Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ http://www.waterboards.ca.gov

Arnold Schwarzenegger
Governor

CLOSING BRIEF OF DIVISION OF WATER RIGHTS PROSECUTION TEAM IN THE MATTER OF HEARING ON DRAFT CEASE AND DESIST ORDER – THOMAS HILL, STEVEN GOMES AND MILLVIEW COUNTY WATER DISTRICT

I. INTRODUCTION

This matter comes before the State Water Resources Control Board (State Water Board or Board) based on the Notice of Public Hearing for the draft Cease and Desist Order (CDO) against Thomas Hill (Hill), Steven Gomes (Gomes), and Millview County Water District (Millview) (hereafter Respondents) pursuant to Water Code section 1831.

The Division of Water Rights (Division) Prosecution Team (Prosecution Team) presented evidence at the hearing on January 16, 2010. The evidence showed that, although the pre-1914 claim of right known as the "Waldteufel Right" was filed for 100 miner's inches under 4-inch pressure, approximately 1,450 acre-feet per annum (afa), there is no reliable information supporting a conclusion that more than approximately 15 afa of water was actually put to beneficial use pursuant to that claim. Since 2001, it is unclear who exactly owns the Waldteufel right, who has been exercising it, and in what amounts. What is clear from the evidence presented at the hearing, however, is that between 2001 and the time the complaint against Respondents was filed, the amount of water claimed as used exceeded 58.5 afa in only one year. The evidence also showed that in the year where more water was claimed pursuant to the Waldteufel claim of right, Millview deliberately altered its records to maximize water use attributable to that right.

Respondents claim the right to use 1450 afa pursuant to the Waldteufel Right. Although there is no competent evidence that the Waldteufel right was ever put to

beneficial use in any amount greater than 15 afa, Respondents suggest that, for the sake of the economy, "entrepreneurs and investors" should not be forced to defend against allegations regarding unused pre-1914 rights. Taken to the logical conclusion, Respondents' proposal would allow unused and underused claims of right to be initiated or enlarged after decades or more of non-use, with a priority date senior to other diligently perfected appropriative rights. Contrary to their suggestion, this approach would do nothing to maximize the beneficial use of water. Instead, approving additional water use in excess of amounts shown to have been put to beneficial use pursuant to pre-1914 claims would essentially eviscerate the concept of due diligence and foster uncertainty for all right holders. Projects that were diligently constructed in compliance with the Water Code would be subordinated to new water use made pursuant to claims with priority based on a senior filing date, destroying the assumptions upon which the feasibility of those projects were based, and discouraging new applications for needed water projects.

Based on the evidence submitted at the hearing, it is the Prosecutions Team's position that either the Waldteufel claim of right was never perfected through beneficial use in any amount greater than approximately 15 afa, or alternatively, that the right was forfeited for non-use to no more than 58.5 afa, and potentially as little as 15 afa. For both the clear legal and strong public policy reasons discussed herein, the Board should issue the draft CDO as written. If Respondents wish to divert or use water in excess of their valid, historically used rights, they must comply with the provisions of the Water Code regarding new appropriations of water like everyone else.

II. FACTS

The Division's received a complaint from Lee Howard on March 6, 2006, regarding the diversion and use of water reported pursuant to Statement of Water Diversion and Use (Statement) S000272. The complaint alleged that the pre-1914 appropriative claim owned by Hill and Gomes for water from the West Fork Russian River had been lost due to non-use and that the point of diversion for this claim had recently been moved downstream to the main stem of the Russian River in order to access additional water not available from the West Fork Russian River. (PT 1, p. 1.)

