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10 HILL, STEVEN L. GOMES

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**BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

In the Matter of Draft Cease) Ref. No. 363:JO:262.0(23-03-06)
and Desist Order No.)
2009-00XX-DWR against Thomas) PRE-HEARING BRIEF OF
Hill, Steven Gomes and) RESPONDENTS HILL, GOMES
Millview County Water)
District.) Hearing: January 26, 2010
Time: 9:00 a.m.
Location: Coastal Hearing Room,
1001 I Street, Second Floor,
Sacramento

1. **INTRODUCTION.** Since 1928 the California Constitution has stated the well accepted truth that the "general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable". Cal. Const., art. X, §2 (formerly art. XIV, §3). See W. Hutchins, The California Law of Water Rights (1956), p. 12-13.

"It is . . . the established policy of this State that the use of water for domestic purposes is the highest use of water and . . . the next highest use is for irrigation." Water Code §106. The State Water Resources Control Board ("**SWRCB**") "shall be guided by [that] policy". Water Code §1254.

1 The water at issue in this proceeding is being distributed
2 by Millview County Water District ("**Millview**") to its customers
3 for domestic use. There is **no** issue herein as to the waste or
4 unreasonable use of water.

5 According to the SWRCB's own literature (Exhibit AA), the
6 "SWRCB does not have the authority to determine the validity of
7 vested rights other than appropriative rights initiated
8 December 19, 1914 or later." The water right at issue in this
9 case, the "**Waldteufel Right**", is a pre-1914 water right (Civil
10 Code §§1415, et seq.). Therefore, there **is** an issue as to how
11 or why the State Water Resources Control Board ("**SWRCB**") can
12 exercise jurisdiction, directly or otherwise, over the
13 Waldteufel Right.

14 The draft cease and desist order ("**CDO**") at issue herein is
15 based upon a June 1, 2007, SWRCB staff report ("**Staff Report**";
16 Exhibit M). The person who filed the complaint (one-page
17 letter; Exhibit G) that led to the Staff Report (Mr. Lee
18 Howard) does not claim to be entitled to any of the water that
19 Millview claims under the Waldteufel Right. In other words,
20 there is no "clash of rights" that might justify a finding that
21 the Waldteufel Right has been diminished. North Kern Water
22 Storage Dist. V. Kern Delta Water Dist. (2007) 147 Cal.App.4th
23 555, 560. There is therefore an issue herein as to legality of
24 the CDO's assumption of a forfeiture.

25 The Staff Report essentially places upon respondents the
26 burden of proving the absence of a forfeiture, whereas under
27 California law the claimant of the competing right (absent in
28 this case) bears the burden of affirmatively proving a

1 forfeiture by five years of non-use of available water. North
2 Kern, *supra*, 147 Cal.App.4th at 560. There is thus an issue in
3 this case as to whether the Staff Report and the CDO violate
4 California law.

5 The statements of water diversion and use upon which the
6 Staff Report and CDO rely in finding a forfeiture are, under
7 Water Code §5108, "for informational purposes only". There is
8 thus an issue herein as to whether the staff report and CDO
9 violate this statute.

10 The Staff Report and CDO contain little if any analysis of
11 whether there was available water in the Russian River at the
12 relevant times of alleged non-use. Only the failure to use
13 "available" water can result in forfeiture. North Kern, *supra*,
14 147 Cal.App.4th at 580-582. There is therefore an issue in
15 this case as to whether or not any finding of a forfeiture is
16 lawful and/or supported by the evidence.

17 The period of alleged non-use upon which the staff report
18 and CDO are based are not the five years immediately preceding
19 the complaint. California law clearly identifies this as the
20 relevant period, however. North Kern, 147 Cal.App.4th at 560
21 ("In order to establish a forfeiture, the plaintiff must prove
22 that the defendant failed to use some portion of its water
23 entitlement continuously over a period of five years
24 immediately prior to the plaintiff's assertion of its
25 conflicting right to the water"; emphasis supplied). There is
26 therefore an issue in this case herein as to whether the Staff
27 Report and CDO are based upon an erroneous application of
28 California law.

