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July 24, 2007

Charles A. Rich, Chief
Complaint Unit, Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
1001 "I" Street, 14th Floor
Sacramento, CA 95812-2000

Re: 363:CAR:262.0 (23-03-06)
Water Right Complaint by Lee Howard Against Thomas Hill
Re Diversion of Water by the Millview County Water District in Mendocino County

Dear Mr. Rich:

We represent Mssrs. Thomas P. Hill and Steve Gomes; and this letter replies to your Preliminary Report of Investigation for the Complaint filed by Lee Howard regarding diversion from the Russian River ("Preliminary Report") on their behalf as owners and holders of the water right claimed by J.A. Waldteufel, recorded in Mendocino County Official Records on March 24, 1914 at Volume 3, Page 17.

Mr. Howard's Complaint dated February 27, 2006 asserted that the pre-1914 right "no longer exists and that individuals as well as Millview County Water District ("Millview"), have no basis of proof that this water has been used in like amounts and in like manner, since 1914."

When Mssrs. Hill and Gomes purchased this water right in 1998 they checked with a member of the staff of the Water Resources Control Board and were assured the right was valid. They even received a printed memorandum from that agency stating, in part, "that pre-1914 rights can be lost as the result of five years' nonuse (*Smith v. Hawkins* 42 P. 454)." They understood that *Smith v. Hawkins* involved a situation where the first appropriator never put his appropriation to any beneficial use for five years and the water was claimed and used by a second appropriator who did. They relied upon these understandings.

Today, Mssrs. Hill and Gomes generally agree with your findings that they "conveyed or transferred [by lease with an option to purchase] a valid pre-1914 appropriative claim of right" to Millview. Under the "no-injury" rule Millview has changed the purpose and place of

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use. Mssrs. Hill and Gomes also agree with your conclusion that while Mr. Waldteufel could have claimed or asserted a riparian right, he instead claimed a common law appropriative right which continues to be used to this date.

Before addressing conclusions in the Preliminary Report that are questioned, it is appropriate to address Question No. 4, quoted at page 5 of your Preliminary Report, as to whether or not "any diversions reported under S000272 have been used in any place other than the 125 Creekbridge Homes." While the use reported under S000272 includes use at the West Fork Subdivision, it is not correct to say that Millview has limited the place of use to the West Fork Subdivision since 2001. In actuality, Millview has leased the entire Waldteufel water right in response to a determination by the California Department of Health that Millview suffered from inadequate water supply source to supply its customers. Since 2001 Millview has utilized the claim initiated by E.L. Waldteufel in its entirety to supplement its source supply and had done so for some time prior to the date of Mr. Howard's Complaint; the water diverted pursuant to this right has been used in its entirety throughout the Millview service area. It was Mssrs. Hill's and Gomes' intent that such use be made to protect the viability of their water right.

Turning to the Lee Howard Complaint, it should be noted that Mr. Howard has no standing to file the complaint he has filed as he makes no allegation of harm to a conflicting right of water use. Forfeiture of the right to appropriate water can be established only by one with a conflicting claim. Mr. Howard lacks standing to assert forfeiture of this valuable property right in the abstract; and his complaint should be dismissed without any adjudication.

Moreover, with respect, we believe your office should not pursue this issue on the basis of its authority independent from a justiciable claim by Mr. Howard. First, as outlined below, the bases for any forfeiture have not been established and will be extremely costly and time consuming to all concerned to pursue. Second, and perhaps more importantly, as a matter of discretion no private or public interest that is now apparent would be served if you could, after much time and costly effort, establish that some part of this water right has been forfeited. For at least the following reasons, your office's only appropriate action should be to dismiss Mr. Howard's Complaint.

a. Your office's efforts to establish forfeiture of this water right would create confusion and doubt about the total amount of water available for use in the Russian River watershed at a time when confusion is already great because flows from the Eel into the Russian are being curtailed. Projected economic activity within Millview's service area, in particular, and in the broader Ukiah Valley, where the 8,000 acre feet of water made available for this area from the Coyote Dam project are consumed, will be stymied. Forfeiture of some part of this water right will certainly not redound to the benefit of the holder of that 8,000 acre feet water right, which is to an entirely different source of water, and may well not redound to the benefit of any Mendocino County water rights holder. The questions of who would benefit, and where and how such rights could be applied, would take many dollars and years to answer – while uncertainty and confusion reigned.

b. The law respecting forfeiture of pre-1914 appropriative rights is not clear. *Smith v. Hawkins* is not controlling in the instant case; it applies only in a situation where the appropriator never perfected his right by putting it to use in a five year period. and there was a competing appropriator who had perfected his right. Up until the 90's, at least, your agency was publicly stating in a handout entitled "Information Pertaining to WATER RIGHTS in California." correctly we believe, that "nonuse [or forfeiture] means failure to put water to beneficial use for a period of years. The courts have held that pre-1914 rights can be lost as a result of five years' non-use," citing *Smith v. Hawkins*. The recent *North Kern v. Kern Delta* case, which did hold that perfected pre-1914 rights can be lost by nonuse, even if completely valid in all respects, which we question, established the great complexity involved in determining just how much of the right to appropriate water, and during what time periods, can be forfeited as a result of water availability and operations over the controlling five (5) year period. To impose upon Mssrs. Hill and Gomes and Millview the cost of litigating these issues with your agency, after your agency assured them this water right is valid and that pre-1914 appropriative rights are subject to forfeiture within the standards set by *Smith v. Hawkins*, would be unconscionable, as well, we believe, as unlawful.

c. If your office were successful in establishing that this water right is subject to forfeiture, and, indeed, that some portion of the right has been forfeited, the principles involved would apply to many other rights on this river – and other rivers and streams - where the rights have previously been considered valid and have been counted as such in determining that the River is "fully appropriated," thereby preventing further appropriations under post-1914 procedures. Water agencies, and individuals, relying upon the purchase of water rights they assumed to be valid to justify long term development plans would be subject to disruptive, and possibly fatal, forfeiture proceedings by 3rd parties, or at least your office. This would all be very inconsistent with the planning processes required for modern investment decisions and the CEQA process required by the Supreme Court in its recent *Vineyards* decision. It would also be inconsistent with at least the spirit of Article X, Section 2 of the Constitution, which strongly and clearly establishes state policy that water should be beneficially used to support the state's growing economy.

