Draft Cease and Desist Order Hearing

Thomas Hill, Steven Gomes, and
Millview County Water District
Russian River and Russian River Underflow
In Mendocino County

January 26, 2010

CLOSING BRIEF
MILLVIEW COUNTY WATER DISTRICT

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"afa"	acre feet per annum
"DCDO"	Draft Cease and Desist Order issued by the State Water Resources Control Board to Millview County Water District on April 10, 2009.
"Division"	Division of Water Rights
"H&G"	Exhibits offered by Thomas Hill and Stephen Gomes
"Mill"	Exhibits offered by Millview County Water District
"PT"	Exhibits offered by the Prosecution Team
"RT"	Reporter's Transcript of the hearing of January 26, 2010 before the SWRCB
"SWRCB"	State Water Resources Control Board
"Waldteufel Right"	That certain water right claimed by J.A. Waldteufel by Notice recorded March 24,1914 in the County of Mendocino, State of California.
"WCA" or the "Act"	The Water Commission Act

I. INTRODUCTION

That the Division aspires to expand its regulation to pre-1914 water appropriations is evident by its overreaching in this matter and the SWRCB docket. This closing brief demonstrates that the facts and law in this matter are unavailing for the Division's desired precedent.

II. SUMMARY OF LEGAL ARGUMENT

The Division of Water Rights (the "Division") investigated a citizen's complaint relating to a pre-1914 Water Right (the "Waldteufel Right") held by Millview County Water District ("Millview"). The Division concluded that the right was valid, but also concluded that the 1,447 afa Waldteufel Right had been forfeited to 15 afa. In sole reliance upon the Staff Report, the Division issued a Draft Cease and Desist Order ("DCDO") prohibiting diversion of more than 15 afa.

A pre-1914 water right may be declared forfeited only by judicial adjudication, not by administrative action. The determination of forfeiture is outside the jurisdiction of both the Division and the SWRCB.

The Division's Prosecution Team apparently recognized this lack of jurisdiction as to the DCDO premise because at the hearing it advanced a completely different theory loosely characterized as being related to vesting. Due process requires that the SWRCB summarily reject the Division's new and dissimilar theory because it was not mentioned in the DCDO, and indeed is contradicted by both the DCDO and the Staff Report upon which the DCDO was premised.

If the SWRCB adopts the DCDO it will be nullified in judicial review because judicial authority is unambiguous that the SWRCB lacks jurisdiction to adjudicate either a statutory or common law forfeiture of a pre-1914 water right. If the SWRCB adopts the DCDO based upon a new theory not grounded in the DCDO, it will be nullified on constitutional and procedural grounds for want of due process.

In violation of its constitutional obligation to protect water rights, especially when held by a municipal water purveyor putting water to the highest and most beneficial use, the Division has utilized its limited resources to assault the Waldteufel Right without either jurisdiction or cause to do so.

If the SWRCB rejects the DCDO and the Division advanced its theories before a court of competent jurisdiction, such an effort would likewise be doomed because (1) the doctrine of forfeiture can only be asserted by a prescribing user; and (2) the Hearing Record abounds with evidence

supporting a judicial finding that the Waldteufel Water Right was perfected as early as 1913, but no later than 1917.

III. SUMMARY OF FACTS

A. The Waldteufel Water Right Was Appropriated and Perfected.

J.A. Waldteufel memorialized an appropriation of water by recording a notice on March 24, 1914 (Civil Code § 1415; Notice, Mill-2), stating that he was appropriating 100 Miner's inches under a four inch pressure.[1] The Notice stated that the appropriation was to irrigate his lands contiguous to the West Fork of the Russian River. Mr. Waldteufel owned a total of 165 acres. (DCDO, ¶2).[2] Mr. Waldteufel's lands were primarily planted in alfalfa which, because it was irrigated, yielded multiple cuttings. (Sworn statement of Floyd Lawrence, PT-5 at 26:15-24) corroborated by a 1913 deed referencing successive cuttings of alfalfa (Mill-1).

The 1913 Deed indicates that the 1914 Notice referred to an existing diversion, rather than a speculative intent to divert in the future. The hearing record shows that the diversion under the Waldteufel Right has been continuous from at least 1913 to the present.[3]

B. The Hearing Record Verifies that the Waldteufel Right Was Appropriated.

1. Appropriation Was Established By Physical Evidence and Direct Testimony.

The Hearing Record establishes that remnants of the original diversion works remain on the property. Hydrologist, Dr. Don McEdwards, visited the original diversion site in November 2009, documenting remnants of the diversion works. Dr. McEdwards identified a "suction line" that was six inches in diameter (RT: 153:10-17). Mr. Lawrence testified that the pump had a "six inch suction line" by which water was diverted from the River (PT-5, 22:1-3).

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[1] The DCDO references afa rather than miner's inches. In 1914, in Northern California, a miner's inch was defined such that 100 miner's inches equates with 1,447 afa.

[2] The Division not only contradicted the legal theory of the DCDO, but also improperly attempted to question express statements of fact upon which the DCDO was premised. The DCDO, at p.2, ¶2, states that a fact upon which the DCDO was based is that "the Waldteufel Property consisted of about 165 acres circa 1914 located both north and south of what is now Lake Mendocino Drive on the west side of the West Fork Russian River." (See IV.D., *infra*). In denying discovery to Respondents the Hearing Officer stated "the legal and factual basis for the proposed order . . . is described in the draft CDO." (See letter 12/3/09, p.2 on SWRCB website for this hearing). This ruling should be binding on the Division as well. Official notice is requested as to this notice.

[3] April 14, 1913 Deed (Mill-1); Notice of Diversion (Mill-2); Lawrence Testimony (PT-5, 35:9-12; 26:15-25, 27:9-13); Staff Report (PT-10, pp.3, 10, 12); aerial photograph July 15, 1951 (Mill-4); aerial photograph August 14, 1963 (Mill-5); statements of water diversion (PT-6); Division Staff Report (PT-10, pp.3, 10, 11, 12); testimony of Bradley (Mill-14, p.4).