1 A pre-1914 water right is a "private property" right.
2 Thayer v. California Development Co. (1912) 164 Cal. 117, 125.
3 The Staff Report finds that it has been forfeited in great
4 part. But there was no hearing before the Board that led to
5 issuance of the Staff Report (indeed, the Howard complaint was
6 closed without further action; see Exhibit T). Instead, there
7 was a unilateral investigation by staff, prompted by a
8 complaint from someone who does not claim to be entitled to the
9 water in question, on a subject beyond the SWRCB's
10 jurisdiction. There is, therefore, an issue in this case as to
11 whether respondents have been afforded due process, this
12 hearing on the CDO (in which respondents' posture is that of a
13 criminal defendant) notwithstanding.

14 For all of these and other reasons, the CDO should not be
15 adopted in any form. The CDO and the complaint should be
16 dismissed. Millview should be allowed to fully exploit the
17 Waldteufel Right for its customers' domestic use, consistent
18 with the fact that "the established policy of this State [is]
19 that the use of water for domestic purposes is the highest use
20 of water"! Water Code §106. Why the SWRCB would want to
21 contend otherwise, or try to prevent Millview from fully
22 utilizing the Waldteufel Right, is unclear, to say the least.

23
24 **2. FACTS.** On March 24, 1914, J. A. Waldteufel generated,
25 signed and recorded in Mendocino County a document entitled
26 "Water Right" (Exhibit C; the "**Waldteufel Right**"), which laid
27 claim to what amounts to 2.5 cubic feet of water per second.
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1 Waldteufel used the Waldteufel Right for beneficial
2 purposes, and had in fact been exploiting it at 2.5 ft. per
3 sec. before March 24, 1914, to irrigate crops growing on nearby
4 real property ("**Wood Property**") and for domestic use. The
5 Waldteufel Right was exploited for that purpose in and after
6 1914, indeed for decades thereafter, up to and including 1998.
7 The Waldteufel Right was vested prior to the new statutory
8 scheme that became effective in December 1914; it is a "pre-
9 1914 water right" (perfected under Civil Code §§1415, *et seq.*).

10 Respondents Thomas Hill and Steven Gomes purchased the Wood
11 Property and the Waldteufel Right (Exhibits D, E, F) in 1998
12 for valuable consideration. There was at the time, and
13 apparently is, a pipe and pump capable of pumping water
14 directly from the river, including underflow, as well as a well
15 at the northwest corner of the Wood Property.

16 In 2001, Hill and Gomes assigned the Waldteufel Right to
17 Millview County Water District ("**Millview**").¹ Millview began
18 to exploit same, pumping water to deliver to its customers for
19 domestic use.

20 Hill and Gomes converted the Wood Property to a residential
21 subdivision, duly approved by the County of Mendocino. There
22 are today 125 nice residences (+/-) on the Wood Property.

23 In February 2006, Lee Howard, a private citizen with no
24 apparent or stated right or claim to water from the West Fork
25 of the Russian River, wrote a one-page letter (Exhibit G; the
26 "**Howard Complaint**") to Virginia Whitney at SWRCB's DWR,
27

28 ¹ Hill's and Gomes' current rights under their agreement with Millview depends upon the volume of the Waldteufel Right.

1 complaining about Millview's exploitation of the Waldteufel
2 Right.

3 The matter was apparently assigned to DWR's Charles Rich
4 ("Rich"). Notices were sent out (Exhibit H), responses were
5 sent in by Millview (Exhibit I) and State Senator P. Wiggins
6 (Exhibit L). Rich went to the Wood Property and met with
7 affected persons. A long-time resident gave a sworn statement
8 (Exhibit J). The matter was handled almost as if it were a
9 reference from the Courts under Chapter 1 (beginning with
10 Section 2000) of Part 3 of Division 2 of the California Water
11 Code.

12 There was no hearing of any sort, however, in connection
13 with Rich's inquiry and/or investigation of the Howard
14 Complaint.

