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Via facsimile and e-mail
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Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento CA 95812-0100

Re: Millview et al. CDO Hearing

Dear Ms. Townsend:

Millview County Water District ("Millview") comments upon the Draft Order issuing a Cease and Desist Order as transmitted by the State Water Resources Control Board (the "Board") on September 19, 2011. In accord with the transmittal notice this letter is limited to "the general acceptability of the draft order or possible technical corrections."

Draft Order Is Not Generally Acceptable

The Draft Order is not "generally acceptable" to Millview because by its essence the draft order purports to adjudicate a forfeiture of the Waldteufel Water Right which the record discloses as having vested under the Pre-Water Commission Act procedure for appropriation. Fundamentally due process is not satisfied when, as here, an administrative agency acts beyond its constitutional jurisdiction.

Furthermore, Millview is perplexed that a state agency would exercise such antagonism to its fulfillment of Millview's duty to supply inhabitants with water found within its boundaries and diverted under a venerable property right held by it with its existence established *prima facie* in the Record.

In Order 2011-0005 the Board recognized that "it can be difficult to obtain evidence roughly 100 years after-the-fact that specific pre-1914 appropriative rights were diligently perfected and subsequently maintained through continuous use," and that the Board is duty bound to protect such rights. It is submitted that the procedure followed in this proceeding meets neither the legal standard of due process, nor the Board's own description of its duty. Instead, the Board on the basis of a one paragraph complaint providing absolutely no evidence to the Division, and no identified standing for the complaint that invoked the investigation function of the Division which then subsequently resolved all inferences in favor of a non-jurisdictional finding of forfeiture. The Draft Order does the same.

To be clear, Millview does not contest the investigation function of the Division, or the Division's important function of administering the diversion of water in accord with the Water Commission Act. However, the investigation function does not confer jurisdiction, but rather is subordinate to jurisdiction. In accord, if the Division finds that it believes that a pre-1914 Right is being utilized which is subject to forfeiture under the common law its remedy to enjoin such use. This would require it to assert such forfeiture before the judicial branch where the Division would have the burden of proof. Instead, the Division has asked this Board, an executive branch agency, to adjudicate common law forfeiture, a function beyond its jurisdiction.

Millview is perplexed that the limited resources of the Division have been diverted to accomplish an extra-jurisdictional forfeiture of a venerable water right held by a public agency to supply to its public domestic water flowing in its boundaries. Millview is perplexed that the Board would authorize the distribution of this Draft Order which on its face adjudicates a non-jurisdictional forfeiture.

Millview is particularly perplexed because this Board in its Decision D-1030 recognized that the permits issued to the Sonoma and Mendocino Districts should be conditioned upon protection of water uses supplied from the Russian River at the time Applications 12919 and 12920 were filed in 1949 (p.34, D-1030). Furthermore, the Board denied Application 17587 filed by Millview for 3.0 cfs year round direct diversion for domestic use from the Russian River (underflow)

within the boundaries of Millview. The Board justified the denial of Application 17587 by D-1110 in 1963 as follows:

> "The Mendocino District is willing to sell water to the two districts [Millview and Willow] which would allow them to firm up their water supply during the months when water will not otherwise be available to them." (P.5, D-1110).

Had the Russian River Improvement District referred to by the Board as the "Mendocino District" been willing to commit to Millview such a supply as assumed by the Board then Millview would not have utilized the scarce financial resources of its ratepayers to purchase the Waldteufel Right at a substantial cost. The fact is the Record shows that the Improvement District has not done so and refuses to do so.

In making such expenditure to purchase the Waldteufel Right, Millview relied upon the finding of the Board in D-1110 that the denial of Millview's Application was appropriate because the water sought to be diverted by Millview under Permit was needed "to supply prior vested rights" such as the Waldteufel Right (p.5, D-1110).

It is ironical that the adjudication of common law forfeiture explicit in the Draft Order is premised upon a complaint filed by the President of the "Mendocino District," which stands to gain nothing by the alleged forfeiture because its rights are perfected to a finite quantity of Coyote Project Water. Further Millview has unequivocally assured the Improvement District that when this Complaint is resolved in Millview's favor it will invest the capital necessary to construct the diversion facilities in the West Fork of the Russian River to divert the Waldteufel Right, all within the boundaries of Millview. Instead, the Complaint filed by the President of the Russian River Improvement District operates only to benefit the Sonoma District who appears in this proceeding not to assert a conflicting right, but to support the Division's non-jurisdictional adjudication of forfeiture to alleviate its flow obligations.

Millview therefore urges the Board to not adopt the Draft Order. Such denial would not be prejudicial to any party possessing a legally defined clash of rights filing a lawsuit before a court with jurisdiction seeking to established forfeiture, and meeting the burden of proof to do so.

The draft order is internally inconsistent and not in accord with due process.

