people

¹ - Maximum annual use in recent years listed as 15 afa. Minimum annual use in recent years listed as 7.5 afa.

Issue #4 – Impact of Moving the POD on the Pre-1914 Appropriative Claim of Right

Pursuant to California water law, the point of diversion under an appropriative right can be changed as long as the change will neither: a) in effect initiate a new right; nor b) injure any other legal user of water

Initiation of a new right – If a diverter who holds a valid pre-1914 appropriative right moves the POD because the watershed above the POD is incapable of providing a fully adequate supply throughout the authorized season of diversion, the incremental increase in the water supply obtained constitutes the initiation of a new appropriation. Such an appropriation is subject to the requirements in effect at the time the new appropriation is initiated. If the initiation occurred after December 19, 1914, the new appropriation would have to be made in accordance with the requirements of the Water Commission Act as codified in the California Water Code or via acquisition of a permit from the State Water Board.

Injury to a legal user of water - Section 1706 of the California Water Code states:

*The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use **if others are not injured by such change**, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made. (underlining and bolding added)*

Flow records for the U.S. Geological Survey gage #11461000 on the West Fork of the Russian River⁹ are available for water years 1912-13 and 1953-2006. Table 2 (below) provides a summary of flow exceedence for these records during the season of use for the pre-1914 appropriative claim of right.

Table 2

USGS Gage #11461000 - Russian River near Ukiah, CA			
Month / Flow	Exceedence¹⁰		
	0.1 cfs	0.5 cfs	1.1 cfs
May	100%	100%	100%
June	99%	97%	95%
July	88%	75%	62%
August	73%	44%	23%
September	76%	39%	20%
October	86%	58%	40%
November	97%	90%	85%

⁹ - As discussed previously the USGS refers to this water body as the Russian River near Ukiah, CA. However, locals often refer to this body of water as the West Fork Russian River.

¹⁰ - "Exceedence" means the amount of time the specified flow was exceeded during the historical record for that particular month

This table demonstrates that while obtaining 15 acre-feet of water per irrigation season from the West Fork is quite feasible, diverting at the maximum rate reported by the Woods of 500 gpm is problematic, especially during the months of July through October.

Millview has effectively moved the POD for the Waldteufel/Woods/Hill/Gomas pre-1914 appropriative claim of right downstream below the confluence of the East and West Forks of the Russian River. Floyd Lawrence's sworn statement indicates that, at times, the historical flows in the East Fork during the summer season prior to the construction of Coyote Dam that impounds Lake Mendocino were actually less than those in the West Fork.

Flows in the East Fork below Lake Mendocino are influenced by imports from the Eel River through the Snow Mountain Tunnel to Potter Valley and diversions to and releases from seasonal storage in Lake Mendocino. The Eel River imports are "foreign in place" whereas the releases from Lake Mendocino are "foreign in time". Both of these sources of supply currently augment the natural flows substantially, especially during the summer and fall seasons. Table 3 depicts the recent maximum, minimum, and average daily flows below Lake Mendocino by month.

Table 3

**Outflows (cfs) from Lake Mendocino
For water years 1997-2006**

Month	Maximum	Minimum	Average
Oct	335	125	223
Nov	507	29	178
Dec	3,092	31	301
Jan	4,725	10	727
Feb	4,548	27	718
Mar	2,100	26	308
Apr	1,988	45	372
May	1,801	93	283
Jun	593	149	240
Jul	341	138	261
Aug	350	161	260
Sep	362	106	247

Water released from storage in Lake Mendocino belongs to either the Sonoma County Water Agency or the Mendocino County Russian River Flood Control and Water Conservation Improvement District and/or their contractors pursuant to Permits 12947 A & B (Applications A012919A & B).

Any imported water from the Eel River that reaches Lake Mendocino is deemed to be "abandoned" and is available for appropriation based on diverters who hold valid appropriative

rights for this water. However, while the Eel River imports had been occurring for about 6 years, E.L. Waldteufel did not anticipate making use of either of these sources of water when he filed his appropriation notice in December 1914 as he only identified a POD on the West Fork. Consequently, moving the POD for the pre-1914 appropriative claim of right downstream below the confluence of the East and West Forks will result in either the initiation of a new appropriation or injure others if the diversions made under this claim of right exceed the flows available in the West Fork at the old POD. Any diversion of water under this claim or right in excess of the flows available from the West Fork are unauthorized and constitute a trespass against the State of California and may harm the interests of other right holders.

Diversions made by either CreekBridge Homes or Millview under the pre-1914 appropriative claim of right during the period 2001 to 2004 did not exceed the rate of diversion authorized. However, the annual diversions exceeded 15 acre-feet in 3 of the 4 years with the maximum reported diversion in 2004 exceeding the authorized amounts by almost 300%.