On August 30, 2006, Division staff conducted a field investigation regarding the complaint. At that time, Respondents told Division staff that all water use since 2001 reported under Statement S000272 occurred at the 125 CreekBridge homes, and that all diversions to serve the CreekBridge homes between May and November the historic irrigation season on the former Wood property) are made pursuant to that claim of right. (PT 1, p. 3.) December through April diversions are made under either Millview's post-1914 appropriative rights (Permit 13936 [Application A017587]), or under contract between Millview and the Mendocino County Russian River Flood Control and Water Conservation Improvement District pursuant to Permit 012947B (Application A012919B). (*Ibid.*)

When J.A. Waldteufel recorded a water right notice on March 24, 1914, initiating the process to obtain a pre-1914 appropriative right to divert water from the West Fork Russian River, the Waldteufel property consisted of about 165 acres located both north

and south of what is now Lake Mendocino Drive and on the west side of the West Fork Russian River. (PT 4.) Between 1914 and 1967, the Waldteufel property was held by eight different parties. (*Ibid.*) In 1945, Lester Wood purchased about 20 percent of the original place of use identified in the Waldteufel filing. Other than Statement S000272 submitted in 1967 by Mr. Wood and supplemental statements filed for the years 1970-72, 1979-81, 1985-87, there is no record documenting whether and how much water was used pursuant to the Waldteufel claim prior to approximately 2001. (PT 1, pp. 3-4.) The amount of water that Mr. Wood or his son, Robert Wood, reported as being diverted and put to beneficial use under the Waldteufel claim ranged between 7.5 and 15 acre-feet per annum with a maximum instantaneous diversion rate of 1.1 cubic feet per second (cfs) (500 gallons per minute). (*Ibid.*; PT 6.)

The Division did receive a copy of a sworn statement from Mr. Lawrence, a long-time resident of the area, stating that alfalfa, oat hay, pears, string beans, and vineyard crops were grown on the portion of the Waldteufel property located south of Lake Mendocino Drive between 1920 and 2001. (PT-5.) Not only was Mr. Lawrence very confused when giving his statement, he was unable to indicate whether water was diverted from the West Fork of the Russian River on a regular or continuous basis, or whether the property was irrigated with percolating groundwater from a well, irrigated with water obtained from a water district pipeline, or "dry farmed" relying on rainfall and a high groundwater table to provide sufficient water for limited agricultural production. (PT 1, p. 4.) Mr. Lawrence's statement is not reliable evidence regarding diversion of water, season of use, or acreage being served by crop type sufficient to support a

different amount of water having been put to beneficial use pursuant to this particular claim of right than the amount recorded by Mr. Wood in Statement S000272.

In January 1998, Hill and Gomes purchased from the Robert Wood Living Trust (Trust) all of the land owned by the Trust that was included in the original Waldteufel place of use, constituting approximately 20 percent of the place of use for the Waldteufel right. All water rights and claims to water associated with the land were included in the sale.[1] (PT 7.) The documents associated with the transaction make no mention of water rights or claims of title associated with lands not included in the purchase (i.e., the balance of the original Waldteufel parcel/ Waldteufel claim place of use not included in the sale to Hill and Gomes). Respondents appear to be assuming that even though Mr. Wood only owned and therefore only sold to Hill and Gomes approximately 20 percent of the original place of use of the Waldteufel claim, along with the water rights owned by Mr. Wood and associated with that land, Hill and Gomes somehow purchased, undiminished, the entire face value of the original Waldteufel claim. No evidence was submitted to support this tremendous assumption.

In 2001 CreekBridge Homes L.P. (CreekBridge) bought about 85% of the property owned by Hill and Gomes and subsequently built 125 homes on the property. (PT 1, p. 6.) CreekBridge purchased not only the property, but also *"the reservation of the proportional water right for this property which was established and recorded prior to*

---

[1] According to the deed, Hill and Gomes purchased certain lands, "together with all water rights and claims of title to water of the grantors in or adjacent to [that land]." (PT 7; Hill & Gomes Exhibit 11.) By separate deed, Hill and Gomes also purchased from the Trust, "all water rights, title and interest that [the Trust] may have in and to any water rights any water rights or claims of title to water in adjacent to or in the vicinity of the [property]. . . ." (Hill & Gomes Exhibit 12.)

December 1914." (*Ibid.*) CreekBridge filed Statement S015625 in 2001, but never filed any subsequent statements. (*Ibid.*; PT-8.) It is unclear whether this Statement is in fact a different claim than Statement S000272, and whether it is still held by CreekBridge, was transferred back to Hill and Gomes, or was transferred to Millview.[2] (Hearing Transcript, p. 171.)

