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April 28, 2009

VIA FAX (916) 341-5400, CERTIFIED MAIL AND FIRST CLASS MAIL

James W. Kassel
Assistant Deputy Director for Water Rights
State Water Resources Control Board
PO Box 2000
Sacramento, CA 95812-2000

Re: 363:JO:262.0(23-03-06); Request for Hearing on Draft Cease and Desist Order

Dear Mr. Kassel:

The Carter & Momsen firm represents Messrs. Thomas P. Hill and Steven Gomes ("**Hill and Gomes**") in the above referenced matter. Chris Neary, Esq. represents Millview County Water District ("**Millview**") and has filed a separate request for hearing on this matter. We endorse the position that Mr. Neary takes on behalf of Millview in that request. Hill and Gomes are in receipt of the Draft Notice of Cease and Desist Order ("**CDO**") associated with this matter and by this letter are requesting a hearing on that CDO pursuant to California Water Code ("**WC**") §1834(b).

Hill and Gomes oppose the CDO on the grounds that 1) the State Water Resources Control Board ("**SWRCB**") does not have the jurisdiction over a pre-1914 water right that it is asserting in these proceedings and 2) the CDO would represent an abuse of discretion even if the SWRCB has jurisdiction to adjudicated the Waldteufel pre-1914 water right, as it is asserting in these proceedings.

Hill and Gomes agree that the SWRCB has jurisdiction to hold a hearing to determine that they claim, and have, a valid pre-1914 water right, which is now held and exercised by Millview pursuant to an agreement among Hill and Gomes and Millview (collectively "Right

Ex- X

Holders"). However, Hill and Gomes assert that SWRCB has no further jurisdiction in this matter because there exists no evidence indicating, much less that would support a finding, that water is being used by Hill and Gomes, or their licensee or successor, in an amount in excess of the water right (2.5 cfs).

1. The SWRCB does not have jurisdiction to adjudicate a forfeiture of a pre-1914 water right.

The CDO is based upon the premise that the amount of the Waldteufel Water Right, a pre-1914 right established under California Civil Code ("CC") §§ 1415[1] and 1416[2], has degraded

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1. **§ 1415. Notice of appropriation**
   A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:
   1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;
   2. The purposes for which he claims it, and the place of intended use;
   3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.
   A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted. After filing such copy for record, the place of intended diversion or the place of intended use or the means by which it is intended to divert the water, may be changed by the person posting said notice or his assigns, if others are not injured by such change. This provision applies to notices already filed as well as to notices hereafter filed.

2. **§ 1416. Work to be done in appropriation of waters**
   Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road or trail building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; provided, that if the erection of a dam has been recommended by the California debris commission at or near the place where it is intended to divert the water, the claimant shall have sixty days after the completion of such dam in which to commence the excavation or construction of the works in which he intends to divert the water; provided, that whenever any city and county, or any incorporated city or town within this state makes, or has made, or acquires, or has acquired any appropriation of any of the waters of this state in accordance with the provisions of section 1415 of this code, it shall not be necessary for such city and county, city or town to commence the work for development of more of the water so claimed than is actually necessary for the immediate needs of such city and county, city or town, and it shall be held to be a sufficient compliance with the requirements of this chapter, to the full amount of water stated in the notice posted and recorded, for such city and county, city or town to within sixty days make the necessary surveys, or within six months to authorize the issuance of municipal bonds, for the construction of the necessary works designed to supply such city and county, city or town with the water required for immediate use. Any appropriation heretofore made by any such city and county,

over time due to nonuse. The SWRCB's staff determined that the Waldteufel Water Right "likely has a valid basis," but that it has degraded due to forfeiture from the 2.5 Cubic-Feet per Second (**"cfs"**) base amount stated in the notice recorded and posted by J.A. Waldteufel pursuant to CC §1415 to an amount not to exceed 1.1 cfs, or "possibly less," and an annual amount not to exceed 15 acre-feet (**"af"**).

The basis of the alleged unauthorized use, enforceable under WC § 1052, in this case is not that Right Holders used more than the 2.5 cfs appropriated by J.A. Waldteufel. Rather, the basis of this proceeding is that the Waldteufel Right, as it stands today, is something less than 2.5 cfs because a portion of it was lost by forfeiture and that the Right Holders used more than the amount remaining after such forfeiture. In fact, the SWRCB's staff determined that 1.4 cfs of instantaneous use and 1,485 acre-feet of total annual consumption was forfeited.