The proposition that the diversion works were completed as required for the appropriation of the Waldteufel Water Right is supported not only by this physical evidence, but also explained by the testimony of Floyd Lawrence who provided a sworn statement in 2006 toward the end of his life when he was 93 years of age. Mr. Lawrence's statement was offered into evidence by the Prosecution Team (PT-5) and by Respondents (Exhibits H&G-J).

The sworn statement of Floyd Lawrence was relied upon by the Division when it prepared the Staff Report in June 2007 upon which the DCDO is premised. (Mill-12, p.12 stating:

> "While Mr. Lawrence's sworn statement does not provide much quantitative data, he does state that agricultural operations continued right up until Creekbridge Homes began construction of new homes on the property around 2001-02. This indicates that at least some amount of use continued in a fairly uninterrupted fashion from the early 1920s to today."

Prior to the hearing when the Division was relying upon statutory forfeiture, Mr. Lawrence's conclusions of long use was not inconvenient. When the Division reversed itself at the hearing to argue that the Waldteufel Right might never have vested, it was inconvenient to the Division that usage had been continuous from 1913 to the present. To support its surprise alternative theory, the Division's investigator speculated that the property may have been "dry farmed" rather than flood irrigated as established by the testimony of Dr. Putnam (RT, 151:6-9) and corroborated by the sworn testimony of Mr. Lawrence (PT-5, 21:13-15). The Division also reversed itself by attacking the credibility of the unavailable Mr. Lawrence by claiming that he was confused and talked mostly about flooding.[4] Although Mr.. Lawrence did talk about flooding, he also provided sworn testimony as to activities upon the Waldteufel land from the time of earliest memory in 1917 to the present. The Lawrence testimony was also improperly questioned as "hearsay."[5]

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[4] As to whether Mr. Lawrence was "confused" it is notable that he recollected the six inch suction line (PT-5, 22:1-3) which was verified by Dr. McEdwards' field observations (RT, 153:10-17). As to discussion of flooding, Mr. Lawrence did testify as to flooding, but he also testified that the Waldteufel property was "flood irrigated" (PT-5, 21:13-15), testimony which was not even noticed or considered by the Division's investigator. (RT, 76:1-5).

[5] While the sworn testimony is indeed hearsay, it is admissible under Govt. Code § 11513(d) for at least two reasons: (1) it would be admissible over objection in a civil action; and (2) it may be used for the purpose of supplementing or explaining other evidence. It would be admissible in a civil action because Mr. Lawrence owned property on the opposite bank of the Waldteufel diversion and it was against his interest to provide sworn testimony supporting competing water usage, Evid. Code § 1230; furthermore, the sworn testimony of Lawrence is offered for the purpose of supplementing or explaining

Floyd Lawrence was born on November 30, 1914 about two weeks prior to the effective date of the Water Commission Act ("WCA"). He was born in a house on the east side of the West Fork of the Russian River, directly across from the place of diversion identified by Mr. Waldteufel. (PT-5 70:10-13). He lived there from his birth in 1914 to the time of his sworn statement in 2006 (PT-5, 2:22). Mr. Lawrence therefore offers credible, direct evidence as to the appropriation and diversion pursuant to the Waldteufel Water Right.

Mr. Lawrence testified under oath that as far back as he could remember, to when he was a child of approximately three in 1917 (PT-5, 21:1-2), he recalled that first Mr. Waldteufel, and then Mr. Dowling, as successor to Mr. Waldteufel, directly diverted from a deep hole eight feet in depth in the West Fork of the Russian River with a suction line six inch in size (PT-5, 22:1-3).

Mr. Lawrence testified that the diversion was by a gasoline pump (PT-5, 25:10-11) and was used to divert directly from an eight foot hole in the River and used to flood irrigate agricultural crops, predominantly alfalfa (PT-5, 21:1-8). He stated, "***there was a pump there, and when that one left, there was another one put in its place. There was a pump there for - oh, at least 50 years.***" (PT-5, 22:9-15). His direct recollection of the pump was supported by the fact that it was a noisy gasoline engine which was so close to his home that he could hear the pump running "many, many times." (PT-5, 22-23). He testified that the pump had a "six inch suction line" by which water was diverted from the River. (PT-5, 22:1-3).

Mr. Lawrence's testimony was credible because he was a non-party with no stake in the validation of the Waldteufel Right, he was testifying under oath, with personal knowledge, and his testimony was directly supported by physical evidence in the record including the remnant diversion works, crops being grown, the Chandon Deed (Mill-2) and the Division's Staff Report (Mill-12).

2. Floyd Lawrence Provides Direct Evidence of Early Appropriation.

Mr. Lawrence's testimony also establishes that the Waldteufel Right was not asserted to put it in "cold storage" but to appropriate water for agricultural cultivation - a beneficial use. He testified that a number of different orchard and row crops were cultivated near the river and that to the west of

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other evidence, the Chandon Deed, the Putnam testimony, the McEdwards testimony, and most importantly, the Division's own conclusion reflected in both the June 7, 2007 Staff Report and DCDO that the Waldteufel Right was "valid" based on and in reliance of the Lawrence testimony to the effect that there had been continuous usage for at least 97 years.

the Dowling house, representing the greatest percentage of the property, the property was cultivated in alfalfa. He stated, "as far back as I can remember, that area west of the house was in alfalfa and he [Dowling] used to - he would cut several crops three or four crops of alfalfa." (PT-5, 26:12-19). That his knowledge was direct is supported by the fact that he worked for Mr. Dowling shucking hay on the property when he was a teenager. (PT-5, 27:23-25, 28:1-3), explaining the Chandon Deed reference to "First cutting . . . of alfalfa."