Hill and Gomes entered into a "License and Assignment of Water Rights Agreement" with Millview in October 2002. (PT 9.) This agreement provides Millview a lease and option to purchase the Waldteufel claim. (*Id.*) The effective period of the agreement is listed as being from October 15, 2002, until October 14, 2006. Millview has since purchased the right outright.

During the summer and early fall, flow at Millview's current point of diversion is dominated by releases from Lake Mendocino. The U.S. Geological Survey (USGS) maintains a flow monitoring station almost immediately upstream of the former Wood property that provides a good accounting of the flows available for diversion from the West Fork Russian River (the source listed in the Waldteufel Right posting). The USGS also maintains a flow monitoring station immediately below the outlet of Lake Mendocino on the East Fork Russian River. Evidence submitted by the Prosecution

[2] It appears that CreekBridge was deeded a share of the Waldteufel right in proportion to the percentage of land it purchased from Hill and Gomes, but no documentation has been provided showing that either CreekBridge transferred its share of the Waldteufel right to Millview or else transferred it back to Hill and Gomes. It should follow, therefore, that CreekBridge owns and has been exercising approximately 85 percent of the Hill and Gomes' share of the Waldteufel claim since 2001, and Hill and Gomes only retained, and hence only transferred to Millview, the remaining approximately 15 percent share of whatever they originally bought.

Team showed that significantly less water is available on the West Fork Russian River than below the confluence with the East Fork Russian River. (PT 1, p. 7-8.)

III. ANALYSIS AND ARGUMENT

Pre-1914 Civil Code

Respondents suggest that "entrepreneurs and investors" should not be forced to defend against allegations that an unused pre-1914 claim does not support newly initiated diversions of water. In 1914, when the Waldteufel claim was filed, Civil Code section 1411 required that "the appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." (Former Civ. Code, § 1411.) This section was repealed and replaced verbatim in 1943 by Water Code section 1240. (Stats. 1943, c. 368, p. 1895, § 150001 [repealed]; Stats.1943, c. 368, p.1615, § 1240 [reenacted].) Likewise, the Civil Code required (and requires) diligent prosecution of the work needed to complete the beneficial use of water to perfect the claim of right. (Civ. Code, § 1416 ["Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water... and must prosecute the work diligently and uninterruptedly to completion...."].)

The Civil Code unambiguously provides that "failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith." (Civ. Code, § 1419.) So under the law in existence at the time the Waldteufel claim was posted, as under current law, the Waldteufel claim

is not immune from a determination that it either no longer exists or has been degraded by the failure to complete the beneficial use of water.

Board's Jurisdiction Over Pre-1914 Claims of Right

Respondents claim that only a court can make the determination that a pre-1914 water right either no longer exists or has been degraded by the failure to complete the beneficial use of water. This proposition is without merit. The State Water Board clearly has jurisdiction to determine the validity and extent of pre-1914 claims of right.[3] For example, Water Code section 1202[4] declares to be unappropriated water,

> all water which has never been appropriated, [and] all water appropriated prior to December 19, 1914, which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation, or which has not been put, or which has ceased to be put to useful or beneficial purpose.

In order to make this determination, the Board may investigate and "ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State." (Wat. Code, § 1051.) This section does not identify any limitation regarding the type of claim of right the Board may investigate. "Water heretofore filed upon or attempted to be appropriated," by any reasonable interpretation, logically includes both pre-1914 appropriative and post-1914 appropriative filings. Any

[3] For example, the Board has the authority to "determine all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." (Wat. Code, § 2501.) While the Board is not currently undertaking a streamwide statutory adjudication pursuant to Water Code section 2500, et seq., on balance, the Water Code sections described below point inexorably to the conclusion that the Board has been empowered by the Legislature to investigate and determine the bases of right for diversions, and take enforcement action when a claim cannot be supported.

[4] Unless otherwise specified, all references are to the Water Code.

other interpretation would render section 1202 superfluous. Were the Board limited to only investigating post-1914 appropriative water rights, it would be unable to make any conclusive determination whether there exists unappropriated water available for appropriation. As discussed below, this approach would cause serious disruptions to the orderly administration of water rights statewide.