The SWRCB, however, does not have jurisdiction over a pre-1914 right to determine any amount of forfeiture of that right. "A pre-1914 right is not subject to the 1913 statutory scheme for purposes of acquisition and supervision of use. [Citation]." Nicoll v. Rudnick (2008) 160 Cal. App. 4th 550, 557. A pre-1914 right is governed by principles of the common law, as opposed to post-1914 rights issued pursuant to the Water Commission Act (**"WCA"**). North Kern Water Storage District v. Kern Delta Water District (2007) 147 Cal.App.4th 555, 559 (hereinafter "North Kern"). See also, People v. Shirokow (1980) 26 Cal.3d 301, 309 stating that "[t]he rights not subject to the statutory appropriation procedures are narrowly circumscribed by the exception clause of the statute and include only riparian rights and those which have been otherwise appropriated prior to December 19, 1914, the effective date of the statute. Any use other than those excepted is, in our view, conditioned upon compliance with the appropriation procedures of division 2. (§§ 1052, 1225; [citation])." As a result, the forfeiture of a pre-1914 water right, as opposed to a permit or license conferred under the WCA and over which the conferring agency retains jurisdiction, is an issue for a court. This restriction of jurisdiction is already recognized by the SWRCB itself[3] and is accepted in - and, indeed, is a center piece in - a

city or town in connection with which surveys were at any time made, or an issue of bonds authorized for the construction of any portion of the works necessary for a diversion of any part of the water appropriated, is hereby confirmed to the full amount of water stated in the original notice or notices.

[3] In a publication entitled "Investigating Water Right Complaints in California, February 2005" and available from the SWRCB's website, the SWRCB states at page 3, "[i]n some cases, the SWRCB may decide not to process a complaint because of lack of information or a determination that the issues more appropriately fall under the jurisdiction of the court system. This situation is most common for major operations involving claimed riparian and/or pre-1914 water rights...." In that same publication, the SWRCB recognizes that a CDO is not an appropriate action when a pre-1914 right is involved in stating, at page 7, that an "SWRCB Order on Other Water Rights...would normally be utilized if the offender has or claims water rights which are not covered by a permit or license under the SWRCB's immediate jurisdiction; for example, complaints relating to riparian or pre-1914 rights."

significant litigation now pending in the State Supreme Court. The SWRCB's vacillating position on such an important question as whether it does nor does not have jurisdiction to adjudicate and otherwise regulate pre-1914 water rights is not conducive to the establishment of a clear and firm legal regime governing such rights as is necessary to maximize their beneficial use in the manner required by Article X, Section 2 of the Constitution[4].

Unlike a statutory license, over which the SWRCB does have jurisdiction to make a finding of forfeiture pursuant to WC §1241, the forfeiture of a common law, pre-1914 water right requires a "clash of rights" by a formal, adverse claimant to the same water. North Kern, 147 Cal.App.4th at 566. The purpose of this requirement is to provide notice to the potential forfeiter that the full amount of their right may be lost unless they object (either verbally or by re-establishing use of the disputed water). Ibid.

No "clash of rights" is asserted in either the SWRCB's staff report or in the draft CDO. While WC §1241 might provide the SWRCB with the ability to determine a forfeiture in the absence of a "clash of rights" when a post-1914 right is involved, that section was enacted as a

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The SWRCB also recognized it's lack of jurisdiction over a pre-1914 right in Water Decision 1290. In that decision at page 32, as to the whether changing the point of diversion of a pre-1914 right would cause injury to other rights holders, the SWRCB stated:

"It is for the courts to determine whether such injury takes place; no such jurisdiction over pre-1914 appropriative rights is given to this Board."

[4] In WRO 2005-0002-EXEC, In the Matter of the Petition for Reconsideration of the California Farm Bureau, Various County Farm Bureaus, and Individual Petitioners, Regarding Annual Water Right Fee Determinations, the SWRCB defends its imposition of fees on post-1914 water permits and licenses and not on riparian and pre-1914 rights by asserting that it does not have jurisdiction over riparian and pre-1914 rights. The SWRCB acknowledges that the pre-1914 rights only "incidentally" benefit from and impose burdens upon its water rights program and that pre-1914 rights are not privileged to the benefits of being under SWRCB's authority (such as administrative procedures for changes to the rights). (WRO 2005-002-EXEC at 14.) Additionally, the SWRCB excuses itself from not requiring fees from pre-1914 rights holders by stating that it has not been provided with the necessary authority to accurately determine how it would assess such fees against these rights. (WRO 2005-002-EXEC at 14, note 25).