Again, Mr. Lawrence's testimony explains other direct evidence. Specifically, the April 4, 1913 Deed by which Mr. Waldteufel acquired property adjacent to the original point of diversion from C. J. Chandon and Molly Chandon (Mill-1) containing a reservation for: " . . . all fruit produced on said premises during the year 1913, together with the first cutting of alfalfa grown thereon in said year." Mr. Lawrence's recollection is corroborated not only as to the fact that pears were grown on 3 or 4 acres adjacent to the River and adjacent to Mr. Dowling's house (RT, 29:1-16), but that multiple cuttings of alfalfa were being flood irrigated and cultivated on the property. (PT-5, 21:13-15).

This evidence compels the conclusion that Mr. Waldteufel's predecessors had perfected a common law appropriation which was recognized as a valid means for perfecting an appropriation independently and concurrently with the Civil Code provisions later relied upon by Mr. Waldteufel.

While it is difficult to determine exactly when the diversion works were constructed, it is known that they were completed by the time of Mr. Lawrence's first recollection when he was three in 1917 (PT-5, 21:1-2). Completion of the diversion works even as late as 1917, if it had not been completed until then, would certainly have qualified as diligence. The Hearing Record shows that the diversion works had been in operation as early as 1913 to supply multiple alfalfa cuttings and certainly by 1914 when Mr. Waldteufel described the diversion works in such detail in his recorded Notice as to indicate that the diversion facilities were then in place (Mill-2).[6]

Furthermore, there is direct uncontroverted evidence that the diversion works as evidenced by the remnant facilities remaining in place, and as identified by Mr. Lawrence and Mr. Rich, were sufficient to divert the entire amount claimed by Mr. Waldteufel in his March 24, 1914 Notice (Mill-2).

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[6] For the perfection of pre-1914 appropriations the critical step is construction of the diversion works creating the capability for diversion, followed by the appropriation to a beneficial use. The diversion works were shown by Dr. McEdwards to be capable of the diversion and irrigation is a beneficial use. *Phelps v. SWRCB* 157 (2008) Cal.App.4th 89, 118-120 for sufficiency of evidence to establish pre-1914 appropriations.

Hydrologist Dr. McEdwards testified that the diversion facilities "were sufficient to divert the entirety" of the quantity claimed by Mr. Waldteufel's Notice (Mill-9, pp.1 and 3). Collectively this factual record establishes that the Waldteufel Right was appropriated to a reasonable and beneficial use as early as 1913 and no later than 1917.

3. Dr. Putnam Confirms That the Quantity Claimed by Waldteufel Equates With the Quantity Needed To Flood Irrigate the Designated Place of Use.

Dr. Putnam is a specialist in alfalfa agronomic practices, and alfalfa forage quality with the University of California Department of Agronomy & Range Sciences. He was a Fulbright Scholar. He has spent his entire career specializing in alfalfa agronomic practices (Statement of Qualifications, Mill-8).

Dr. Putnam identified the likely characteristics of a 1913 alfalfa crop on this specific property with its prevalent soil conditions, and the amount of water necessary for the 165 acre tract claimed as the place of use by Mr. Waldteufel (Mill-1; topographic map depicting the Healey Lot 103, Mill-3; and size of Waldteufel property as being 165 acres, DCDO Statement of Fact, p.2, ¶2).

Dr. Putnam concluded that a 162 acre crop of alfalfa irrigated by flood irrigation would have required between 923 afa dry weather appropriation and 1310 afa dry weather appropriation (Mill-10). He utilized 162 acres of alfalfa because Mr. Lawrence testified that approximately 3 acres were in pears with the remainder in alfalfa (PT-5, 29:12). The basis of Dr. Putnam's analysis including each assumption and its basis is set forth precisely in his written testimony (Mill-10).

It is also apparent from the record that Mr. Waldteufel knew exactly how much water he needed to appropriate because he acquired the diversion works in April 1913 and farmed through the dry season in 1913, stating the amount of water being diverted in March 1914 after he had direct experience as to the amount of irrigation needed, Mr. Waldteufel having acquired the property in April 1913 and filing his Notice in March 1914 (Mill-1, Mill-2).

All of this evidence confirms that the amount of water identified in the March 1914 Notice was the amount needed to flood irrigate his 162 acre alfalfa field and grow pears on three acres, and that the Notice identified a then existing appropriation for beneficial use. Mr. Dowling also had a home on the property and inferentially watered stock (PT-5, 1-2).

C. The Complaint Should Have Been Summarily Dismissed.

In February 2006 Mr. Howard filed a complaint with the Division of Water Rights contending that the Waldteufel Right had not been used between 1996 and 2001; that there was "no basis of proof that the water has been used in like amount and like manner since 1914," and that the point of diversion had been moved 400' downstream (Mill-11). The Complaint inartfully alleged that the Waldteufel Right had been forfeited, the basis of such forfeiture being the unverified allegation that Mr. Wood, predecessor of Mssrs. Hill and Gomes, had not used the right between 1996 and 2001.

The Division should have closed the Complaint immediately on receipt because the Complaint invited the Division to pronounce a forfeiture of a pre-1914 water right which the Division had no jurisdiction to undertake. Even if the complainant had followed the correct procedure by filing his complaint with a court of competent jurisdiction, the complaint would have been deficient because it did not identify the complainant as a competing and prescribing user with a "clash of rights," and further identified the incorrect period for evaluating forfeiture.

Instead of dismissing the complaint out of hand, the Division commenced an investigation outside its jurisdiction, producing a Staff Report on June 1, 2007 concluding that the Waldteufel Water Right was valid and vested but that it had been forfeited from 1447 afa to 15 afa based entirely upon a Statement of Diversion filed for one year in 1967 (PT-10) and despite evidence of continuous use of the right since 1913.