It is well settled that, "with the exception of riparian rights or appropriative rights *perfected*[5] prior to December 19, 1914, all water use is conditioned upon compliance with the statutory appropriation procedures set forth in division 2 of the Water Code (commencing with section 1000)." (State Water Board Order (Order) 2001-22 at p. 25-26, citing Wat. Code, §§ 1225, 1201, italics added.) Because water not diligently put to beneficial use pursuant to a pre-1914 claim of right constitutes unappropriated water, any appropriation of water in excess of a perfected right constitutes a new appropriation, requiring compliance with division 2 of the Water Code.

The Legislature has likewise vested the Board with the authority to prevent the unauthorized diversion and use of water. The Water Code provides that "the diversion or use of water subject to [Division 2 of the Water Code] other than as authorized in this division is a trespass," and authorizes the Board to pursue enforcement action against violators of this proscription. (Wat. Code, § 1052; see also Wat. Code, §§ 1055, 1831.) The Board has been instructed that "it is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses,

---

[5] The California Supreme Court noted as early as 1869 that a water right is acquired by the actual appropriation and use of the water, and not merely by an intent to take the water. (*Nevada County & Sacramento Canal Co. v. Kiddbut* (1869) 37 Cal. 282, 310-14, italics added.)

certifications and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water." (Wat. Code, § 1825; see also Wat. Code, § 183 [authorizing the State Water Board to hold any hearings and conduct any investigations necessary to carry out the powers vested in it].)

Because the Board is empowered to determine whether there is unappropriated water, and water not diligently put to beneficial use under both pre- and post-1914 appropriative rights constitutes unappropriated water, it follows that the Board may and must make a determination regarding whether water was in fact put to beneficial use pursuant to a claim of right. No right to the use of water could ever have vested if water was never put to beneficial use, and therefore any new additional appropriation would require compliance with the Water Code. If that new diversion were undertaken without compliance with the Water Code, it would be an unauthorized diversion, and the Board has been instructed to prevent the unlawful diversion of water. Vigorously.

It should be noted that this is not an issue of first impression for the Board. In Order WR 2001-22, the Board determined that it has jurisdiction to ascertain whether water use is covered by a valid pre-1914 appropriative water right. (*Id.*, pp. 25-26.) The Board held that "the assertion that a prima facie showing of a pre-1914 water right ends the [State Water Board's] jurisdiction lacks legal support and is inconsistent with the [State Water Board's] statutory mandate to ensure that unauthorized diversions do not take place." (*Ibid.*) The facts of the case at hand do not provide any new rationale supporting the Board's departure from this relatively recent interpretation of its authority.

Finally, Respondents have already had a chance to convince a court that the Board is without jurisdiction over unexercised pre-1914 claims of right, and failed to do so. Prior to issuance of the draft CDO at issue here, Respondents sued the State Water Board in Mendocino County Superior Court for declaratory relief, to quiet title, and for a writ of ordinary and/or administrative mandamus. The court was asked to declare that the Waldteufel right was a valid right that authorized continuous diversion of 2 cfs throughout the year, equivalent to about 1,450 afa. In disposing of Respondents' claims, the court not only did not say that the State Water Board was without jurisdiction to act, but suggested that inaction by the Board would be an abuse. The court specifically advised the Board to pursue a due process course to reviewable finality. Recognizing that Board was in the process of scheduling the present administrative hearing that would result in a reviewable administrative decision, the court said it would be an abuse of its discretion to presume that the Board would not finish that process. So not only would the Board be in error were it to fail to exercise its clear jurisdiction in this case, it would be acting in violation of the Mendocino County court's order.

Failure to Put Water to Beneficial Use vs. Forfeiture

Failure to put water to beneficial use and forfeiture are two distinct legal doctrines with essentially the same consequence. The law requires that water must be put to beneficial use for a user to have a right to the continued use of that amount of water. (Former Civ. Code, § 1411 ["The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases."] (Repealed and replaced verbatim by Water Code