WRO 2005-0002-EXEC led to litigation between the California Farm Bureau and the SWRCB that is currently pending before the California Supreme Court. While the case is pending, the Court of Appeals decision preceding that appeal is clarifying and persuasive, though not precedential, and provides an informative summary of the SWRCB's position in that dispute: "the Division has no statutory authority over riparian, pueblo and pre-1914 water rights represented by 'Statements of Water Diversion & Use' that account for 38 percent of the state's water subject to water rights" Cal Farm Bureau v. SWRCB (2007) 146 Cal.App.4th 1126,1133. Continuing to defend its fee policies in that case, the SWRCB "acknowledges that its 'core regulatory program, the administration of water right permits and licenses, does not apply' to holders of riparian water rights. The SWRCB has 'only the authority to take action if the use by a pre-14 or riparian holder is wasteful or unreasonable." Id. at 1134.

part of the WCA and thus is inapplicable to a pre-1914 right. The Right Holders here did not have statutorily issued water licenses and therefore their water right could not be forfeited unless an adverse claim was made and they failed to effectively object to that claim within five years. Any such "clash of rights" issue amounts to a water rights dispute over which the SWRCB admits it has no jurisdiction[5] and requires that the adverse claimant to the right claimed to be forfeited bears the burden, in a court proceeding, to "prove that the [forfeiter] failed to use some portion of its water entitlement continuously over a span of five years immediately prior to the plaintiff's assertion of its conflicting right to the water." North Kern, 147 Cal.App.4th at 569.

2. There is Insufficient Evidence to Support the Claimed Forfeiture

Without waiving the Right Holders' position, as outlined supra, that the SWRCB does not have jurisdiction to determine a forfeiture of all or a portion of a pre-1914 right, the Right Holders also contend that even if the SWRCB does have such jurisdiction, the required findings for a forfeiture have not been made by the SWRCB's staff and could not be supported by substantial evidence. The staff has not correctly applied the law governing forfeiture of such a right.

A. The Statements of Water Diversion and Usage are Insufficient Evidence

Once there is a formal, contrary claim to the water authorized for diversion under a pre-1914 right, the burden is on the adverse claimant to prove the forfeiture. North Kern, 147 Cal.App.4th at 569. The SWRCB attempts to meet, and ultimately circumvent, this burden in the draft CDO by dubious evidence of water right usage and then shift this burden of proof to the Right Holders by inappropriately imposing this enforcement action. Never do they even attempt to assert what amount of water was "available" to the water rights user during any relevant period.

Crucial to a claim of forfeiture, in addition to the requirement of an adverse claimant, is a five-year period of continual nonuse of "available" water in the amount claimed forfeited. Id. at 577. This must be "the five-year period immediately prior to the assertion of the rival claim." Ibid. See also Smith v. Hawkins (1895)110 Cal. 122, 127-8 stating that forfeiture for nonuse occurs upon "the failure of [alleged forfeiter] to make any beneficial use of the water for a period of more than five years next preceding the commencement of the action...." Additionally, "the California Constitution and the Water Code mandate a forfeiture analysis that reflects the actual, historical use of water" not usage in the abstract. North Kern, 147 Cal.App.4th at 577.

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[5] "Water right disputes, which are beyond the jurisdiction of the SWRCB, are civil matters." Investigation Water Right Complaints, supra at page 3.

The SWRCB's staff, however, based its determination of forfeiture on the Statements of Water Diversion and Use ("Statement")[6] submitted by the Right Holders' predecessors in interest for the years 1967, 1970, 1971, 1974, 1979, 1980, 1981, 1985, 1986, and 1987. Based upon these statements, which cannot be used as evidence to challenge a legal right[7], the SWRCB's staff determined that "a logical conclusion based on the currently available evidence would be that considerably more than 5-years passed without diversions exceeding these amounts." (Report of Investigation for a Complaint Filed By Lee Howard dated June1, 2007 page 10.) However, even if the evidence of the Statements could be used against the Right Holders, this "logical conclusion" is merely an attempt to inappropriately argue usage in the abstract and is, as discussed below, far from logical.

First, no continuous five year period is identified and covered. Second, the 1979, 1980, 1981, 1985, 1986 and 1987 Statements do not state any amount of water diverted, only a purpose of use, and no "logical conclusion" about the amount used can be drawn from that information. Third, the Statement with the 1970, 1971 and 1974 usages states the exact same amount used for all three years, and was signed in 1970. The only "logical conclusion" from the 1970 Statement is that the individual submitting the Statement erroneously thought that the purpose of this document was to forecast usage, not record actual historical use. Thus, there is only one statement, from 1967, that might provide some useful information on historical usage. No evidence establishes what amount of water was "available" to this user in that year.

The SWRCB's staff essentially found that the "logical conclusion" was that the 1967 Statement represented, and thus established, the maximum usage over a five period (without ever identifying a particular five year period). From that "logical conclusion" the staff then determined that any amount greater than the amount stated in the 1967 Statement was forfeited.

