



# State Water Resources Control Board



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**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 River<sup>1</sup> 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 2002-04<sup>2</sup>.

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

<sup>1</sup> - 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.

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

- 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 CreekBridge<sup>3</sup>.
- 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

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<sup>3</sup> - 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.

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

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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.

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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.

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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.

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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.<sup>4</sup>

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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.

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

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 Fork<sup>5</sup> 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)*

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<sup>5</sup> - 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.

*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 right<sup>7</sup>, 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

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<sup>7</sup> - 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.

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.

#### 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 River<sup>9</sup> 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	Exceedence <sup>10</sup>		
	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%

<sup>9</sup> - 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.

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

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 20<sup>th</sup> 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



**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.