Issue #5 – Abandonment of pre-14 claim of appropriative right by Mr. Wood

Ms. Barbara Spazek, Executive Director of the Flood Control District, submitted a letter to Complaint Unit staff on April 20, 2007. This letter contains the following passage:

... the property associated with the Pre-1914 water right was sold to Mr. Hill by Robert Wood, a former member of the Board of the MCRRFCD. Mr. Wood, on several occasions, mentioned during meetings that he had abandoned this water right at the time of approval of the West Fork Subdivision. One of these occasions was recorded in our Minutes dated, March 10, 2003. For your information I am attaching a copy of these minutes (Exhibit B).

Mr. Wood is no longer alive and cannot be consulted for more information than is contained in the minutes. A letter was sent to Mr. Hill, along with copies to other interested parties, on April 30, 2007. This letter transmitted a copy of Ms. Spazek's April 20th letter and asked for any information that might have a bearing on the abandonment issue including any information (e.g., maps, environmental review documents, conditional use permits, etc.) that might shed further light on the status of the pre-1914 appropriative claim of right. Mr. Neary, legal counsel for Millview, responded via a letter dated May 7, 2007. Copies of the following documents were included with this letter:

- a) "Assignment of Water Rights"
- b) Grant Deed between Robert Wood, as Trustee of The Robert Wood Living Trust, and Messrs. Hill and Gomes
- c) Negative Declaration for the West Fork Subdivision
- d) Final Conditions of Approval for Subdivision #S 1-97, Wood issued by the County of Mendocino
- e) Subdivision Maps for the West Fork Subdivision

Mr. Neary contends that the evidence currently available supports a conclusion that Mr. Wood did not abandon any water rights related to the property purchased by Messrs. Hill and Gomes regardless of the fact that the minutes for the March 10, 2003 meeting of the Flood Control District, on face value, suggests otherwise. The documents provided by Mr. Neary contain no reference to any action by either the County of Mendocino or Mr. Wood that would indicate that the pre-1914 appropriative claim of right was abandoned at the time the West Fork subdivision was approved by the County of Mendocino. If the County had truly required such an action as part of the approval process, at least one of these documents should have contained such information.

Ms. Spazek was provided a copy of Mr. Neary's letter as well as the documents he submitted via a letter dated May 18, 2007. She was asked to contact Complaint Unit staff by the close of business on May 25, 2007 if she could provide any additional evidence that would have a bearing on the matter. She did not contact Complaint Unit staff. Consequently, convincing evidence that Mr. Wood abandoned the water right is not currently available and staff assume that no such abandonment has occurred.

CONCLUSIONS

1. Evidence is not currently available to suggest that the portion of the property formerly owned by Messrs. Waldteufel and Wood and currently owned by Messrs. Hill and Gomes (i.e., the ≈100-ft wide buffer strip adjacent to the West Fork Russian River) is not riparian to the West Fork Russian River. The property on which CreekBridge Homes constructed 125 homes has been physically severed from the West Fork Russian River. Unless evidence exists that the riparian status of this land was somehow reserved at the time the title transaction resulted in physical severance, these parcels no longer possess a riparian claim of right.
2. The pre-1914 appropriative claim of right originated by Mr. Waldteufel in December 1914 and transferred over time to the Woods, Messrs. Hill and Gomes, and Millview has a valid basis. However, due to the forfeiture provisions of California water law, the right has degraded to the point where the maximum authorized diversion is 15 acre-feet per annum at a maximum instantaneous rate not to exceed 500 gpm or 1.1 cfs; or possibly less if the maximum instantaneous rate of diversion since 2001 for a period of 5 consecutive years has been less than this rate.
3. The POD for this pre-1914 appropriative claim of right can be moved downstream to Millview's facilities. However, the maximum instantaneous rate of diversion under this right at this location cannot exceed the lesser of either 500 gpm (or a smaller rate if recent use has been less as discussed in conclusion #1 above) or the amount of water in the West Fork at USGS Gage # 11461000.
4. CreekBridge and Millview may have diverted water in excess of the amount authorized under the pre-1914 appropriative claim of right. At least a threat of unauthorized diversion exists unless Millview keeps close track of the basis of right for all water diverted at Millview's facilities.

RECOMMENDATIONS

1. That Millview be formally directed to reduce diversions pursuant to the claim of a pre-1914 appropriative right and develop a detailed accounting methodology to track water diverted under the following bases of right:
 - a) the claim of a pre-1914 appropriative right (unless Millview terminates the agreement with Messrs. Hill and Gomes and ceases all diversions under this base of right);
 - b) License 492 (Application A003601);
 - c) Permit 13936 (Application A017587); and
 - d) Contract with the Flood Control District pursuant to Permit 12947B (Application A012919B).

2. That the complaint filed by Lee Howard against Thomas Hill be closed. Closure of the complaint would not preclude enforcement action against Millview for a potential unauthorized diversion.