15 On June 1, 2007, Rich issued his Staff Report (Exhibit M).
16 Rich therein concludes that the Waldteufel Right is a pre-1914
17 water right with a valid basis, but has been forfeited in great
18 part (approx 90%) through non-use. He recognized there is no
19 evidence of abandonment. The Staff Report does not contain a
20 competent analysis of whether water was available in the
21 Russian River but was not used by Millview during the five
22 years preceding the Howard Complaint, or at any other time.

23 Hill, Gomes and Millview filed objections to the Staff
24 Report (Exhibits N, O), and the Mendocino County Water Agency
25 weighed in as well (Exhibit P), all with no apparent effect.

26 In March 2008, Hill, Gomes and Millview formally requested
27 "reconsideration" of the Staff Report (Exhibit R), stating
28 their reasons.

1 In April 2008, DWR's Virginia Whitney denied
2 reconsideration (Exhibit S) and stated that the Howard
3 Complaint was being closed without further action (Exhibit T).

4 One week later, Millview, Hill and Gomes filed suit in
5 Mendocino County Superior Court for (*inter alia*) a writ of
6 mandate requiring SWRCB to take final action on the Staff
7 Report rather than leave Millview 'hanging' without really
8 knowing what SWRCB's position was on what Millview's rights
9 were.

10 In January 2009, the judge in the Superior Court case
11 stated that SWRCB's "proposed inaction would be an abuse of
12 discretion" (Exhibit V).

13 In April 2009, SWRCB issued the draft CDO (Exhibit W),
14 which is expressly and patently based upon the Staff Report.

15 Hill and Gomes (Exhibit W) and Millview (Exhibit Y) timely
16 requested a hearing thereon. More than four months later,
17 SWRCB gave notice of the hearing on the CDO.

18 The Superior Court action was dismissed in October 2009,
19 the Court declining to retain jurisdiction pending final action
20 by SWRCB.

21 Hill, Gomes and Millview, having been embroiled in
22 litigation in Superior Court in a mandamus action in which the
23 record was already set, did not seek to conduct discovery in
24 the instant proceeding until after the Superior Court action
25 was finished. They sought an exception to normal procedures,
26 including the right to propound written discovery. Their
27 request was denied by the hearing officer. Hill and Gomes
28 requested reconsideration, but that was denied.

1 **3. MILLVIEW IS PUTTING THE SUBJECT WATER TO THE "HIGHEST**
2 **USE" POSSIBLE IN CALIFORNIA.** Millview merely seeks
3 recognition, or this Board's acceptance, of its right to
4 continue to apply the water appropriated under the Waldteufel
5 Right for domestic use, which is the "highest use of water" in
6 California as declared by the Legislature. It is not apparent
7 why SWRCB seeks to prevent Millview from doing so, or why SWRCB
8 - supposedly guided by the above-referenced policy (Water Code
9 §1254) - responded in such an accommodating manner to Lee
10 Howard's complaint. There is zero evidence that Millview is
11 wasting or using unreasonably the water appropriated under the
12 Waldteufel Right. Indeed, the water has been shifted from the
13 second highest use to the highest use under California water
14 law. Water Code §106.

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16 **4. SWRCB IS ACTING IN EXCESS OF ITS JURISDICTION.** SWRCB's
17 own literature states that "SWRCB does not have the authority
18 to determine the validity of vested rights other than
19 appropriative rights initiated December 19, 1914 or later"
20 (Exhibit AA). The Board has confirmed this position in
21 California Farm Bureau Federation v. California State Water
22 Resources Board S. 150518, currently pending in the California
23 Supreme Court, and upon numerous other occasions and
24 situations. In the Matter of Applications 29919, 29920, 22921,
25 and 29922, Water Rights Order 2001-22, pp. 25-26. SWRCB "does
26 not have the authority to determine the validity of" the
27 Waldteufel Right. See Nicoll v. Rudnick (2008) 160 Cal.App.4th
28 550, 557; People v. Shirokow (1980) 26 Cal.3d 301, 309; People

1 v. Murrison, 101 Cal.App.4th 349, 359.