section 1240.); Hutchins, The California Law of Water Rights (1956) p. 135 ["the right is not measured by the extent of the original claim of appropriation [citations], nor by the quantity diverted if not all put to beneficial use [citations]."].) By failing to put the water to beneficial use in the first place, a diverter has failed to perfect the right to use as much water as they claim. (*People v. Murrison* (3d DCA, 2002) 101 Cal.App.4th 349, 363-64 [124 Cal.Rptr.2d 68] ["An appropriative right is limited to the amount of water the appropriator can put to a reasonable beneficial use *and* has put to beneficial use subject to the rights of riparians and senior appropriators."], citing *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 753 [72 Cal.Rptr.2d 1]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105 [227 Cal.Rptr. 161].) By the doctrine of forfeiture, on the other hand, a lawful user of water who has perfected a right to use water may lose all or a portion of that right by failing to continue to put that water to beneficial use. (Wat. Code, § 1241; Civ. Code, § 1419.) Beneficial use, then, is the crux of any legal right to use water.

To determine whether a water right claimant has perfected a water right, the courts have required that a claimant substantiate the basis and extent of the right. (See *People v. Murrison*, *supra*, 101 Cal.App.4th at pp. 363-64 ["We also question whether Murrison has established a water right. While he traced the origins of his claimed right, he failed to present any testimony about the nature and quantity of the right at any time, including the period since the rights were created to the date of trial.... [Citations.] Having failed to present evidence on the amount of water historically used ... and the manner in which it was put to use throughout the past 100 years, Murrison has failed to

establish a prima facie pre-1914 appropriative right."].) The courts have consistently stressed that, "while [pre-1914] rights may be lost through disuse, they may not be expanded without further appropriations," (*Pleasant Valley Canal Co. v. Borror*, *supra*, 61 Cal.App.4th at p. 753) and that actual beneficial use is the limit of an appropriative right. (*Id.*; *People v. Murrison, supra*, at pp. 363-64; *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at p. 105.)

The California Supreme Court reinforced this in 1980 in the case of *People v. Shirokow* (1980) 26 Cal.3d 301 [162 Cal.Rptr. 30]. In that case the court looked at the legislative declarations of policy in the Water Code and determined that "[t]hese declarations of policy together with the comprehensive regulatory scheme set forth in section 1200 et seq. demonstrate a legislative intent to vest in the board expansive powers to safeguard the scarce water resources of the state." (*Id.* at p. 308-310.) The court went on to conclude that "section 1201 should be interpreted in such a manner that the waters of the state be available for allocation in accordance with the code to the fullest extent consistent with its terms." (*Ibid.*) The Court expressed concern that

> [t]o conclude otherwise would substantially impair the board's ability to comply with the legislative mandate that appropriations be consistent with the public interest.... (§ 1255.) Moreover, the board is hindered in its task by any uncertainty as to the availability of water for appropriation. The problem is compounded by nonsanctioned uses which make it difficult for the board to determine whether the waters of the state are being put to beneficial use for the greatest public benefit. (Cf. § 105.)

(*Ibid.*) Not only is the Board responsible for determining whether water is available for appropriation, but the Board has "expansive powers" that it is to "exercise to the fullest extent consistent with [the Water Code]" in making such a determination.

It is a different situation where the party claiming a pre-1914 right is able to show that the right has in fact been perfected and thus has vested. In those circumstances, Water Code section 1241 provides for forfeiture of the right where water has not been put to beneficial use.

> When the person entitled to the use of water fails to use beneficially all or any part of the water claimed by him, *for which a right of use has vested,* for the purpose for which it was appropriated or adjudicated, for a period of five years, such unused water may revert to the public and shall, if reverted, be regarded as unappropriated public water. Such reversion shall occur upon a finding by the Board following notice to the permittee and a public hearing if requested by the permittee.

(*Ibid.*, italics added.) Like post-1914 appropriative rights, pre-1914 rights that have vested are also susceptible to forfeiture for non-use pursuant to Water Code sections 1240-1241. (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (*North Kern*) (2007) 147 Cal.App.4th 555 [54 Cal.Rptr.3d 578].) The *North Kern* court held, on the facts of that case, section 1241 provides that the extent of reasonable and beneficial use, when there is another claimant to the water, is the maximum use that occurred during the five years immediately preceding a "clash of rights." It should be noted that the *North Kern* court did not go so far as to suggest that this should be the rule in all cases. Initially, the Court of Appeal held that "the appropriate five-year period must be no later than the five years immediately preceding 1976...," and left it to the trial court to define the exact period of measurement appropriate in that case. (*North Kern, supra*, p. 566.) When the trial court's ruling on remand came back up to the Court of Appeal, the court held that

> [t]he trial court's requirements follow logically from our prior opinion: Until there is a formal claim to the water, use is permissive. [Citation.] After

> such a claim to the water, a failure to object by the senior appropriator may well work an abandonment or commence a period of adverse possession but, in the absence of an objection (whether verbal or by the act of using the disputed water), there is no clash of rights sufficient to permit establishment of a forfeiture.

