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October 3, 2011

Via Electronic and U.S. Mail

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
commentletters@waterboards.ca.gov

Re: Comment Letter – October 18, 2011 Board Meeting: Regarding Millview County Water District Proposed Cease and Desist Order

Dear Ms. Townsend:

This letter is submitted in regard to the State Water Resources Control Board (SWRCB) Draft Order which requires Millview County Water District (Millview) to cease and desist the threatened unauthorized diversion of water under a claimed pre-1914 appropriative right. This firm represents numerous pre-1914 appropriators and riparians around the state and is therefore interested in the SWRCB's authority with respect to the types of water rights at issue in the Draft Order. The Draft Order presents numerous novel and troubling legal theories and interpretations. As detailed below, however, our comments focus on the portions of the Draft Order that address (a) the relationship between riparian and appropriative rights, (b) the law on forfeiture of pre-1914 appropriative rights and the burden of proof placed on respondents in these types of proceedings, and (c) the monitoring and reporting requirements that the SWRCB may impose on pre-1914 appropriative rights.

We respectfully request that the SWRCB reject the Draft Order as presented, and that the SWRCB require that the Draft Order be amended consistent with this letter. In its current form, the Draft Order would subject pre-1914 water right holders to novel and unsupportable legal theories and evidentiary burdens, and would extend the SWRCB's enforcement authority over such rights beyond any reasonable interpretation of Water Code section 1831(e). Moreover, the Draft Order introduces new and unwarranted uncertainty about the nature, scope and existence of hundreds, perhaps thousands, of pre-1914 and post-1914 appropriative water rights throughout the State. Such a result runs counter to Article X section 2 of the California Constitution and

other doctrines that promote and encourage the reasonable, beneficial and orderly use of the State's water resources.

Relationship Between Riparian and Appropriative Rights

The Draft Order declares, for apparently the first time ever in the more than 150 year development of California water law, a "general rule" that "it is not possible for a riparian water right holder to develop an overlapping appropriative right that authorizes the diversion and use of the same amount of water as the riparian right, subject to the same limitations." (Draft Order, at pp. 10, 24.) The authorities cited in the Draft Order do not support this proposition. Indeed, there is not a single case or statute that contain such a general rule, and there is absolutely no policy justification for creation of such a rule now.

No Legal Authority for Stated Rule

The Draft Order cites *Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 252, *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398, and Water Code section 1201 to support its novel assertion. These authorities certainly do not stand for the proposition stated in the Draft Order, and cannot reasonably be relied upon as support for expansion of the law as proposed in the Draft Order. In the *Rindge* case, the court held: "It is established in California that a person may be possessed of rights 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." This case, however, cannot reasonably be interpreted to support the Draft Order's conclusion that a landowner cannot establish, perfect and maintain a valid appropriative water right for the same water and the same beneficial uses that may be supported and authorized by a riparian right. The Draft Order quotes from Hutchins, The California Law of Water Rights, at page 209 but omits the discussion regarding the California Supreme Court case *Healy v. Woodruff* (1893) 97 Cal. 464, 466-467, where the court held that a water user may possess both appropriative and riparian rights, and is not prevented from later acquiring more water by appropriation if necessary.

The other authorities cited in the Draft Order also do not stand for the proposition stated. Water Code section 1201 does not limit or even address the question of whether a riparian may establish an appropriative right for the same use permitted by the riparian right; the statute is simply a recognition of the settled principle that water available for appropriation is subject to prior rights (both riparian and senior appropriations). Likewise, the court in *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398 did not state that an appropriative right may only be established where it is not in the exercise of plaintiff's rights as a riparian owner. Rather, the court's holding was merely that the plaintiff in that case was unable to produce evidence of his appropriative right which he claimed was to all the foreign waters in the creek.