Millview also urges the Board not to adopt the Draft Order because the Draft Order is internally inconsistent in a material matter. Remember that the hearing in this matter was ordered by the Superior Court after the Division attempted to accomplish forfeiture *de facto* by disseminating to the public an investigation report resting upon a finding of forfeiture. Further remember that the Court directed the Board to "pursue a course of due process."

On the subject of due process the Draft Order recognizes that a ruling on the issue of whether the Waldteufel Water Right was perfected "appears to be outside the issues fairly raised by the Hearing Notice and proposed Cease and Desist Order (CDO)." This is to say that it would violate due process for the issue of perfection to be addressed by the Board.

Not only is the issue of perfection outside the issues raised by the notice and therefore outside due process, it is outside the jurisdiction of the Board to adjudicate common law and statutory appropriative rights. Beyond that, the Division is judicially estopped from asserting non-perfection. (See Millview Closing Brief, p.9).

Notwithstanding all of this, the Draft Order in Section 5.2.2 entitled "Perfection of the Waldteufel Claim of Right, the Board "finds" that the Waldteufel Water Right was perfected not in the amount established by the Notice, the capacity of the diversion facilities, and the size of the place of use supporting a perfection between 932 afa and 1310 afa, but rather in the amount of 243 afa. (See discussion *infra* to the effect that the reasoning adopted in the Draft CDO supports a perfection in the amount of 1152 afa, not 243 afa).

The Order itself admits that a finding of non-perfection is beyond the "course of due process" ordered by the Superior Court. Not only did the Draft CDO not provide notice that perfection was in issue, but the facts supporting the finding - that the property was 32 acres in size - is directly inconsistent with an express statement in the Draft CDO that the "**Waldteufel Property consisted of about 165 acres circa 1914.**" (Draft CDO, p.2, ¶2). In a pre-hearing order denying discovery herein, the Hearing Officer stated without qualification that "the legal and ***factual*** basis for the proposed order . . . is described in the draft CDO."[1] Millview relied upon this unambiguous statement as to the assumed facts for the hearing and it is inconsistent with due process for the Draft CDO to be premised upon a different, inferred, assumed fact.

Therefore, it is inconsistent with due process for the Board to make a "finding" beyond its jurisdiction, beyond its notice of the hearing, and in reliance upon a purported fact inconsistent with the facts as determined by the Hearing Officer as being binding in this proceeding.

Although the Draft CDO in its preamble acknowledges that the topic of perfection is not constitutionally before the Board, the Draft CDO backslides by later making a "finding" that the Waldteufel Right was not perfected. The Draft CDO improperly suggests that the defect of notice was cured by the written testimony of Charles Rich. This cannot be so because the written testimony not only did not provide such notice at pages 8-9 of his written testimony, but more importantly, was communicated at the point in time when the Board requires that evidence be simultaneously exchanged. Hence, any notice in Mr. Rich's testimony, even if it existed, would not provide due notice because Millview was already required by the Board rules to present its evidence in written form without knowledge or notice as to the matter in question.

The Draft CDO identifies the forfeiture period as being from 1966-1986. No consecutive five year period is identified in the Record or in the Draft CDO.

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[1] A request for Official Notice of the December 3, 2009 letter was timely made by Millview. A ruling on this Request for Official Notice is renewed and hereby expressly requested. The December 3 letter is posted to the hearing webpage.

Furthermore, the forfeiture period is not next preceding the issuance of the original Draft CDO in March 2009.

Also noteworthy is that there is no judicial decree of forfeiture found in the Record or referenced in the Draft CDO. Forfeiture is not self-combusting.

The argument advanced by Millview since 2007 is that the Board lacks jurisdiction to adjudicate forfeiture either *de jure* or *de facto*. This argument was recognized recently by the Superior Court reviewing the Board's Order 2011-0005 (*Woods Irrigation Co.* Cease and Desist Order). While the Superior Court decision is not binding until your pending appeal is resolved, the recognition of a court of the very jurisdiction arguments advanced by Millview should provide substantial pause to this Board in issuing the Draft Order wherein the Board purports to exercise concurrent jurisdiction with the judicial branch. Further, the rejection of the Draft Order by the Board would not preclude a party possessing standing from bringing an action in Court which has unquestioned jurisdiction to adjudicate a common law forfeiture.[2]

Possible Technical Corrections

The notice inviting comment is unclear as to the scope of its state limitation. These limitations are interpreted by Millview as being that the Board does not invite extended legal argument or additional evidence.