(*North Kern, supra,* p. 566.) It does not follow that the "test" applied by the trial court is applicable to all divergent fact-scenarios. The Court of Appeal's ruling nowhere makes that contention.

Unlike here, that case did not involve the State Water Board exercising its authority over water rights. This is a potentially significant difference. Where the State Water Board is alleging that a right has been forfeited, it does not make sense to require the same exact "clash of rights" as was present in *North Kern*, a controversy between two competing water users, because the Board essentially represents all lawful water users. When the Board is asserting that a particular right has been forfeited pursuant to Water Code section 1241, any number of actions could constitute a "clash of rights" under the *North Kern* reasoning, including approval of junior applications or a declaration that a stream system is fully appropriated.

Strictly applying the *North Kern* decision where the Board is prosecuting an enforcement action would allow the perverse result where an unused pre-1914 claim of right could be initiated after close to a century of non-use merely by one year of water use in the five years prior to action by the Board. Rights not used for decades could subordinate other diligent water users or water projects, effectively "jumping the line" by reestablishing rights with earlier priority dates. The Prosecution Team is not suggesting necessarily that *any* five year period of non-use be the rule where the Board is

prosecuting a forfeiture action pursuant to Water Code section 1241; merely that the Board would be unduly limited in exercising its statutory authority regarding water rights were it to strictly apply the test used by the trial court in *North Kern*. Instead, the Board should consider other reasonable "clashes of rights" such as fully appropriated stream declarations or the approval of junior water right applications on a showing that water is available for appropriation, in determining the appropriate period for forfeiture for non-use of water.

Here, the Board has declared the Russian River fully appropriated, finding that no water remains available for appropriation. (See Order WR 91-07.) Likewise, the Board has set minimum flows for the Russian River, using actual flow conditions as the baseline for the required environmental analysis. (State Water Board Decision 1610, p. 24.) For purposes of applying the *North Kern* decision, either of the above Board actions should be sufficient to constitute an "objection (whether verbal or by the act of using the disputed water)" to new diversions pursuant to unexercised senior claims of right. (*North Kern, supra*, 147 Cal.App.4th p. 566.) Allowing Respondents to divert upwards of 1,400 afa more than any annual amount of water diverted pursuant to the Waldteufel claim in almost a century, and claim priority over junior right-holders that actually put water to beneficial use, is very likely not what the *North Kern* court had in mind.

Alternatively, the Howard complaint filed in February 2006 unquestionably constitutes a "clash of rights" under *North Kern*. Mr. Howard was concerned and complained to the State Water Board that little, if any, water had been put to use

pursuant to the Waldteufel claim for over 90 years and that the proposed sale or lease of this claim of right would result in significant *new* diversion from the Russian River downstream of Lake Mendocino. These concerns were communicated to Hill and Gomes in a letter dated March 29, 2006, transmitting a copy of the complaint and requesting an answer. (PT 1, p. 10.) So even if the Board were to strictly apply the *North Kern* decision to this case, Respondents have not shown water use pursuant to the Waldteufel claim greater than 58.5 afa in the five years immediately prior to the filing of the Howard complaint. (PT 11; see also Hearing Transcript, pp. 173-78.)