D. The Division's Investigation Found the Waldteufel Right to be Valid.

Division Staff conducted a field visit on August 30, 2006 producing a Staff Report on June 7, 2007 (PT-10). Notably, the investigation identified that a pre-1914 water right was filed by Mr. Waldteufel in 1914 and perfected by appropriation as early as 1914, as explained in Floyd Lawrence's testimony relied upon by Division Staff. Indeed, the Division concluded in its June 2007 Staff Report that, "The Pre-1914 appropriative claim of right originated by Mr. Waldteufel in December 1914 and transferred over time to the Woods, Messrs. Hill and Gomes, and Millview ***has a valid basis***." (PT-10, p.16, emphasis added).

Upon verification that the subject of the complaint was a valid pre-1914 water right, the Division should have notified the complainant that the Division did not have jurisdiction. Instead, the Division prepared its June 2007 report and published it to third parties asserting that all but 15 afa had been forfeited.

That the Division rested its June 2007 staff report upon a finding of forfeiture cannot be denied. At page 10 thereof, the Division correctly recognized that there are two methods by which a pre-1914 water right may be adjudicated as being lost, abandonment and forfeiture for non-use. The Division rejected the notion that there was an abandonment (PT-10, p.11), as no evidence was presented that would even hint at abandonment.

But, the Division in its Staff Report concluded that "[D]ue to the forfeiture provisions of California Water law, the right has degraded to the point where the maximum allowed diversion is 15 acre feet per annum . . .." This finding was beyond the jurisdiction of the Division, and is beyond the jurisdiction of the SWRCB. Only a court of competent jurisdiction has the authority to declare a common law forfeiture (*North Kern Water Storage Dist. v. Kern-Delta Water Dist.* (2007) 147 Cal.4th 555, 560).

Furthermore, the Division finding of forfeiture was based upon the erroneous position that beneficial usage must be established by a "quantifiable" amount and that the only quantifiable information was a single Statement of Diversion filed by a former owner in 1967 the first year that such statements were provided for by the Water Code (RT, 54:7-11 for reliance upon the 1967 right and section).

Furthermore the Report failed to identify a prescribing competitor to the water with a "clash of rights" as defined in *North Kern, ibid.* at 566. In investigating the complaint, the Division upon correctly determining that a valid pre-1914 right involved should have then determined whether or not there was any judicial adjudication of forfeiture in the county where the right was perfected. There is no evidence of such a judicial adjudication in the record, and, in fact, none exists.

Furthermore, the reliance upon one single year of use was misplaced because forfeiture requires five consecutive years of non-use and the Division offered no data for such non-use (RT, 54:14-17).

E. The Staff Report Has Already Been Before the Court.

The Division adopted the Staff Report's conclusion that the Waldteufel Water Right had been perfected ("vested") but that it had been "forfeited" upon the basis of the 1967 Statement of Diversion filed by Mr. Wood (H&G-T). The Division purported to take its final action without conducting a hearing. The Respondents sued to either invalidate the Staff Report, or in the alternative, to require the Division to properly bring it to finality by conducting a hearing. (Mendocino County Superior Court, case No. 08-51448). The Court stated that the Division's action constituted an "abuse of discretion" and that the "SWRCB should either disavow the conclusion of forfeiture, or pursue a due process course to be reviewable finality." (Mill-13).

The Division responded by noticing this DCDO for hearing to determine whether or not there was a "forfeiture." When the Division recognized that there was no jurisdiction for such a finding, and no factual basis for such a finding, it attempted to switch the focus to the issue of "vesting," although it had on several occasions admitted in writing that the Waldteufel Right was vested (H&G-T; and the Staff Report).

The Board should be mindful that the Court implored it to "pursue a due process course" to a final decision (Mill-13). Due process is offended by this record where the Division noticed the hearing by a DCDO that does not even mention "vesting," yet apparently rests its case upon a theory not even mentioned in the DCDO.[7]

F. The Draft Cease and Desist Order is Premised Upon the Staff Report.

The DCDO adopted the factual findings in the June 1, 2007 Staff Report (the "Staff Report") verbatim, characterizing it at paragraph 13 of the DCDO as having found the validity of the Waldteufel Right but that the right had degraded to an annual diversion rate of "15 acre-feet per annum." In reliance upon the degradation finding (which was based upon "the forfeiture provisions of California Water Law"), the DCDO orders the respondents to restrict all diversions to "an annual

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[7] It is noteworthy that the Division specifically admitted in a pleading in the judicial proceeding that the Waldteufel Right had been perfected by diversion, but that it had been forfeited from "its original amount." (Milliview joins Hill and Gomes' Request for Official Notice). Judicial Admissions are not merely evidence of a fact, they are a conclusive concession of the truth of the matter that has the effect of removing that matter from the issues in that case. *Weiss v. Baba* (1963) 218 Cal.App.2d 45, 48.

amount of 15 acre-feet." The quantity of 15 acre-feet derives entirely from the Staff Report (RT, 49:15-18; 93:5-8).

As summarized above, and discussed in more detail, *infra* at Section IV.A., neither the Division nor the SWRCB possesses the jurisdiction to make a determination of common law forfeiture, and statutory forfeiture is inapplicable to pre-1914 rights.

As also summarized above, and discussed in more detail *infra*, the Division having recognized that there was not legitimate argument supporting the Division's jurisdiction to find a degradation to 15 acre feet per annum, attempted to backtrack at the hearing by questioning the validity of the right for the first time.[8] This backtracking by the Division at the hearing amounts to an admission that it did not have the jurisdiction to declare the valid Waldteufel Water Right as being "forfeited."

The SWRCB should reject the new theory advanced by the Division for the first time in hearing testimony that the Waldteufel Right was not "valid" because it had not "vested." Rejection is mandated not only because the Respondents did not have notice of the reversal of theories until it rolled out in hearing testimony, but also because the Division applied the wrong legal theory as to "vesting." Also, Millview in rebutting the argument of forfeiture established in passage that the Waldteufel Right had been *perfected* by its evidence that the Waldteufel Right was appropriated to beneficial use - which is the correct legal standard.

