

PT 1

IN THE MATTER OF THE CONSIDERATION OF A CEASE AND DESIST ORDER AGAINST THOMAS HILL, STEVEN GOMES, AND MILLVIEW COUNTY WATER DISTRICT FOR THREAT OF AN UNAUTHORIZED DIVERSION OF WATER PURSUANT TO A CLAIM OF PRE-1914 APPROPRIATIVE RIGHTS

DIVISION OF WATER RIGHTS PROSECUTION TEAM EXHIBIT 1 (PT-1)

WRITTEN TESTIMONY OF CHARLES RICH, SENIOR WATER RESOURCES CONTROL ENGINEER

My name is Charles Rich. I am a professional Engineer, registered in California, and a Senior Water Resources Control Engineer with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). I have over 30 years of water rights experience working for the Division in programs dealing with water right application acceptance, protest and hearing actions, permit issuance, licensing, complaint and compliance actions, adjudications, and petitions for change and/or transfer of water rights. I currently serve as the Chief of the Complaint Unit in the Division. During my tenure with the Division, I have had the opportunity and occasion to review and/or analyze thousands of California water rights based on western water law including riparian, pre-1914 appropriative, post-1914 appropriative, percolating groundwater, diffused surface runoff, pueblo, and inter-state claims of right. A copy of my resume is attached. (PT-2).

My testimony herein provided, identifies my personal knowledge of the evidence, actions, and rationale for the Division's recommendation to issue the Notice of Cease and Desist Order (CDO) that is the subject of this hearing.

The Complaint Unit received a complaint from Lee Howard against Thomas Hill on March 6, 2006 regarding the diversion and use of water reported pursuant to Statement of Water Diversion and Use S000272. The complaint contains allegations that the pre-1914 appropriative claim of right of Messrs. Hill and Gomes for water from the West Fork Russian River had been lost due to non-use and that the point of diversion for this claim of right had been moved downstream to the main stem of the Russian River below Coyote Dam in order to access additional flow of water that is not available on the West Fork Russian River.

Responses to the complaint were requested from Mr. Hill, his partner Steven Gomes, and the parties receiving recent benefit of the alleged claim of right, CreekBridge Homes and Millview County Water District (Millview). Millview, the only entity to respond to staff's request for answer, submitted a letter dated April 24, 2006. (PT-3). This response indicates that:

1. Mr. Hill and his business partner, Steven Gomes, believe they hold a valid pre-1914 appropriative claim of right known as the "Waldteufel right"¹.
2. Diversion and use of water under the "Waldteufel right" is reported via Statement of Water Diversion and Use S000272.
3. Messrs. Hill and Gomes, via a lease agreement, are allowing Millview to divert all of the water authorized for diversion pursuant to the "Waldteufel right" with the exception of 125,000 gallons per day reserved for use at the homes constructed by CreekBridge Homes on the land formerly owned by Messrs. Hill and Gomes.
4. Millview was supplying water to the place of use identified under Statements S000272 and S015625 (i.e., the former Hill/Gomes property that was in the original place of use for the "Waldteufel right"), which is completely within Millview's district boundaries, during the months of May through November. Water service was 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).
5. Based on conversations between Millview's legal counsel and Robert Wood 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.

¹ - J.A. Waldteufel recorded a water right notice on March 24, 1914 with the County of Mendocino. Pursuant to the Civil Code of 1872, posting a notice initiated the process to obtain a pre-1914 appropriative claim of right to divert water. (Hutchins, *The California Law of Water Rights* (1956) p. 89.) If the work to divert the water proceeded diligently and uninterruptedly to completion, the claimant's right to use the water would relate back to the date of the posting. (*Ibid.*)

On August 30, 2006, I conducted a field investigation regarding the complaint against Mr. Hill. I met with Messrs. Hill and Gomes as well as Millview's General Manager and legal counsel. The property formerly owned by the Wood family was visited as part of this inspection. During this visit, I observed an old wooden crib inlet channel about two hundred feet downstream of the Lake Mendocino Drive bridge on the west bank of the West Fork Russian River. Some piping was still in place. No diversion appeared to have occurred at this location in recent years. Mr. Gomes asserted that some diversion of water to the Wood property for irrigation of crops including grapes continued from this point of diversion until the land was graded for houses in 2001. Flow in the river at this location at the time of the inspection was less than 1 cubic foot per second (cfs). Millview's point of diversion is located on the main stem Russian River about 2,000 feet downstream of the abandoned Wood point of diversion and about 600 feet below the confluence of the East and West Forks of the Russian River. Flows at this location consist of water coming from the West Fork of the Russian River combined with releases from Lake Mendocino. Flow in the river at this location at the time of the inspection was approximately 227 cfs.