2 The Board also acknowledged its limited jurisdiction in its
3 own previous decisions involving pre-1914 rights.

4 "The SWRCB has jurisdiction to impose such a
5 reporting requirement to the extent necessary to
6 ascertain whether EID's water use is covered by a valid
7 pre-1914 appropriative water right. With the exception
8 of riparian rights or appropriative rights perfected
9 prior to December 19, 1914, all water use is
10 conditioned upon compliance with the statutory
11 appropriation procedures set forth in division 2 of the
12 Water Code (commencing with section 1000). (Wat. Code,
13 §§ 1225, 1201.) Unless EID's water use is covered by
14 valid pre-1914 rights, EID's water use constitutes an
15 unauthorized diversion and trespass against the state.
16 (Wat. Code, § 1052.)"

17 (In the Matter of Applications 29919, 29920, 22921, and 29922
18 Water Rights Order 2001-22, pp. 25-26 ["ElDorado Irrigation
19 Decision"])

20 In the ElDorado Irrigation Decision, SWRCB acknowledged
21 that the extent of its jurisdiction over a pre-1914 right is an
22 inquiry into whether a water diversion is made pursuant to a
23 valid pre-1914 water right - otherwise, if there is no pre-1914
24 right asserted, the diversion would be unauthorized. The
25 inquiry, however, stops at the determination that the diversion
26 is made pursuant to a valid pre-1914 right. In this case,
27 SWRCB's staff determined that the Waldteufel right is a valid
28 pre-1914 water right. (Exhibit M, pp. 8, 16.) SWRCB's
jurisdiction - as acknowledged and defined by SWRCB itself -
ends there unless there is a reasonably supported factual
allegation that the water is being wasted or the use is
unreasonable.

SWRCB brings this proceeding under Water Code §1831. But
under Water Code §1831(e), a cease and desist order is not

1 available to SWRCB with respect to "the diversion or use of
2 water not otherwise subject to regulation of [SWRCB] under"
3 Part 2 ("Appropriation of Water") of the Water Code. Part 2
4 (commencing with Section 1200) does not deal with pre-1914
5 water rights. SWRCB has exceeded its jurisdiction in issuing a
6 CDO as to the Waldteufel Right. This proceeding should thus be
7 terminated and the CDO should not be adopted in any form.
8

9 **5. HOWARD IS NOT A COMPETING CLAIMANT FOR THE SUBJECT**
10 **WATER.** SWRCB had no authority to entertain the Howard
11 Complaint because Howard is not a competing claimant for the
12 subject water; there is no "clash of rights". North Kern,
13 *supra*, 147 Cal.App.4th 555, 560.

14 In addition to those two requirements, the forfeiture
15 proponent must "prove that the defendant failed to use some
16 portion of its water entitlement continuously over a span of
17 **five years immediately prior to the plaintiff's assertion of**
18 **its conflicting right to the water."** Ibid. [emphasis added];
19 See also Smith v. Hawkins (1895) 110 Cal. 122, 127-128. The
20 CDO, based as it is upon the Staff Report that responded to the
21 Howard Complaint, is thus unlawful and should not be adopted to
22 any extent.
23

24 **6. RESPONDENTS DO NOT HAVE THE BURDEN TO PROVE THE**
25 **WALDTEUFEL RIGHT HAS NOT BEEN FORFEITED.** The Staff Report
26 erroneously and unlawfully places upon respondents the burden
27 of proving the absence of a forfeiture. This is clearly
28 unlawful, as discussed at p. 3 and in Section 5, *supra*.

1 California law requires the claimant of a competing water right
2 to bear the burden of affirmatively proving a forfeiture by
3 five years of non-use of available water. North Kern, supra,
4 147 Cal.App.4th at 560. No such proof was made in connection
5 with the Howard Complaint or the Staff Report. The CDO, which
6 adopts the finding of forfeiture, violates California law and
7 must not be adopted to any extent.

8
9 **7. THE STAFF REPORT AND CDO IMPROPERLY RELY UPON STATEMENTS**
10 **OF DIVERSION.** The statements of water diversion and use upon
11 which the Staff Report and CDO rely in finding a forfeiture
12 don't establish a forfeiture, even if they could be relied
13 upon. More importantly, the Legislature has clearly
14 established that they cannot be relied upon. Water Code §5108,
15 says clearly that such statements are "for informational
16 purposes only". The report and the CDO are therefore unlawful
17 and must not be adopted to any extent.