G. The Division's Case-in-Chief Was Contradictory, Unsupported, and Irrelevant.

The Division also dedicated a substantial portion of its hearing testimony to challenging the nature of Millview's recent usage under the Waldteufel Right, and challenging the availability of surface flow in the West Fork of the Russian River. Neither challenge has any legal significance to

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[8] The Staff Report was unequivocal as to the validity of the Waldteufel Right. Mr. Rich stated, "My conclusions are . . . the pre-1914 appropriative claim of right originated by Mr. Waldteufel in December [sic] 1914 and transferred over time to the Woods, Messrs. Hill and Gomes, and Millview ***has a valid basis.***" (Emphasis added) (Mill-12, p.1, ¶2). The Staff Report was also unequivocal as to the fact that "**due to the forfeiture provisions of California water law**, the right has degraded to the point where the maximum authorized diversion is 15 acre-feet per annum." (Id.). The Staff Report then recommended that "Millview be formally directed to reduce diversions . . .." (Mill-12, p.17) which recommendation was adopted in the DCDO in the precise language of the Staff Report, "IT IS HEREBY ORDERED . . . to prevent a threatened unauthorized diversion as set forth in section 1052 of the California Water Code" that Respondents restrict all diversions to "an annual amount of 15 acre-feet. . .."

the issue of forfeiture.[9]

The nature of Millview's recent usage of a right having "a valid basis," would be relevant only if there was a clash of rights between Millview as right holder and a prescribing user. *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555, 565. It was established that there was no prescribing use, or indeed even a competing user (RT, 42:24-25; 43:1-8; 246:3-7).[10]

The Division introduced USGS flow data of surface flow although it was unclear as to when or where the measurement point was (see RT, 259:21-24 where the Division improperly suggested that the Board go outside the record to consult the USGS website). Even if the Board were to adopt the Division's apparent conclusion that the surface flow was insufficient to sustain the Waldteufel Right at any specific time, such non-availability would excuse non-use, rather than establish a forfeiture (*North Kern*, *id.* at 580-582).[11]

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[9] The Division's switch of legal theories at the Hearing places Millview in the untenable position of having to address two separate contradictory theories, one for which it had notice, and the other for which it had no notice. Evidence of recent usage and surface flow availability are also irrelevant under the Division's belated alternate theory because a Civil Code appropriative right is perfected by diligent completion of diversion works and appropriation of water to a beneficial use to differentiate it from speculative cold storage of rights; and the alleged unavailability of surface flow at any specific time excuses from full use of a perfected water right, rather than nullifying such right. *North Kern, Id.* at 585.

[10] Also the Division completely misunderstood and miscommunicated to the Board the nature of such Millview usage confusing it with the usage by Creekbridge. The Staff Report mischaracterized Mr. Bradley's written response to staff inquiry (H&G, Ex. 1) as stating that Millview relied upon the Creekbridge usage although such usage was separately reported by Creekbridge (PT-8) and the License itself identified the Creekbridge usage as a reservation to Hill and Gomes - something that Millview did not receive from Hill & Gomes (Mill-5, p.1, ¶C). Against this written record the Division presented self-serving hearsay testimony of alleged oral statements made during the field inspection (RT, 63:11-16), even though Mr. Rich testified he could not recall the specific statement (RT, 64:21-22) and which was disputed under oath by Mr. Bradley who did recall (RT, 194:11-15). Also the Division and SCWA confused reports made to the Division with work papers in Millview's files which were supplied along with many other documents in response to a public records request and which work papers were never filed with anybody.

[11] Again, Millview is put to the unfair burden of responding to two separate, conflicting theories. If the Division was attempting to make the point that there was insufficient water for Mr. Waldteufel to have appropriated, it did not come close to providing evidence upon which such conclusion could be reached. Even on this point the Division presented conflicting testimony. Mr. Rich testified that "there's been more water available . . . than what has been diverted by Millview . . ." (RT, 36:2-5) and "there *probably* wouldn't have been enough water to fully irrigate that property with an alfalfa crop all the way through the summer." (RT, 76:10-24). However, there was direct evidence in the record from Mr. Lawrence who worked for Mr. Dowling shucking hay that there were three or four cuttings per year (PT-5, 5:12-19) contradicting the Division's speculation to the contrary.

Furthermore, the amount of surface flow is not necessarily controlling under any of the conflicting theories presented by the Division in that the testimony established that Mr. Waldteufel's diversion drew from underflow as well as surface flow. Mr. Lawrence testified that the "suction line" extended to an eight foot hole at the point of diversion which was the deepest place in the river (PT-5, 21:1-8). This indicates that the diversion relied not only upon surface flow but also flow commonly referred to as "underflow." Furthermore, there was evidence that the diversion was drawn not only from the river, but also from a shallow well on the Waldteufel property. (RT, 217:14-25; 218:1-22; and for a depiction of the well, H&G-Z). Therefore, the amount of *surface* flow available does not necessarily limit the amount that was or is available for appropriation, or current use.

Although the DCDO went to some lengths to analyze USGS surface flow records (PT-10 at pp. 14-15) which analysis was imported into the DCDO at p.5, the DCDO proposes to restrict the Waldteufel Right to diversions of 15 afa "from the Russian River, its tributaries or *underflow, or a subterranean stream* associated with the Russian River Valley." (DCDO, p.7). Therefore, even though a premise of the DCDO is an alleged deficiency of surface water, the draft order by *non sequitur* proposes to prohibit diversion of underflow and water flowing through a subterranean stream.