At the conclusion of the complaint inspection, Messrs. Hill and Gomes as well as the General Manager and legal counsel for Millview provided the following information in response to my specific questions:

- Diversions to serve the 125 CreekBridge homes during the May to November period (i.e., the historic irrigation season on the former Wood property) are made pursuant to the alleged 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 between Millview and the Flood Control District pursuant to Permit 012947B (Application A012919B).
- All use of water since 2001 reported under Statement S000272 or made pursuant to a pre-1914 appropriative claim of right initiated by J. A. Waldteufel has occurred at the 125 CreekBridge homes.
- Millview does not possess a deposition, declaration, or other written document regarding any testimony that may have been provided by Robert Wood or his predecessors in interest regarding the use of water pursuant to the Waldteufel pre-1914 appropriative claim of right while owned by the Wood family.

- The 125,000 gallons per day (gpd) allotment (that, according to Millview's letter dated April 24, 2006 in response to the Howard complaint, was deeded to the 125 CreekBridge homes at 1,000 gpd each for a total of 125,000 gpd) has been transferred to Millview pursuant to the License and Assignment of Water Rights Agreement between Messrs. Hill and Gomes and Millview.

The analysis of the complaint issues was based on the following facts:

1. J.A. Waldteufel recorded a water right notice in Volume 3, Page 17 of the County Records on March 24, 1914, *initiating* the process to obtain a pre-1914 appropriative claim of right to divert water from the West Fork Russian River. 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), for domestic, culinary, and irrigation purposes on Lot #103 of the Yokayo Rancho (Waldteufel property)².
2. The Waldteufel property consisted of about 165 acres circa 1914 located both north and south of what is now Lake Mendocino Drive and on the west side of the West Fork Russian River. Portions of the property have been sold over the years such that Messrs. Hill and Gomes only purchased about 20% of the original Waldteufel property in 1998. The portion of the original Waldteufel property located on the south side of Lake Mendocino Drive involved in this action currently includes Mendocino County Assessor Parcel number 169-130-68, consisting of about 5 acres and 125 residential lots with separate parcel numbers within the CreekBridge Home Subdivision, totaling about 28.5 acres. Neither Messrs. Hill and Gomes nor Millview has provided any documentation that the entire claim of right initiated by Mr. Waldteufel was actually transferred to the parcel of land purchased by Messrs. Hill and Gomes or whether any of the rest of the original Waldteufel parcel retained any portion of the claimed right.
3. Records available to the Division (PT-4) indicate that between 1914 and 1967, the Waldteufel property was held by eight (8) different parties. Division staff are not aware of any documentation indicating that the owners prior to Mr. Wood actually diverted water and put it to beneficial use pursuant to the Waldteufel claim of right or, if they did so, how

² - Page 3 of the response to the complaint submitted by Millview (PT-3) contains a map indicating the approximate location of Lot #103 of the Yokayo Rancho.

extensive such diversion and use actually was (both as to quantity of water and acreage of land irrigated). The Division did receive a copy of a sworn statement from a long-time resident of the area (PT-5), stating that alfalfa, oat hay, pears, string beans, and vineyard crops were grown on the portion of the Waldteufel property located south of Lake Mendocino Drive between 1920 and 2001. While the sworn statement suggests that some farming occurred on the property from the early 1920's, it does not indicate whether water was actually diverted from the West Fork of the Russian River on a regular or continuous basis, or whether the property was irrigated with percolating groundwater from a well on the property, irrigated with water obtained from a water district pipeline, or "dry farmed" relying on rainfall and a high groundwater table to provide sufficient water for limited agricultural production. The sworn statement certainly does not establish a reliable record regarding diversion of water, season of use, or acreage being served by crop type to quantify the historical beneficial use of water pursuant to this particular claim of right. It also does not establish that water was available for use from the West Fork Russian River pursuant to this claim of right in sufficient quantities for the claimed uses. Consequently, no documentation has been provided to support a finding that the right initiated by J. A. Waldteufel in 1914 ever became a *vested* right in the amounts claimed.

