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December 3, 2009

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Dear Gentlemen:

**WATER RIGHT HEARING REGARDING PROPOSED CEASE AND DESIST
ORDER AGAINST MILLVIEW COUNTY WATER DISTRICT, THOMAS P. HILL,
AND STEVEN L. GOMES**

This letter responds to the request for authorization to conduct pre-hearing discovery pursuant to the Civil Discovery Act (Code Civ. Proc., §§ 2016.010-2036.050) submitted by Millview County Water District, Thomas P. Hill and Steven L. Gomes (hereafter referred to as Millview et al.) on November 12, 2009.

Millview et al. contend that, consistent with due process requirements, the State Water Resources Control Board (State Water Board or Board) should authorize pre-hearing discovery pursuant to the Civil Discovery Act. Millview et al. argue that they need to conduct discovery in order to determine in advance of the hearing what authority the Board asserts over the issues in this proceeding, and what evidence the Board's staff relied upon in making the determination that a portion of a claimed pre-1914 appropriative water right held by Millview et al. has been forfeited. In addition, Millview et al. seek discovery related to previous Board decisions on applications to appropriate water from the West Fork of the Russian River and the Board's determination that the Russian River is fully appropriated. Millview et al. seek to propound special interrogatories, make inspection demands, make requests for admissions, and take the depositions of the persons most knowledgeable about the issues in this proceeding.

For the reasons set forth below, Millview et al.'s request is denied.

Preliminarily, the State Water Board's procedures for adjudicative proceedings provide for notice and an opportunity to be heard, discourage surprise testimony and exhibits,

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and allow for discovery in appropriate cases. (See generally Gov. Code, § 11400 et seq.; Wat. Code, § 1100; Cal. Code Regs., tit. 23, §§ 648, 648.4.)

The State Water Board's prior approval is not required for a party to conduct discovery pursuant to Water Code section 1100 and sections 11450.10 and 11450.20 of the Government Code. Water Code section 1100 authorizes parties to adjudicative proceedings before the State Water Board to take the depositions of witnesses in accordance with the Civil Discovery Act. Government Code sections 11450.10 and 11450.20 authorize a party's attorney of record to issue a subpoena for attendance at a hearing or a subpoena *duces tecum* for the production of documents. (See also Cal. Code of Regs., tit. 23, § 649.6.)

Millview et al. are cautioned, however, that any discovery sought pursuant to these provisions is subject to a motion for a protective order. Pursuant to the Civil Discovery Act, a protective order prohibiting or limiting depositions may be issued to protect a party or deponent from undue burden and expense. (Cal. Code Civ. Proc., § 2025.420, subd. (b).) Similarly, a protective order may be issued if the discovery sought would be "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." (*Id.*, § 2019.030, subs. (a) & (b).) Pursuant to Government Code section 11450.30, a protective order may be issued to protect a person served with a subpoena or subpoena *duces tecum* from unreasonable or oppressive demands.

At this stage in this proceeding, it appears that a protective order would be warranted because the discovery Millview et al. seek is obtainable from a more convenient, less burdensome, and less expensive source. Specifically, most of the information that Millview et al. seek to obtain either has been or will be provided to Millview et al. pursuant to the State Water Board's hearing procedures. The legal and factual basis for the proposed enforcement action against Millview et al. is described in the draft cease and desist order. In addition, the Prosecution Team has identified its expert witnesses on the Prosecution Team's Notice of Intent to Appear, and the Prosecution Team will serve Millview et al. with the Prosecution Team's written testimony and exhibits in advance of the hearing. Accordingly, the evidence that State Water Board staff relies upon in asserting that a portion of the claimed pre-1914 right held by Millview et al. has been forfeited should be provided to Millview et al. prior to the hearing, without the need for formal discovery. Finally, information concerning previous Board decisions on applications to appropriate water from the West Fork of the Russian River, and information concerning the Board's fully appropriated stream determination pertaining to the Russian River, can be obtained by reviewing the Division of Water Rights' files. The Division's files are open to the public during regular business hours, and Millview et al. can arrange to have copies made of specific files or documents.

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Millview et al. has not served any notice of deposition or subpoena under Water Code section 1100 and Government Code sections 11450.10 and 11450.20, and this ruling does not necessarily address the appropriateness of any specific discovery request under those provisions. For the reasons explained above, however, Millview et al. should be aware that discovery, other than that already provided for through the identification of expert witnesses and the presubmission of direct testimony and exhibits, does not appear to be warranted at this stage in the proceeding. The information that Millview et al. seek to obtain can be obtained in a less burdensome manner from the Prosecution Team's pre-hearing submittals or by reviewing the State Water Board's files. If after reviewing the Prosecution Team's exhibits and the State Water Board's files, Millview et al. conclude that discovery is necessary, they may initiate discovery pursuant to Water Code section 1100 or Government Code sections 11450.10 and 11450.20.

Water Code section 1100 and Government Code sections 11450.10 and 11450.20 do not authorize all of the forms of discovery that are permissible pursuant to the Civil Discovery Act, including interrogatories, inspection demands, and requests for admission. To the extent that Millview et al. seek authorization to conduct forms of discovery that are not authorized under Water Code section 1100 and Government Code sections 11450.10 and 11450.20, Millview et al.'s request is denied. Millview et al. have not provided any support for the contention that authorizing other forms of discovery is necessary to satisfy due process requirements.

If you have any questions about this letter, please contact Dana Heinrich, Senior Staff Counsel, at (916) 341-5188.

Sincerely,



Arthur G. Baggett, Jr.
Hearing Officer

cc: Division of Water Rights Prosecution Team
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