IV. LEGAL ARGUMENT

A. SWRCB Has No Jurisdiction to Find the Forfeiture of Pre-1914 Rights.

1. DCDO Asserts Forfeiture.

The DCDO is premised upon the Staff Report which squarely stated that, "due to the forfeiture provisions of California water law, the right has degraded to the point where the maximum authorized diversion is 15 acre-feet per annum." (PT-10, p.1, ¶2). The Staff Report recommended that "Millview be formally directed to reduce diversions . . .." (PT-10, p.17) which recommendation was adopted in the DCDO in the precise language of the Staff Report, the DCDO stating, "IT IS HEREBY ORDERED . . . to prevent a threatened unauthorized diversion as set forth in section 1052 of the California Water Code" that respondents restrict all diversions to "an annual amount of 15 acre-feet. . .." The Division's investigator admitted that the DCDO is traceable directly to his finding that "due to the forfeiture laws of the State of California, the right has degraded to 15 acre-feet per annum." (RT,

49:15-18; 93:5-8).[12]

Therefore, a threshold legal issue arises as to whether either the Division of Water Rights, or the SWRCB has the jurisdiction to make a finding that a pre-1914 water right has been forfeited. There is no doubt or ambiguity that there is no such jurisdiction.

2. Statutory Forfeiture Provisions Are Inapplicable to Pre-1914 Water Rights.

All of the jurisdiction of the Division of Water Rights, as well as that of the SWRCB, derives exclusively from the Water Commission Act (Stats. 1913, Ch. 586). The statutory forfeiture provisions in the Water Code were codified as Water Code §§ 1240-1241 in the 1943 recodification of the Water Commission Act (Stats. 1943, Ch. 368).

The statutory forfeiture provisions were not contained in the original Water Commission Act adopted in 1913 but were added by a 1917 amendment to the Water Commission Act as § 20a (Stats. 1917, Ch. 554, §20a).

The California Supreme Court squarely held that the statutory forfeiture provisions relate only to water which is appropriated under a license or permit under the Water Commission Act. In *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 933-934 the Supreme Court held:

> "The primary purpose of the [Water Commission] Act was to create a system for appropriation of surplus water . . . [citations], and it is reasonably clear that Section 20a was intended to refer only to water which had been appropriated under a license or permit." [Bracketed material added].

Because the statutory forfeiture provisions were added as an amendment to the Water Commission Act by Section 20a of the 1917 amendment, the statutory forfeiture provisions have no application to the Waldteufel Right which was appropriated under the Civil Code provisions pre-dating the Water Commission Act, and not appropriated under a "license or permit."

3. Common Law Forfeiture Is Within the Exclusive Jurisdiction of the Court.

Common law forfeiture relates to judicial recognition that a water right could be forfeited if the plaintiff in a legal action proved that the holder of the right failed to use the water entitlement continuously over a span of five years immediately prior to the plaintiff's assertion of its conflicting

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[12] Again, the Hearing Officer stated that the issue for the hearing was "forfeiture" (see 12/3/09 letter identified in fn.2 *supra).*

right to the water. *Smith v. Hawkins* (1898) 120 Cal. 86, 88. Common law rights are not subject to the jurisdiction of administrative bodies because it is recognized that water rights as distinct from the corpus of the water are a form of private property *Thayer v. California Development Co.* (1912) 164 Cal.117, 125. Private Property is subject to dispossession only through the doctrines of prescription, adverse possession, or abandonment, all of which are within the exclusive jurisdiction of the courts. *Smith v. Hawkins, id.* at 126.

Recent caselaw has reaffirmed the applicability of the holding in *Smith v. Hawkins*. In *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555, 560 the court held that:

> "Forfeiture of the right to appropriate water from a natural water course can be established through a quiet title or declaratory judgment action brought by one with a conflicting claim to the unused water, such as the owner of a junior right to use water from the same water course."

Three major requirements for common law forfeiture are missing in the current proceeding. First, no legal action has been brought in a court such as would have jurisdiction to declare a forfeiture of a water right such as the Waldteufel Right. Secondly, there is no conflicting claim to the water alleged to be unused. Third, there was no five year period identified (RT, 54:11-17). The DCDO states on its face that it is authorized under Water Code § 1831 which tracks back to the Complaint filed by Lee Howard dated February 27, 2006 in which no competing use was stated, or is currently known to the Division. (Mill-11; RT, 42:24-25, 43:1-4).[13]

4. The DCDO Is Incorrectly Premised Upon Water Code §1831.

The opening paragraph of the DCDO states that the "State Water Resources Control Board (State Water Board) is authorized under Water Code §1831 to issue a cease and desist order . . .."

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[13] The Division's investigator, who is not an attorney, testified that the DCDO is premised upon the notion that the *North Kern* "Court indicated that the 'clash' or objection could be verbal or by the act of using the disputed water." (PT-1, p.9, ¶10, FFN.5). This testimony was erroneous because the Division's investigator relied upon *North Kern* as was published at 146 Cal.App.4th 424, which was de-published. The Court which issued the opinion vacated it and issued a replacement opinion at 147 Cal.App.4th (2007) 555 in which the Court expressly clarified that the "clash of rights" required something more than mere oral negotiations. *North Kern, id.* at 587. The "clash of rights" provides the notice all property owners are entitled to if they are in jeopardy of losing a property right. Furthermore, *North Kern* expressly holds that forfeiture of a common law right is established through "quiet title or declaratory judgment action" because a water right is a property right and the courts have exclusive jurisdiction over property rights. In contrast, permits and licenses issued under the Water Commission Act are entitlements rather than property rights and they are within the jurisdiction of the SWRCB.

The Division's reliance upon Water Code §1831 is misplaced. This section is codified in Division 2 (Water); Part II (Appropriation of Water); Ch. 12 (Enforcement of Water Rights). Water Code § 1831(e) expressly prohibits the Board from regulating water rights which are not perfected under the Water Commission Act:

> "This article shall not authorize the Board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the Board under this part."