The draft CDO acknowledges that Mr. Howard, the complainant, may not have the required clash of rights but that the Division might have such required standing by reason of its statutory authority. In the context of this common law forfeiture as distinguished from a statutory forfeiture this suggestion in the draft CDO has significant consequences. To the extent that common law forfeiture can

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[2] In the matter of *Young v. SWRCB*, Superior Court of California, County of San Joaquin, Case No. 39-2011-00259191, Judge Holland held, "The State Board lacked jurisdiction to determine the extent of riparian and pre-1914 appropriative rights through its limited cease and desist order authority pursuant to Water Code 1931 [sic]." The premise of this proceeding is that it is authorized by the Board's cease and desist authority, Water Code § 1831.

be asserted as to a perfected and vested right, the premise for the requisite "clash of rights" is adverse possession. (Contrariwise, the premise for statutory forfeiture is a determination by the Division that the statutory conditions for forfeiture have been met). The State is bound by the Fifth Amendment of the United State Constitution which commands that no person may be deprived of property without due process of law and that no private property may be taken for public use without just compensation. It would then appear unconstitutional on its face for the Draft CDO to be premised on the notion that the requisite "clash of rights" may reside with the State exercising what is in effect adverse possession.

At p.38 of the Draft CDO it is stated that the accounting sheets include the amount of water Millview "claims" to have used. The Record discloses that these accounting sheets were found in Millview's file pursuant to a public records act request and that no claim was necessarily asserted by Millview in connection therewith. The documents might have been rough drafts, worksheets, or final accountings. Nothing in the Record supports the notion that Millview asserted any "claim" by reason of these documents.

The Draft CDO cites *Rindge v. Craggs* as authority for the conclusion that a riparian owner may not acquire an overlapping appropriative right. The citation is in error, the proper citation being "*Rindge v. Craggs* (1922) 56 Cal.App. 247." More importantly, the holding of the case is misstated in that the case holds at p.252 that "[i]t is established in California that a person may be possessed of right as to the use of the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator." The reasoning of the Draft CDO is built upon a "general rule" which is erroneously stated. Further, even if the general rule was stated correctly its coupling with the factual assumption in the Draft CDO that Mr. Waldteufel only owned 32 acres (inconsistent with the Hearing Officer's designation of the assumed facts for the hearing) this assumed fact would lead to the conclusion that 130 acres of the 165 acres constituting the place of use designated in the Notice was non-riparian. Hence, the limited

perfection as described and reasoned in the Draft CDO would not be 243 afa, but rather 1056 afa (1310 acre feet of water ÷ 165 acres x 132 acres = 1056 afa).[3] Therefore, if perfection was in issue it would lead to a substantially different conclusion than reached in the Draft CDO.

The Draft CDO improperly utilizes the denial of Millview's Application acted upon in D-1110 to support the notion that the Russian River Improvement District, or "Mendocino District," is injured by Millview's use of the Waldteufel Right. Decision 1110 recognized that Millview is entitled to water from the Mendocino District. It is explained in the Record (RT 185) that Millview holds a contract with the Mendocino District, but that such contract is disregarded by the Department of Health because the Improvement District's contract is illusory. (RT 184-185). As a result of the Improvement District's unbending position on the structure of the contract, Millview and virtually every other public water purveyor in Mendocino County is under a connection moratorium. The moratorium is not attributable to lack of source water, but rather to the fact that the Improvement District refuses to correct the contract so that it meets the standards of the Department of Health, or the needs of the public water purveyors. But as illusory as the contract is for purposes of determining whether connections may be made, the Record is clear that Millview holds a contract with the Improvement District for 970 afa (RT 185). Hence, the Improvement District cannot be injured even if Millview diverts Project Water, because Millview holds a contractual, albeit illusory, right to do so.

The Draft CDO incorrectly states that the Russian River is "fully appropriated," citing D-1610 which by its terms is limited to the East Fork of the Russian River and does not purport by its terms to include the West Fork of the Russian River which is the intended and subject place of diversion. The sweeping statement in the Draft CDO is incorrect.

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[3] As a technical matter, the size of the property purchased by Waldteufel from the Chandons was 33.88 acres, not 30 acres. The size of the designated place of use stated in the Draft CDO issued in March 2009 was not 160 acres, but 165 acres.

Due Process requires timely adjudication

Millview has been adversely affected by the delay in these proceedings. Delay is inconsistent with due process. In this matter the Superior Court has ordered the State to pursue a course of due process.

The hearing in this matter was held in January 2010. The Draft CDO was issued in September 2011. Your staff represented to Millview that the standard time for processing a Draft CDO was ninety days after the hearing. The *Woods Irrigation* matter came to hearing six months after the present matter, yet the Final CDO was issued in January 2011. In fact that matter turns on a similar issue and is being appealed by you to the Court of Appeals, hence that matter is already before the Court of Appeals, even though the hearing upon it was six months after the present case. The point is that there has been substantial unexplained delay in your handling of this matter.

If there is any further significant delay in this proceeding Millview will seek a judicial remedy.

Thank you for the opportunity to comment upon the Draft CDO.

Yours very truly,

CHRISTOPHER J. NEARY

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cc: Hon. Philip Schafer
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