Turning to the merits of your report, Mssrs. Hill and Gomes dispute the Preliminary Report's conclusions that the maximum rate of diversion authorized pursuant to the claim of E.L. Waldteufel *may* have "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 . . ." The purpose of this response is to convince you to change these preliminary conclusions and point to circumstances negating forfeiture or, at least, mandating dismissal of Mr. Howard's complaint.

1. **The Law Abhors a Forfeiture.**

To suggest that the Waldteufel water right "has degraded" is to suggest that a portion of the right claimed by E.L. Waldteufel is forfeited. This is inconsistent with the findings of the Preliminary Report that the lease and option agreement to Millview "conveyed or transferred a valid pre-1914 appropriative claim of right." Also, it is axiomatic that the law abhors a

forfeiture and forfeiture is never presumed. The burden is on he who claims a forfeiture. To meet this burden requires establishment of the proper measurement period and actual proof – not inferences based on speculation – of use, as well as water available, during these periods, by a user with a conflicting claim. Mr. Howard did not advance any data in his complaint and, as such, provided an insufficient basis for the Division of Water Rights to make a finding of forfeiture; and your Preliminary Report does not fill the void.

Any conclusion of forfeiture deriving from the Preliminary Report would have to be drawn from the four corners of the Preliminary Report dated June1, 2007. This data is lacking. It is not enough to say that evidence of continued use of the water right through the present is non-quantitative; it's not the water right holder's burden to prove non-forfeiture. Also, the Preliminary Report failed to recognize that Millview has held and used the right for the five years preceding the Howard Complaint.

We believe that the measurement periods of any asserted forfeiture are each day during the five years preceding the Howard Complaint and, for that measurement period, the right was held and controlled by Millview either directly or indirectly.

2. Water Usage Computations.

The Preliminary Report extrapolates data from Lester Wood's reported usage on statements of water diversion and use. As pointed out above, the applicable measurement period is five years next preceding Mr. Howard's Complaint, not usage in the 1960s or 1970s. Nonetheless, Lester Wood's reported usage is ambiguous as it is unclear whether the diversions reported by him were each using 500 gallons per minute, or using 500 gallons per minutes in the aggregate as assumed in the Preliminary Report. Furthermore, the sworn statement of Floyd Lawrence references flood irrigation throughout the Waldteufel place of use. Mr. Wood's report is limited to usage upon property then owned by Lester Wood.

3. Flow Data Not Supportive of Forfeiture.

It is also axiomatic that the inability to obtain water because of a natural shortage cannot be the basis of a forfeiture. All this would have to be accounted for in the assertion of forfeiture.

It is notable that the USGS gage, although near the point of diversion claimed by E.L. Waldteufel, is not necessarily reflective of the flow at the point of diversion. There is no reliable information about flow in the Russian River, including underflow, at the Millview point of diversion. In 1914, Mr. Waldteufel sited the point of diversion at the place where there was the greatest flow, so there is not necessarily a correlation between the flow at the USGS gage and the point of diversion claimed by Mr. Waldteufel. This is supported by Floyd Lawrence's sworn statement in which he noted that the point of diversion was also at the location of the best swimming hole on the West Fork. Mr. Waldteufel and his successors apparently diverted with a very large pump from a deep hole on or near the river.

Although the USGS gage measures surface flow, it is not reflective as to whether or not there is sufficient subterranean water available to supply the vested right in full. In fact. water used upon the lands of Waldteufel supplementing surface flow, previously thought to be percolating groundwater and not included in statement so diversion, is likely to have been surface water under the definition of "surface flow" as applied by the Division of Water Rights.

4. Right Claimed Under Pre-1914 Authority.

The J.A. Waldteufel water right was claimed under Civil Code Part 4, Title 8, Water Rights, and specifically the procedures set forth in Civil Code § 1415. It is part of the same statutory scheme as Civil Code § 1416 which recognizes that when a governmental agency such as the Millview county Water District acquires an appropriation in accordance with the provision of Civil Code § 1415, it shall not be necessary to commence work for development of more of the water so claimed than is actually necessary for the immediate needs of the agency to preclude forfeiture.

Millview County Water District is in the initial stages of environmental review for permanent acquisition of the J.A. Waldteufel water right leased by it since October 15, 2001. It is submitted that the statutory scheme under which the right is claimed qualifies Water Code § 1240. Water Code § 1241 is inapplicable to non-Water Commission Act appropriations.

Please reconsider your intended report and recommendations. They are not justified by the information relied upon and they will cause much, very costly mischief and not be of benefit to any identified person.

Sincerely,

Jared G. Carter

cc: Tim Bradley
Thomas P. Hill
Steven Gomes
Lee Howard
Barbara Spazek
Senator Wiggins Office