Policy Does Not Support the Stated Rule

The Draft Order asserts that the reasonable and beneficial use requirement in Article X, section 2 of the California Constitution supports the Draft Order's novel expansion of California water law. The reasonable and beneficial use doctrine does not address overlapping water rights or otherwise support the statement in the Draft Order that overlapping rights for the same use would not be consistent with its requirements. Rather, the constitutional mandate simply requires that a water use be limited to no more water than is reasonably necessary to satisfy the authorized beneficial uses. (*See* Hutchins, The California Law of Water Rights, at page 209; *Rindge v. Crags Land Co.*, 56 Cal.App. at 252 ("the total water claimed under the combined rights does not amount to more than is reasonably necessary to satisfy the necessary uses to which it is designed to be put.").) The constitutional reasonable and beneficial use doctrine applies to the exercise of all water rights, but it is inapposite to the "general rule" stated in the Draft Order.

The Draft Order also implies that a riparian can only establish an appropriative right if it authorizes a use that the riparian right does not authorize. While it is true that an appropriative right may be established, perfected and maintained to support diversions and use of water in excess of riparian rights, it is also true that an appropriation may be developed to support uses beyond an existing appropriative right. The cases cited in the Draft Order do not in any way explain the basis for the proposition stated in the Draft Order. In *City of Lodi v. East Bay Municipal Utility District* (1937) 7 Cal.2d 316, 335, for example, the court explained that the seasonal storage of water is a non-riparian use; the court did not address whether such use could be supported by an appropriative right even if it were also supported by a riparian right.

In *Pleasant Valley Canal Company v. Borror* (1998) 61 Cal.App.4th 742, 774-775, the court recognized that a person may possess both riparian and appropriative rights. The court noted one instance in which this might occur, where a person established an appropriative right on government land before obtaining title to the land and a riparian right. However, the court did not limit a water right holder to establishing an appropriative right in these circumstances alone. The court also noted that the water was used on non-riparian land and therefore the use was not riparian; but the case certainly does not hold, as the Draft Order implies, that a riparian may not develop an appropriative right for use on riparian lands.

By announcing this novel "general rule," the Draft Order appears to be targeting an issue that is not currently before the SWRCB, and that is whether a riparian land owner may "double dip." That is, may a riparian landowner exercise a riparian right and develop an appropriative right, such that it uses twice as much water. Such circumstances might arise, for example, if a riparian landowner perfected an appropriative right and then transferred it away, but continued to use water on the riparian land under the riparian claim. That issue is not before the SWRCB in this proceeding, and should be dealt with when the case presents itself.

In attempting to state a general rule in this case, the Draft Order effectively undermines and creates significant uncertainty concerning hundreds, perhaps thousands, of appropriative rights in California that may also have been developed in whole or in part on riparian riparian lands. Some of these pre-1914 appropriative water rights have been modified and changed over time, as authorized under Water Code section 1706 and California common law, and the water use may since have lost its riparian character. For example, some of these pre-1914 rights may support water use on non-riparian lands, and some of these rights may have added an element of seasonal storage not be authorized under riparian right. The Draft Order suggests that these water right changes may have been improper, and creates a cloud over these otherwise unassailable pre-1914 appropriative rights.

This concern does not pertain to just pre-1914 appropriative rights. As a matter of practice, the SWRCB has not historically investigated the riparian character of a putative appropriative water right application. As such, there is little doubt that current water use under many of the permits and licenses issued by the SWRCB also could be supported, in whole or in part, by riparian rights. Again, the Draft Order creates a cloud over such rights.

Forfeiture and Burden of Proof

The Draft Order rejects respondents' argument that the SWRCB has improperly shifted the burden of proof to them to prove that forfeiture did not occur by concluding that "the prosecution team has established a prima facie case of threatened unauthorized diversion under the Waldteufel claim of right by presenting evidence that the right has been forfeited in part through non-use and Millview has diverted more water than authorized under the right." (Draft Order, at p. 36.)