4. Lester Wood purchased property located south of Lake Mendocino Drive in 1945 consisting of about 20% of the place of use identified in the Waldteufel notice of appropriation filed with the County Recorder in 1914. In 1967, Mr. Wood filed Statement of Water Diversion and Use (Statement) S000272 (PT-6) with the State Water Board consistent with the requirements of Water Code section 5100, et seq. Supplemental statements for Statement S000272 were also filed for the years 1970-72, 1979-81, 1985-87, and 2002-04³(PT-6). The amount of water that Mr. Wood or his son, Robert Wood, reported as being diverted and put to beneficial use ranged between 7.5 and 15 acre-feet per annum with a maximum instantaneous diversion rate of 1.1 cfs (500 gallons per minute). The original Statement filed indicates the year of first use was 1914 based on a reference to Volume 3, Page 17 of the Mendocino County Records (i.e., the Waldteufel Notice of Appropriation).

³ - The 2002-04 supplemental statement was filed by Mr. Gomes. All of the others were filed by either Lester Wood or his son, Robert Wood.

5. In January 1998, Thomas Hill and Steven Gomes purchased approximately 33 acres of the Waldteufel property located immediately south of Lake Mendocino Drive and adjacent to the West Fork Russian River⁴ from the Robert Wood Living Trust (Trust). This is all of the land owned by the Trust that was included in the original Waldteufel place of use, and constitutes approximately 20% of the original Waldteufel right place of use. The documents associated with this transaction (PT-7) indicate that all water rights and claims of title to water that may have been associated with the land were included in the sale. Those documents are silent regarding any water rights or claims of title associated with lands not included in the purchase (e.g., the balance of the original parcel listed as the Waldteufel claim's place of use that were under different ownership or control at the time of the sale to Hill and Gomes).
6. CreekBridge Homes L.P. (CreekBridge) bought about 85% of the property owned by Messrs. Hill and Gomes in 2001 and subsequently built 125 homes on the property. CreekBridge filed Statement S015625 in 2001 (PT-8). 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.*" The Division's records show that only the original statement was filed. No supplemental statements from CreekBridge are contained in the file for Statement S015625. The current status of CreekBridge's interest in the property and the claimed water right is unclear. No information or documentation has been provided to the Division to indicate whether the claim of right associated with this Statement is still held by CreekBridge, ceased to exist via abandonment, was transferred back to Messrs. Hill and Gomes, or was transferred to Millview.
7. Messrs. Hill and Gomes entered into a "License and Assignment of Water Rights Agreement" with Millview in October 2002 (PT-9). This agreement provides for the lease and option to purchase by Millview of the "Waldteufel claim" of pre-1914 appropriative right held by Messrs. Hill and Gomes. The recitals of this agreement include the following statement:

Licensor (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

⁴ - 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. I will refer to it as the West Fork in my testimony.

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. Division staff understands that the effective period of this agreement has been extended and is either still in effect or has been replaced by a new sales/option agreement.

8. During the summer and early fall, flow at Millview’s point of diversion is dominated by releases from Lake Mendocino. The U.S. Geological Survey (USGS) maintains a flow monitoring station (#11461000 – Russian River near Ukiah, CA) at the upstream end of the Wood property that provides a good accounting of the flows available for diversion from the West Fork Russian River (the source listed in the Waldteufel Right posting). The USGS also maintains a flow monitoring station (#11462000 - East Fork Russian River near Ukiah, CA) immediately below the outlet of Lake Mendocino. The following tables identify the average, maximum, and minimum monthly flows over the period of record for both of these gages:

**USGS 11461000 Russian River Near Ukiah, CA (aka West Fork Russian River)
Main Daily Discharge (cfs) for 59 years of record (1911-10-01 to 2008-09-30)**

Month	Avg	Max	Min
Oct	7.6	146.8	0.0
Nov	102	682.4	0.1
Dec	377	1,663.0	1.8
Jan	557	1,986.0	3.8
Feb	507	1,975.0	14
Mar	351	1,436.0	20
Apr	166	770.4	4.3
May	47	242.8	3.2
Jun	12	57.4	0.2
Jul	2.5	10.8	0.0
Aug	0.7	3.75	0.0
Sep	0.6	2.7	0.0