The citation to "this part" is to Part II, "Appropriations," pursuant to the WCA (Water Code §§1200-1851). The quantification of a pre-1914 water right certainly constitutes regulation which is expressly prohibited to the Board.[14]

5. The DCDO Improperly Relies Upon Water Code § 1052.

The DCDO also cites Water Code §1052 as authority for its issuance. This section states that "diversions or use of water *subject to this division*" is a "trespass." The reference to "division" is to Division 2 containing the process for appropriations under the Water Commission Act (§§1200 *et seq.*) not to appropriations under the prior law which are protected by Water Code §103. Section 1201 exempts riparian water and "water otherwise appropriated" from the Division's jurisdiction. Water appropriated under the Civil Code provisions therefore is specifically excluded. (See *People v. Skirokow* (1980) 26 Cal.3d 301, 309).

The Division not only strayed outside its jurisdiction in proposing the DCDO, but violates what the Supreme Court has described as being the Division's "first concern," which is to "protect the interests of those who have prior and paramount rights." *Meridian v. San Francisco* (1939) 13 Cal.2d

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[14] The Water Commission Act does provide limited jurisdiction for the SWRCB. Section 12 of the Water Commission Act which, while not included in the 1943 codification of the Water Code, has not been repealed and remains in effect, provides that the "State Water Commission shall have the authority to . . . upon the application of any appropriator or user of water under an appropriation of any appropriator or user under an appropriation made and maintained according to the law prior to the passage of this Act prescribe the time within which the full amount of the water appropriated shall be applied to a useful or beneficial purpose . . .." This provision is the only provision in the entire WCA conferring any jurisdiction upon the SWRCB as to pre-Act appropriations and then, only "upon the application" of a pre-Act appropriator. The maxim, *"expressio unis est exclusio alterius*" ("the expression of some things in a statute necessarily means the exclusion of other things not expressed") instructs that the SWRCB jurisdiction as to pre-Act rights is limited to circumstances having no application to the Waldteufel Water Right or the issues in this proceeding. Remember, that the WCA is not a mere statute, but was approved by the electorate at a Statewide election in 1914. Not only does the SWRCB lack jurisdiction to quantify the Waldteufel Right as it strives to do by the DCDO, but the entire subject matter jurisdiction relating to pre-Act appropriation is left to the common law by the very Act creating the SWRCB.

424, 450. Indeed a fundamental directive to the Division is protection of property rights. The Constitution demands that the Division view holders of pre-1914 rights with the eyes of a mother guarding each child and his rights as vigorously as she might guard the rights of the family as a whole. The Division's prosecution of this DCDO violates its fundamental duty.

B. The Division Misapplied the Burden of Proof.

Notwithstanding the issue of jurisdiction, the Division misunderstood and misapplied the applicable burden of proof. A party asserting the doctrine of forfeiture as to a pre-1914 water right has the burden of proving that such a forfeiture has taken place. Hutchins*, California Law of Water Rights* (1956), p. 297; *Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 821. In the "investigation" of the complaint, the Division turned the burden of proof on its head by requiring Millview to "produce evidence" that forfeiture had not occurred (RT, 68:12-15). With administrative slight of hand, the Division went further and required Millview to provide "quantitative evidence" of use from an era when such information is, at best, available through hearsay. The Division rejected evidence provided by Millview purportedly because it did not provide "quantifiable information." (RT, 68:16-20). Not only did the Division turn the burden of proof on its head, but it manufactured a requirement that Millview establish usage by "quantifiable information." In contrast, the Division did not require the complainant Lee Howard to provide any information, or **any** quantifiable information to justify his complaint (RT, 68:22-24).

The SWRCB should be mindful of its constitutional duty to protect the beneficial use of water. California Constitution, Art. X, §2. In doing so, the Board should be aware that the sanctity of a great amount of water rights in this State upon which the economy of this State depends would be jeopardized if a long-established pre-1914 right could be eradicated by a simple one paragraph letter to the complaint division and the complaint division's subsequent requirement of "quantifiable information" from the late 19th and early 20th century for which no such information is likely to be available and any evidence is likely to be hearsay. The Division has referred to this proceeding as a potential "precedent" and in doing so the Board should be alarmed that great disruption of perfected property rights could be adversely affected by *ad hoc* "investigations" (RT, 37:7-8).

The record in this case abounds with instances where the Division ignored or rejected testimony of affirmative water use rebutting forfeiture of a "valid right." The Division's investigator

testified that in his subjective determination the facts were not perfect enough. For example, a deed which references a reservation for the "first cutting" of alfalfa was purportedly insufficient to establish that there were multiple cuttings. (RT, 67:22-25; 68:1-3). Evidence that a noisy pump was in place for over fifty years was found by the Division to not be probative of whether there was ever a diversion (RT, 74:16-19, 76:19, 25). This indicates that the Division misunderstands the burden of proof. It is its burden as the proponent for forfeiture to produce evidence to support its conclusion, not to act as an advocate to dismiss evidence.

Likewise, the Division questions whether the entirety of the Waldteufel Right was held by Millview's grantors when it is the burden of the Division to point to a reservation. It did not do so because there is no such reservation. As for lack of evidence of there having been a reservation see PT-4.

C. The Waldteufel Right Was Perfected by Appropriation.

Millview's right was perfected at the latest when Mr. Waldteufel "appropriated" water for a beneficial use. Appropriations of water are accomplished under three different bodies of law: (1) Common Law Appropriations (1850-1914); (2) Civil Code Appropriations (1872-1914); and (3) Water Commission Act Appropriations (1914-present).[15]

Common Law Appropriations require a "visible and avowed intent" to appropriate water, and became "complete and perfect" upon completion of diversion facilities and subsequent application of the water to beneficial use. *Nevada County & Sacramento Canal v. Kidd* (1868) 37 Cal.282, 312-314. The Supreme Court in *Kidd* identified these rules as frustrating speculation in water rights and placement of water in "cold storage." In that the evidence shows that the Chandons had multiple cuttings of alfalfa under cultivation in April 1913, and the amount of water required for such beneficial use, all of the elements are present for a Common Law Appropriation.