First, the Draft Order improperly relies on Evidence Code section 550 and the Law Revision Commission Comment following to support the assertions that "[g]enerally, in an enforcement action, the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation," and "[a]t that point, the burden shifts to the alleged wrongdoer to answer such evidence, including establishing affirmative defenses." The burden of proof for proving forfeiture is properly found in caselaw concerning forfeiture,[1] which clearly provides that the party asserting a forfeiture of pre-1914 water rights bears the burden of proof. (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 820; *Lema v. Ferrari* (1938) 27 Cal.App.2d 65, 71-74.) The Draft Order confuses the burden of proof with the burdens of evidence and persuasion. The Division of Water Rights' enforcement unit bears the burden of proof to establish forfeiture; the

[1] The Evidence Code provision and Law Revision Commission Comment following cited in the Draft Order do not state a general rule that in an enforcement action, the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation, nor do they contain the burden of proof for establishing forfeiture. In fact, the technical rules in the Evidence Code do not apply to adjudicative proceedings before the SWRCB. (Evid. Code § 300; 23 CCR § 648.5.1, referencing Gov. Code § 11513(c) ("The hearing need not be conducted according to technical rules relating to evidence and witnesses").)

burden of persuasion remains with the prosecution while the burden of producing evidence may shift to the other party if the prosecution establishes a fact giving rise to a presumption. (Evid. Code §§ 500, 550.) But it remains the Division's burden to ultimately prove that all of the elements of forfeiture have been established with clear evidence. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 103 ("It is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges.")

Second, the Draft Order inexplicably and impermissibly questions the precedential value of the court's decision in *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal. App. 4th 555, 560 ("*North Kern*"). (Draft Order, at p. 32.) In fact, "[g]iven the Supreme Court's denial of petitions for review, the opinion stands as the most extensive published analysis of the forfeiture law as applicable to non-statutory appropriations." (1 Slater, California Water Law and Policy, § 2.31[4], at pp. 2-134-2-135.)

To establish forfeiture, a plaintiff, or in this case the Division of Water Rights enforcement staff, "must prove that the defendant 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 560.) Prior to *North Kern,* every other case involving nonuse has concluded that the period of five consecutive years immediately preceding the filing of the action is the correct forfeiture period. (1 Slater, California Water Law and Policy, § 2.31[4], at pp. 2-133-2-134, *citing Smith v. Hawkins* (1895) 110 Cal. 122, 127; *Smith v. Hawkins* (1898) 120 Cal.86 ("the maximum quantity of water beneficially employed by plaintiffs at sometime within the five years next before the bringing of the action."); *Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450, 452; *Duckworth v. Watsonville Water & Light Co.* (1907) 150 Cal. 520; *Bazet v. Nugget Bar Placers, Inc.* (1931) 211 Cal. 607, 616-618; *Hand v. Clease* (1927) 202 Cal. 36, 45.) No authority supports the SWRCB's determination in the Draft Order that a twenty year period from 1967 to 1987, which occurred eleven years before 1998 when respondents acquired the claim of right, and 19 years prior to 2006 when the administrative complaint was filed with the SWRCB, is sufficient to establish forfeiture.

Finally, the Draft Order does not satisfy the burden of proof to establish forfeiture, which is the Division's burden to prove before the SWRCB may find that a threat of unauthorized diversion exists. The Draft Order first relies on statements of water diversion and use from an inappropriate forfeiture period to conclude that a certain portion of the valid pre-1914 right has been forfeited. Then, the Draft Order concludes that, even if it is assumed that the measurement period required by North Kern applies, there was partial forfeiture because "the record does not contain any evidence that water use under the Waldteufel claim of right increased between 1987 and 1998." (Draft Order, at p. 34.)

The Draft Order cites to the constitutional reasonable beneficial use requirement several times as a policy explanation for its finding of partial forfeiture, yet does not cite, and certainly does not honor the well established legal maxim that "[e]quity abhors forfeiture." (*Hand v. Cleese* (1927)

202 Cal. 36, 46; Draft CDO, at pp. 33, 36-37.) In North Kern, the court explained that forfeiture "is generally disfavored in the law." (*North Kern*, 147 Cal.App.4th at 572.) Furthermore:

> since no measure of forfeiture is exact, minimization of forfeiture is preferable to maximization. If there must be error, it should occur in the direction of preserving to the senior appropriator a sufficient water entitlement to accomplish the purpose for which the appropriator continues to beneficially use the water.

(Id.) The presumption against forfeiture of a pre-1914 appropriative water right requires the Division's enforcement staff to do more than speculate about the use history of a pre-1914 claimant, and certainly does not allow the Division to shift the burden of proof to the claimant. (*See Lux v. Haggin* (1886) 69 Cal. 255, 298-299 (explaining that reliance on a conflicting "presumption drawn from facts which did not necessarily exclude a retention" of the water right was not enough to meet the burden of proof).) The burden of producing evidence should not have shifted to the respondents in this case, and the Draft Order impermissibly places the burden of proof on respondents to show that forfeiture does not exist.