However, one year of an estimated usage - over forty years ago - is not sufficient to meet the burden required to show the forfeiture of a property right. That concept requires repeating, what is at issue here is a property right and the challenger to that right bears the burden of proving nonuse sufficient to meet the requirements of forfeiture. North Kern, 147 Cal.App.4th at 559-560 and Thayer v. California Development Co. (1912) 164 Cal. 117, 125-6 (stating that water appropriations under the Civil Code of 1872 confer property rights). This pre-1914 right is

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[6] In using these statements as evidence of forfeiture, the SWRCB gives no regard to WC §5108 which states:

> "Statements filed pursuant to this part shall be for informational purposes only, and neither the failure to file a statement nor any error in the information filed shall have any legal consequences whatsoever other than those specified in this part."

[7] WC § 5108, quoted supra, note 6.

not a post-1914 license, and cannot be treated as such by the SWRCB. There is no evidence to meet the burden of demonstrating, based upon actual historical usage and not in the abstract, that any amount of the water right was forfeited due to continuous nonuse during the five years prior to a competing claim to the same water.

B. No Consideration of Actually Available Water

Consistent with the requirement to show actual, historic use, another fundamental determination to a forfeiture analysis is establishment of the actual amount of water available for diversion during the proposed forfeiture period. North Kern, 147 Cal.App.4th at 580 ("But under the law of forfeiture, the 'historical beneficial use' becomes the highest use during the five-year history encompassed in the forfeiture period when, as in our examples, such use was not constrained by the actual availability of water." [emphasis added]).

Even if one year of information (1967) could provide enough data to establish forfeiture, the SWRCB is required to establish that the actual use was not otherwise constrained based upon the availability of water. This is not considered by the SWRCB's staff and is yet another fatal flaw in the "logical conclusions" made.

C. The Waldteufel Right Must Have Been Evaluated Previously

In numerous water rights decisions, orders, and in licenses and permits issued by the SWRCB related to appropriations of Russian River water, the SWRCB has stated that it has considered all previously vested water rights, including pre-1914 rights.[8] Additionally, the SWRCB has determined that the Russian River should be classified as "fully appropriated".[9]

In issuing orders, decisions, permits and licenses, the SWRCB was required to consider all previously vested rights and ensure they are protected[10]. Thus, the right at issue in this case

[8] For example, in issuing water permits to Sonoma County Water Agency and the Russian River Flood Control District in Water Right Decision 1610, the SWRCB conditioned those permits as being subordinate to prior rights and determined that, as of 1985, there was unappropriated water available in the Russian River to allow for direct diversion appropriations under permits issued by that decision.

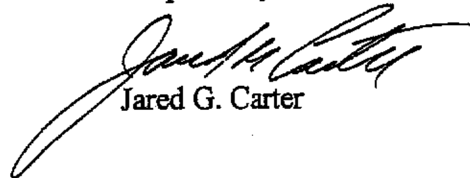
[9] See Water Right Order 98-08

[10] Cal. Const. Art. X §2: "nothing herein contained shall be construed as... depriving any appropriator of water to which the appropriator is lawfully entitled."; WC §1243.5: "In determining the amount of water available for appropriation, the board shall take into account, whenever it is in the public interest, the amounts of water needed to remain in the source for protection of beneficial uses, including any uses specified to be protected in any relevant water quality control plan established pursuant to Division 7 (commencing with Section 13000) of this code.

must have been considered at various points throughout the exercise of the SWRCB's authority in any proceeding related to appropriations within the Russian River. The Right Holders, through the undersigned attorney, have asked, by way of a public information request, to be provided with any and all information in SWRCB's possession or control related to the Waldteufel pre-1914 right regarding how it has been quantified and protected throughout these earlier proceedings. (See letter from Jared G. Carter to Jim Kassel dated November 15, 2007.) To date, that information has not been provided.

For the reasons stated herein, the Right Holders request a hearing as provided for under WC §1834(b) and request that they be provided with all information, orders, and other documents in SWRCB's possession or control quantifying the volume of pre-1914 rights - including specifically the Waldteufel Right - in the Russian River prior to the date of Mr. Howard's Complaint. Prior to the hearing Right Holders request the right to file an additional brief, supported by evidentiary declarations, and the right to present and cross-examine witnesses at the hearing, since the purpose of the hearing is to diminish their fundamental, vested property right.

Respectfully submitted,



Jared G. Carter

[PR]OOF OF SERVICE BY U.S. MAIL

I am employed in the County of Mendocino, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 444 North State Street, Ukiah, California.

On April 29, 2009 I served **a letter to James W. Kassal, Assistant Deputy Director for Water Rights, State Water Resources Control Board, dated April 28, 2009** on the interested parties by placing true and complete copies thereof, in sealed envelopes with first class postage thereon prepaid in full, in the U.S. mail at Ukiah, California, addressed as follows:

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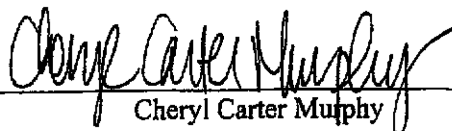
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on April 29, 2009, at Ukiah, California.



Cheryl Carter Murphy