**USGS 11462000 East Fork Russian River near Ukiah, CA (below Coyote Dam)
Main Daily Discharge (cfs) for 48 years of record (10/1/1959 to 9/30/2008)**

Month	Avg	Max	Min
Oct	225	419	42
Nov	231	635	13
Dec	341	1,175	7.0
Jan	604	1,905	21
Feb	595	1,934	18
Mar	411	1,780	13
Apr	317	1,026	53
May	230	577	76
Jun	215	361	104
Jul	247	336	179
Aug	255	388	163
Sep	242	416	93

This data indicates that the flows at the current Millview point of diversion are well in excess of those available at the point of diversion used to divert water pursuant to the Waldteufel pre-1914 appropriative claim of right prior to 2002, especially during the late summer and early fall.

- The staff Report of Investigation (Staff Report) prepared in response to the Howard complaint was sent to the parties on June 1, 2007 (PT-10). Staff concluded that the pre-1914 appropriative claim of right initiated by Mr. Waldteufel in December 1914 likely has a valid basis. However, no evidence has been brought forth by any party to document the actual amount of diversion and beneficial use of water between the filing of the original notice of appropriation in 1914 and the first filing of Statement S000272 in 1967. Use reported by the Wood family between 1967 and 1998 did not exceed an instantaneous rate of 500 gallons per minute (gpm) or an annual volume of 15 acre-feet. Nor has staff been provided with any evidence or information substantiating how much of the claimed right was transferred over time to the Wood family, Messrs. Hill and Gomes, and then possibly Millview. Consequently, staff felt that there was no evidence upon which to base a conclusion that this claimed right was ever used, and therefore could have vested, in any amount greater than the instantaneous rate of 500 gallons per minute (gpm) and annual volume of 15 acre-feet. Some confusion and dispute seems to have arisen due to the

reference in the Staff Report to Water Code sections 1240-1241. Where, as here, all evidence suggests that a claimed right was only used in very limited quantities, the claimed amount that has never been put to beneficial use may not be technically “forfeited” pursuant to Water Code sections 1240-1241, but the right to use it still would not exist. Water Code sections 1240-1241 only apply to rights that have become vested by virtue of the right holder having put the water to full beneficial use within a reasonable time after posting the notice of intent to appropriate water. Therefore, the conclusions of the Staff Report are sound and consistent with California water law. Because no evidence is currently available to demonstrate that the Waldteufel right has become a vested right for diversions in excess of 1.1 cfs or 15 acre-feet per annum, a forfeiture analysis for diversions greater than these amounts is unnecessary. If the parties were to prove that the Waldteufel right ever vested in amounts greater than these, then a forfeiture analysis pursuant to sections 1240-1241 would apply as a limitation on the amount that had previously vested.

10. The California Court of Appeal, Fifth Appellate District (*North Kern Water Storage Dist. v. Kern Delta Water Dist. (North Kern)* (2007) 146 Cal.App.4th 424), recently held that:

- for forfeiture to occur, there must be a “clash of rights”⁵,
- forfeiture occurs not because the right holder is misusing the resource but, instead, so the state can assign the water right to someone who will use it, and
- in essence, Section 1241 provides that the extent of reasonable and beneficial use, when there is another claimant to the water, is the maximum use that occurred during each “time-step” of the immediately preceding five years prior to the “clash of rights.”

11. If evidence shows that the Waldteufel claim of right ever vested in any amount greater than that concluded by the Staff Report, the Howard complaint filed in February 2006 clearly constitutes a “clash of rights” under *North Kern*. Mr. Howard was concerned and complained to the State Water Board that little, if any, water had been utilized pursuant to the Waldteufel claim of right for over 90 years and that the proposed sale or lease of this claim of right would result in up to approximately 1,500 acre-feet of **new** diversion from the Russian River

⁵ - The court indicated that the “clash” or objection could be verbal or by the act of using the disputed water.