Monitoring and Reporting Requirements

The Draft Order requires Millview to monitor and report its pre-1914 diversions to the SWRCB, beyond the requirements set forth in Water Code section 5100, *et seq*. Under the Draft Order, Millview must maintain a record of all diversion of water on a daily basis and identify the amount of water and the basis of right, including its valid pre-1914 appropriative right. (Draft Order, at p. 44.) Millview must also submit a copy of the annual record for each calendar year to the Division of Water Rights. (Draft Order, at p. 45.) These monitoring and reporting requirements go beyond the conditions imposed in the prior SWRCB Orders that are cited in the Draft Order as precedent decisions, and are prohibited by Water Code section 1831(e).

Pursuant to Water Code sections 1052 and 1831, the SWRCB may investigate claimed pre-1914 appropriative water rights in order to determine if there is a trespass or unauthorized diversion. Water Code section 1831(e) makes it abundantly clear, however, that the SWRCB does not have authority to regulate that right under its enforcement authority. Only one of the "precedent decisions" cited in the Draft Order, Order WR 2001-22, addresses the SWRCB's authority to impose reporting requirements on a pre-1914 appropriator.[2] (Draft Order, at p. 22.)

[2] Order WR 2004-0004 did not impose any monitoring or reporting requirements. Order WR 2006-0001 and Order WR 2009-0060 imposed reporting requirements without citation to authority, and the requirements were not contested in those proceedings. Moreover, in those latter Orders the appropriators were permitted to temporarily continue diverting in excess of the water rights as determined by the SWRCB, and the monitoring and reporting requirements were imposed in conjunction with a schedule to bring the diversions into compliance with the water rights. Furthermore, at the time these prior orders were issued, pre-1914 appropriators and riparians were not legally mandated to file Statements of Water Diversion and Use ("SWDUs"). Water Code section 5100, et seq. was

In Order WR 2001-22, the SWRCB required a report setting forth the legal basis for certain water deliveries, including "proof of the nature of the claimed rights, when they were initiated and perfected and for what amounts and purposes, the chain of title for each right, and proof that the rights had been maintained through continuous diversion and use." (Order WR 2001-22 at p. 25.) The reporting requirement in Order WR 2001-22 was limited to proof of the validity of the water right, not the future exercise of the water right. Indeed, Order WR 2001-22 found that SWRCB jurisdiction to require reporting extends only "to the extent necessary to ascertain whether [the] water use is covered by a valid pre-1914 appropriative water right." (*Id.*) In contrast to Order WR 2001-22, the monitoring and reporting requirements imposed in the Draft Order concern the portion of the pre-1914 right determined by the Draft Order to be valid. This is precisely the type of "regulation" proscribed by Water Code section 1831(e).

Water Code section 1831(e) unequivocally limits the scope of the SWRCB's enforcement authority to issue CDOs against water users holding riparian or pre-1914 water rights; the SWRCB may not require monitoring and reporting from pre-1914 and riparian claimants beyond the requirements set forth in Water Code section 5100, *et seq*. Section 1831(e) states that the SWRCB is not authorized "to regulate in any manner, the diversion or use of water not otherwise subject to regulation under this part." The reference to "this part" in section 1831(e) is to Part 2 of Division 2 of the Water Code, section 1200 through section 1851, governing the SWRCB's authority to issue and regulate appropriative water rights permits and licenses. The monitoring and reporting requirements imposed in the draft CDO are a manner of regulation expressly prohibited by Water Code section 1831(e).

Thank you for your time and attention to our comments. We appreciate the opportunity to comment on the Draft Order. If you have any questions concerning the above, please do not hesitate to contact the undersigned.

Sincerely,

Robert E. Donlan

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amended in 2010 to make SWDUs mandatory for most pre-1914 appropriators and riparians. Thus, the SWRCB no longer has any need to require monitoring and reporting beyond what is already required to be reported in SWDUs.