18
19 **8. THERE IS NO EVIDENCE THAT WATER WAS AVAILABLE BUT WAS**
20 **NOT USED.** The Staff Report and CDO contain little if any
21 analysis of whether there was water in the Russian River
22 "available" to the owner of the Waldteufel Right at the
23 relevant times of alleged non-use. California law requires,
24 that non-use occur when there was water that could have been
25 used before forfeiture can be found. North Kern, supra, 147
26 Cal.App.4th at 580-582. No such showing was made in this
27 proceeding. The Staff Report and the CDO based thereon
28 therefore are based upon a misapplication of California law.

1 **9. THE STAFF REPORT AND CDO DO NOT LIMIT THEIR INQUIRY TO**
2 **THE FIVE YEARS BEFORE THE HOWARD COMPLAINT.** The Staff Report
3 and CDO fail to comply with the requirement that the period of
4 non-use of available water must be "immediately prior to the
5 plaintiff's assertion of its conflicting right to the water."
6 North Kern, supra, 147 Cal.App.4th at 560. See also Smith v.
7 Hawkins (1895) 110 Cal. 122, 127-128 (five years preceding the
8 competing claim).

9
10 **10. THE STAFF REPORT AND CDO WERE ISSUED WITHOUT**
11 **RESPONDENTS HAVING BEEN AFFORDED DUE PROCESS WITH RESPECT TO**
12 **THEIR VESTED PRIVATE PROPERTY RIGHTS.** A pre-1914 water right
13 is a "private property" right. Thayer v. California
14 Development Co. (1912) 164 Cal. 117, 125. The Staff Report
15 finding that it has been forfeited in great part did not follow
16 a hearing at which respondents had the opportunity to call
17 witnesses or cross-examine the other parties' witnesses. In
18 other words, notwithstanding the hearing in this 'enforcement
19 action' (at which respondents' posture will apparently be that
20 of a criminal defendant), SWRCB is depriving respondents of
21 property (a major portion of their water right) without due
22 process of law, in violation of both the Federal and State
23 Constitutions. SWRCB is patently violating respondents' civil
24 rights, for reasons unknown.

25
26 **11. CONCLUSION.** SWRCB staff is embarked upon an unlawful
27 course of conduct that violates respondents' vested property
28 rights and civil rights on several levels, and which would

1 prevent Millview from making the maximum possible beneficial
2 use of water available under their pre-1914 right. SWRCB's
3 course is contrary to the dictates of the self-executing
4 provisions of the 1928 Constitutional amendment and other
5 California statutory and common law.

6 Before this Board supports this approach it should consider
7 carefully the unintended consequences likely to follow. If
8 every current holder of a pre-1914 right can be made to bear
9 the disruption and expense caused by a powerful state agency's
10 attempt to diminish the extent and value of that right upon no
11 more solid basis than exists in this case, great confusion and
12 economic harm will surely result. Particularly in the Sierra
13 Foothills of Central California, there are many such pre-1914
14 rights that have been, and are, used, traded, sold and relied
15 upon for every type of private and public activity,
16 consistently with the policy formalized in the 1928
17 Constitutional amendment. Never before has anyone thought that
18 the owners of these rights could be made to prove their
19 validity and extent upon a mere complaint to the SWRCB by a
20 member of the public without even a competing claim to the
21 water subject to the right.

22 This Board should strive to support and protect pre-1914
23 rights, not to lend its power to undermining them. The Board
24 should clearly and quickly dispel the thought
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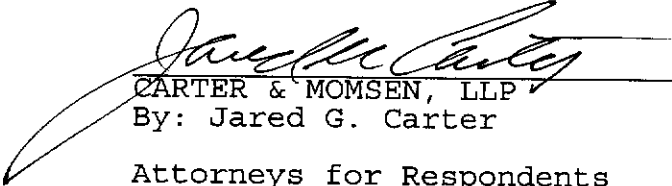
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1 that it will encourage and support every new theory advanced to
2 justify expanding its authority to diminish such rights.

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Dated: January 4, 2010


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