downstream of Lake Mendocino. These concerns were communicated to Messrs. Hill and Gomes as part of the Division's complaint processing procedures in a letter dated March 29, 2006 transmitting a copy of the complaint and requesting an answer. Recent concerns raised by fishery agencies and environmental advocates highlight the fact that the main stem Russian River downstream of Millview's point of diversion is often short of sufficient flow to fully satisfy existing right holders or protect public trust resources during almost any period of the year; especially during a drought. The Russian River is listed by the State Water Board as fully appropriated. (See State Water Board Order WR 98-08⁶.) Downstream diverters are likely to be harmed if Millview or Hill and Gomes are allowed to divert up to approximately 1,500 acre-feet of water annually pursuant to an old, underused claim of right that never vested (or at best only vested to an annual diversion amount of 15 acre-feet), and claim priority over junior right-holders that actually put water to beneficial use.

13. Millview submitted a considerable amount of material in response to a Public Records Act (PRA) request issued by the Division dated January 29, 2009⁷. Included in this material are water right accounting sheets for calendar years 2001-08 (PT-11). In these materials Millview allocates its diversion of water from the Russian River downstream of the confluence with the West Fork below Lake Mendocino pursuant to several claims of right including: a) the Waldteufel claim of right; b) License 492 (Application 3601), c) Permit 13936 (Application 17587); d) a water purchase contract with the Flood Control District; and e) water purchased by the Calpella County Water District from the Flood Control District and wheeled by Millview. Millview's data submitted as part of its PRA response regarding Millview's diversion of water pursuant to the Waldteufel claim are summarized in the table below:⁸

⁶ - This finding is based on Decision 1110 adopted in February 1963.

⁷ - All of the documents contained in Millview's response to the PRA request are stamped with the following notation: "SWRCB Subpoena Response". These documents appear to have been prepared in response to a subpoena duces tecum issued to Millview by the Division on July 31, 2008, but were never sent until requested pursuant to the January 29, 2009 PRA request. I will refer to these materials as the PRA response in my testimony.

⁸ This information has been converted from millions of gallons to acre-feet.

**Diversions Claimed Pursuant to the Waldteufel pre-1914 Appropriative Right in ac-ft
(as documented in the January 29, 2009 PRA Response)**

Month/Year	2001	2002	2003	2004	2005	2006	2007	2008
January	0.000	0.479	1.093	2.029	72.337	1.654	41.900	72.429
February	0.000	0.559	1.243	1.679	65.386	2.154	35.280	81.593
March	0.000	0.703	1.381	3.799	80.221	1.878	45.457	78.340
April	0.009	1.040	1.995	4.766	81.891	2.461	56.505	100.071
May	0.067	1.768	3.836	6.475	110.757	6.248	72.343	118.951
June	0.243	2.385	4.257	5.877	119.000	7.632	88.581	118.951
July	0.284	2.940	4.128	9.237	119.000	8.111	32.807	118.951
August	0.960	2.219	7.359	8.065	119.000	7.387	39.834	118.951
September	0.613	2.072	4.689	7.663	119.000	6.230	27.436	0.000
October	0.566	2.372	4.923	4.324	119.000	3.830	18.413	0.000
November	0.697	1.372	2.590	2.197	88.522	4.787	89.756	0.000
December	0.318	1.234	2.627	2.744	80.638	2.793	74.814	0.000
Total	3.76	19.14	40.12	58.86	1,174.75	55.167	623.12	808.23

This information indicates that Millview now claims to have diverted water pursuant to the Waldteufel claim of right during all months of the year from April 2001 through August 2008, the last month covered by these records. This is in direct contradiction to Millview's statements in the April 2006 written response to the Howard complaint **AND** in the answers to specific questions provided at the end of the field inspection in August 2006, where Millview stated in no uncertain terms that water was only used pursuant to the Waldteufel claim of right during the months of May through November. Millview had also claimed that water was only used pursuant to the Waldteufel right on the 125 homes in the CreekBridge development. Use for 125 homes with a typical lot size of about 7,000 square feet would be no more than 62.5 acre-feet per annum⁹. Yet Millview now claims to have used almost 19 times as much water pursuant to this right in calendar year 2005.