The Civil Code provided an alternate method of appropriation. It specified a procedure to memorialize an "avowed intent" requirement by posting and recording of a notice (Civil Code §1415). Civil Code §1416 required that within sixty days the claimant must begin diligent work on diversion works. Civil Code §1417 required conducting waters to the place of intended use. On March 24,

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[15] Common Law Appropriations and Civil Code Appropriations were in effect concurrently, and a right could be perfected by either procedure at the option of the appropriator. *Hutchins*, *Id.,* p.86.

1914 Mr. Waldteufel recorded the required Notice (Mill-2). The evidence shows that the diversion works were completed and conducting water to the lands; and that the diversion works were completed and sized appropriately to conduct water to Mr. Waldteufel's adjacent alfalfa field where alfalfa was indeed cultivated.[16] Consequently the Waldteufel appropriation was perfected and it became a usufructuary property right which is now held by Millview to supply its customers.

The Division misplaced its entire analysis upon usage for the single year 1967 when Mr. Wood reported usage of 15 acre feet in the first year Statements of Diversion were required. Upon perfection, there is no requirement that the entire water right be used every year. However, an appropriator who fails to utilize the entirety of the right runs the risk of a competing user prescribing against the water right. But, here, there is no prescribing user, so non-use or reduced use at any time after perfection is not relevant.

D. The Issue of Vesting - In the Sense of Validity - Is Not Before the Board.

Hearing testimony by the Division veered to "vesting" from the forfeiture language used in the Staff Report and the DCDO's adoption of the Staff Report's forfeiture finding. To the extent that the Division's concept of "vesting," was an alternate theory, it should be summarily dismissed because the DCDO constituted the notice for the hearing and it did not reference "vesting."[17]

At times the Division's investigator used the term "vest," as though there was never a water right at all because Millview had purportedly not carried a burden of proof improperly thrust upon it to provide "quantifiable" evidence of usage. This view was rebutted by evidence that the Waldteufel Right had been appropriated under the Civil Code provisions whereupon it became a "complete and perfect" right. But, the theory of the DCDO was that the right had been forfeited to 15 acre-feet per

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[16] Mr. Waldteufel's Notice (Mill-2) defines the quantum, purpose and place of usage, relying upon his actual experience over the summer of 1913 (Mill-1); Dr. McEdwards testified that the Diversion Works were sized to divert the amount asserted in the Notice (Mill-9); Dr. Putnam testified that Mr. Waldteufel's alfalfa field would have consumed 1310 afa to irrigate alfalfa (Mill-10); the Chandon Deed establishes cultivation of alfalfa (Mill-1); and Mr. Lawrence explained that three or four cuttings of alfalfa were cultivated on the property annually (PT-5, 26:15-24). While the completion of the Diversion Works can be inferred from the usage of water, the Diversion Works appeared to be in existence at the time of the Notice because the pump was described in particularity and is known to exist as remnants of it continue to exist (Mill-9) and the nature and long usage of the pump confirmed and explained by Mr. Lawrence (PT-5, pp.21-22).

[17] A word search of the DCDO discloses that the word "vest" does not appear anyplace in the DCDO.

annum - not that it never existed. The Staff Report itself recognizes the Waldteufel Right as being "valid."

The Division's misuse of terminology creates the confusion. The proper term for determining whether the right was duly appropriated is "perfection." If the Division was using the term "vesting" as being synonymous with "perfection," the Division was improperly injecting a new theory into the proceeding - a theory nonetheless rebutted by evidence. If the Division used the term "vesting" as being synonymous with "forfeiture," then the Board's attention should focus on the issue as to whether it has jurisdiction to make such an adjudication.

Notably, the Division's investigator testified under oath that he was using the term "forfeiture" "interchangeably" with "vested" (RT, 55:20-22) so the Board should accept the Division's testimony in this regard to avoid what would otherwise constitute an offense to due process.

V. JOINDER

Millview joins in all filings by Hill and Gomes including but not limited to their Closing Brief and their Requests for Official Notice.

VI. CONCLUSION

Upon the issue of whether or not the "valid," "vested," and perfected Waldteufel Right was forfeited, the Board should dismiss the proceeding for want of jurisdiction. Upon the issue as to whether the Waldteufel Right was perfected, Millview provided evidence that all of the steps of appropriation occurred so as to constitute "perfection," but also, and in any event, the Board cannot properly entertain theories at variance with the DCDO noticed for hearing. The Board should dismiss the Draft Cease and Desist Order.

DATED: April 5, 2010

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CHRISTOPHER J. NEARY
Attorney for Respondent
MILLVIEW COUNTY WATER DISTRICT

PROOF OF SERVICE

I, JENNIFER M. O'BRIEN, declare that:

I am employed in the County of Mendocino, State of California. I am over the age of eighteen and not a party to the within entitled action; my business address is 110 South Main Street, Suite C, Willits, California 95490. On this date I served the attached

CLOSING BRIEF - Millview County Water District
Re: Millview et al. CDO Hearing

on the parties in said cause via e-mail addressed as follows:

State Water Resources Control Board
email: wrhearing@waterboards.ca.gov

Division of Water Rights Prosecution Team
David Rose
email: Drose@waterboards.ca.gov

Thomas Hill and Steve Gomes
email: jaredcarter@pacific.net
bcarter@pacific.net
mknight@pacific.net

Sonoma County Water Agency
Alan B. Lilly
email: abl@bkslawfirm.com

and, on April 3, 2010, five copies, via Federal Express, overnight delivery, postage prepaid, deposited in the Ukiah, California Federal Express drop off box, addressed as follows:

Tracking No. 8715 0671 6417	Attention: Ernest Mona State Water Resources Control Board Division of Water Rights 1001 I Street, 2nd Floor Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 5th day of April, 2010 at Willits, California.

JENNIFER M. O'BRIEN