After several requests by the Division, Millview submitted water right accounting sheets for calendar years 2001-08 (PT-11). In these materials Millview allocates its diversion of water from the Russian River downstream of the confluence with the West Fork below Lake Mendocino pursuant to several claims of right including: a) the Waldteufel claim of right; b) License 492 (Application 3601), c) Permit 13936 (Application 17587); d) a water purchase contract with the Flood Control District; and e) water purchased by the Calpella County Water District from the Flood Control District and wheeled by Millview. As was clearly shown at the hearing, this data regarding Millview's diversion of water pursuant to the Waldteufel claim was, at least for 2005, entirely fabricated to maximize retention of the claimed right. (Hearing Transcript, pp. 173-78.) As 2005 is the only year prior to the filing of the Howard complaint in which more than 58.5 afa was even claimed to have been used pursuant to the Waldteufel right, there is no evidence to support that right existing in any amount greater than 58.5 afa, even under the most conservative application of the *North Kern* decision.

Policy Considerations

Respondents suggested a view of the public policy regarding unused water rights - allow speculation on old, unused water rights. It is the Prosecution Team's view that this is an extremely unsound policy, which could lead to enormous difficulties in managing water rights. Respondents' suggested policy would allow unused and underused claims of right to be initiated or enlarged after decades of non-use, with a priority date senior to other diligently perfected appropriative rights. Contrary to Respondents' claims, this would not maximize the beneficial use of water. It would very likely have the opposite effect. By subordinating the rights of diligently perfected projects in favor of unused pre-1914 rights, the Board would completely eviscerate the concept of diligence and foster uncertainty for all right holders.

There likely exist filings for hundreds of thousands of acre feet of water under which water has either never been put to beneficial use or else has not been used in decades. If reestablished with pre-1914 priority dates, water use pursuant to these claims would wreak havoc on the administration of water rights and very likely render valueless many diligently completed junior water rights made in reliance on the fact that new appropriations of water would have later priority dates.

No Injury Rule

The "no injury" rule prevents a change in point of diversion, place of use or purpose of use from operating in a way so as to injure any junior appropriator. (See Order WR 99-12, p. 12.) Due to the oversubscribed nature of the Russian River watershed, were the Board to determine that the Waldteufel right has not degraded to

the extent suggested by the Prosecution Team, any water made accessible by the change in point of diversion from the West Fork Russian River to a spot below the confluence with the East Fork Russian River would necessarily have to be junior to other existing diversions to avoid injury by virtue of the change.

For this reason, the Board should require that the point of diversion for the claimed right be moved back to the West Fork Russian River above the confluence with the East Fork. Absent competent evidence that the Waldteufel claim may be exercised at the current point of diversion without taking water released from Lake Mendocino, Respondents have the potential to divert water in excess of the natural flow of the West Fork Russian River. The point of diversion for a pre-1914 right may be changed so long as there is no injury to other valid water right holders, but a change that makes new water available requires a showing that the change would not cause injury to other lawful water users.

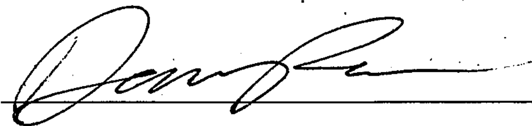
IV. CONCLUSION

The State has a policy to apply water to beneficial use to the fullest extent possible. This holds true particularly in watersheds where there is heavy demand for water and supply is limited. The Russian River watershed is such a watershed, where competition for limited water resources is intense, and the disparity between demand and available supply is well documented. Allowing the new diversion of water pursuant to a senior priority date would send the wrong message regarding the Board's policy on beneficial use and wreak havoc on the existing system of water rights priorities.

Leaving new water rights forever subject to subordination by the initiation of long-dormant or even never-exercised water right claims would eliminate any degree of certainty that investment in new water projects would be feasible, leading to less, not more, beneficial use of the waters of the state. The Board has a strong interest in the effective functioning of the water rights system, and allowing what amounts to the cold storage of a water right is inconsistent with a well-functioning system of water rights and should not be sanctioned.

Since Respondents have given every indication that they intended to divert water in the future up to the face value of the Waldteufel right as claimed in the initial posted notice, in addition to the face value of all of Millview's other water rights, there exists a threat of unauthorized diversion, and the Board should issue an order requiring that Respondents not divert water in excess of their existing water rights, including the Waldteufel claim as limited by historical beneficial use to no more than 15 afa.

Respectfully submitted this 5th day of April 2010, at Sacramento, California.



David Rose
Staff Counsel
STATE WATER RESOURCES CONTROL BOARD