There is also a significant discrepancy between the numbers reported in the PRA response and the numbers contained in the Progress Report by Permittee signed under penalty of perjury for Permit 13936, and a smaller, but still noticeable difference between the numbers in the PRA response and those reported on the Reports of Licensee for License 492 (PT-12). Use reported under Permit 13936 in the Progress Reports for 2005 and 2007 are 740.75 and 403.04 acre-feet respectively, whereas the use in the later-submitted PRA response are 0 and 340.06 acre-feet respectively. Invoices from the Flood Control District

⁹ - Typical usage on a standard suburban lot is no more than 1/2 acre-foot per annum.

(PT-13) indicate that Millview purchased 728.21 acre-feet of water during the July to October period of 2005, while the PRA response indicates that only 277.87 acre-feet was purchased for the entire year. These inconsistencies raise the possibility that Millview is retrospectively misrepresenting under which basis of right it is claiming its water diversions in an effort to show much more significant diversions pursuant to the Waldteufel claim of right than could otherwise be supported. Water right law does not allow right holders to cycle their diversions through multiple water rights to avoid forfeiture of any one right. Actual use remains the limit of water rights.

14. Three letters of comment were received in response to the Staff Report but these letters contained no additional evidence responsive to the conclusions made in the Staff Report. The complaint was closed via letter dated April 17, 2008. The parties were informed that any diversion and use of water pursuant to the Waldteufel pre-1914 appropriative claim of right in excess of an instantaneous rate of 500 gpm or an annual total of 15 acre-feet would be considered an unauthorized diversion and a trespass against the State of California. However, as evidence was not available at that time to indicate that Millview's¹⁰ diversions exceeded those authorized by the combined rights available to Millview (i.e., the limited amount shown to have been put to beneficial use pursuant to the Waldteufel pre-1914 appropriative claim of right, License 492, Permit 13936 and the contract with the Flood Control District), no enforcement action was initiated at that time.
15. Messrs. Hill and Gomes and Millview sued the State Water Board in April 2008 for declaratory relief; to quiet title, and for a writ of ordinary and/or administrative mandamus. The Mendocino County Superior Court was asked to declare that the Waldteufel right was a valid right that authorized continuous diversion of 2.0 cubic feet per second throughout the year, equivalent to about 1,450 acre-feet per annum. While the judge in that case eventually dismissed the case, in doing so he strongly suggested that the State Water Board take a final reviewable action regarding the validity of the Waldteufel right so that Messrs. Hill and Gomes and Millview could eventually seek judicial review in an appropriate fashion.

¹⁰ At that time, Millview was the only entity diverting water under the Waldteufel claim of right, pursuant to the lease agreement described in paragraph 7 above.

16. Staff took another look at the use of water pursuant to the Waldteufel claim of right based on the information provided in the PRA response. Based on that information, the average monthly rate of diversion pursuant to the Waldteufel pre-1914 appropriative claim of right exceeded the 1.1 cfs maximum authorized diversion rate under this claim of right (as based on the findings of the Staff Report, as discussed above) 25% of the time between 2001 and 2008. The annual limitation of 15 acre-feet per annum (as based on the findings of the Staff Report, as discussed above) was exceeded in 7 of the 8 years or 88% of the time. Millview's reported average monthly rate of diversion under the Waldteufel pre-1914 appropriative claim of right (at Millview's point of diversion, which is located below the confluence of the East and West Forks of the Russian River, where flows are augmented heavily by water released from storage at Lake Mendocino), exceeded the flows at the original point of diversion in the West Fork Russian River over 22% of the time during the low flow period (June through November) between 2001 and 2008. Consequently, it appeared that Millview was claiming water diversions in excess of the amount that the Staff Report found had been historically put to beneficial use under the Waldteufel pre-1914 appropriative claim of right. However, there was still no indication that the total amount of water diverted by Millview during this same period exceeded the total amount authorized pursuant to the combined rights available to Millview (i.e., Waldteufel pre-1914 appropriative claim of right, License 492, Permit 13936, and the contract with the Flood Control District). Therefore, staff still was not inclined to take enforcement action for past unauthorized diversions. However, since Millview and Hill and Gomes were giving every indication that they intended to divert in the future up to the face value of the Waldteufel right as claimed in the initial posted notice, in addition to the face value of all of Millview's other water rights, staff concluded that diversions in excess of Millview's collective rights would occur at some point in the near future. Consequently, a threat of unauthorized diversion existed and the draft Cease and Desist Order was issued on April 10, 2009.