ALAN B. LILLY, State Bar No. 107409
BARTKIEWICZ, KRONICK & SHANAHAN
A PROFESSIONAL CORPORATION
1011 22nd Street, Sacramento, CA 95816-4907
Telephone: (916) 446-4254
Fax: (916) 446-4018
E-Mail: abl@bkslawfirm.com

Attorneys for Sonoma County Water Agency

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

Russian River and Russian River Underflow in Mendocino County Public Hearing to Determine Whether to Adopt a Draft Cease and Desist Order Against Thomas Hill, Steven Gomes and Millview County Water District _____	)

SONOMA COUNTY WATER AGENCY'S CLOSING BRIEF

Hearing Date: Jan. 28, 2010

INTRODUCTION

The Sonoma County Water Agency ("SCWA") holds four water-right permits for the diversion and beneficial use of water in the Russian River system. These permits require SCWA to maintain minimum instream flows throughout the Russian River, for over 100 miles from the confluence of the East Branch and West Fork of the Russian River to the Pacific Ocean. SCWA is interested in this proceeding because any unlawful diversion of water in the Russian River system may impact the amounts of water that are available for diversion under SCWA's water-right permits, or the amounts of water that are stored in Lake Mendocino and SCWA's resulting ability to maintain required minimum instream flows in the Russian River. (See SCWA exh. 1, pp. 1-4.)

The SWRCB's September 3, 2009 notice of public hearing for this proceeding refers to the draft cease-and-desist order (the "draft CDO") that was issued by the Assistant Deputy Director of Water Rights on April 10, 2009. The draft CDO concluded that the alleged "Waldteufel" pre-1914 appropriative right exists, with a maximum authorized instantaneous diversion rate of 1.1 cubic feet per second ("cfs") or the flow in the West Fork Russian River at USGS gage # 11461000 (Russian River near Ukiah), whichever is less, and with a maximum authorized annual diversion rate of 15 acre-feet per year ("af/yr"). (Draft CDO, p. 7.) The draft CDO would require Thomas Hill, Steven Gomes and the Millview County Water District (collectively referred to in this brief as "Hill, Gomes and Millview") to maintain daily records of Millview's diversions and to state which basis of right was used for each day's diversion. (*Id.*) The September 3, 2009 notice states that the key hearing issue is:

> Should the State Water Board adopt the draft CDO issued on April 10, 2009? If the draft CDO should be adopted, should any modifications be made to the measures in the draft order, and what is the basis for such modifications?

SCWA requests that the SWRCB make some important modifications to the draft CDO, and that the SWRCB then adopt a final cease-and-desist order (the "final CDO"). The final CDO should separately analyze the following legal issues: (1) Was any pre-1914 appropriative right ever perfected pursuant to the notice that J. A. Waldteufel recorded in March 1914? (2) If such a right

was perfected, then (a) what maximum instantaneous and annual diversion rates were authorized by the right when it was perfected, (b) were these maximum authorized instantaneous and annual diversion rates ever reduced through forfeiture, and (c) what instantaneous and annual limits must be included in the right now, to prevent any injuries to other legal users of water from Millview's recent changes in the point of diversion, purpose of use and place of use of this right?

For the reasons discussed in this brief, SCWA requests the SWRCB to conclude in the final CDO that Hill, Gomes and Millview have not met their burden of proving that the alleged pre-1914 right ever was perfected, and that this right therefore does not exist. If the SWRCB concludes that some pre-1914 right was perfected, then SCWA asks the SWRCB to conclude in the final CDO that: (a) this right was perfected only at some very limited diversion rates, substantially less than the 2 cfs and 1,450 af/yr rates claimed by Hill, Gomes and Millview; (b) if these maximum authorized diversion rates exceeded 1.1 cfs or 15 af/yr, then they were reduced to these rates in the 1966-1987 period; and (c) these maximum authorized diversion rates may not be increased by Millview's changes in point of diversion, purpose of use and place of use. SCWA also asks that the final CDO require Millview to maintain daily records of its diversions, to prepare an accounting that properly allocates these diversions among the various rights that are available to Millview, to explain the basis for this allocation, and to use the same allocation method each year.

ARGUMENT

I

THE SWRCB HAS JURISDICTION TO DETERMINE WHETHER THE ALLEGED "WALDTEUFEL" RIGHT EXISTS, AND, IF IT EXISTS, TO DETERMINE ITS MAXIMUM AUTHORIZED DIVERSION RATES

In their pre-hearing brief, Hill and Gomes argued that the SWRCB does not have jurisdiction to determine the existence of, or to quantify, the alleged "Waldteufel" pre-1914 appropriative right. (See Hill & Gomes pre-hearing brief, pp. 8-10.) Hill, Gomes and Millview also made similar arguments during the January 26 hearing.

These arguments should be rejected. Water Code section 1052, subdivision (a), provides that the diversion or use of water subject to Division 2 (sections 1000-1851) of the Water Code other

than as authorized by this division is a trespass, and section 1831, subdivision (d)(1) authorizes the SWRCB to issue a cease-and-desist order in response to a violation or threatened violation of this prohibition. While the Water Code does not explicitly define the term "water subject to" Division 2 of the Water Code, the scope of this term is best determined through Water Code section 1200, which defines "water" to refer "to surface water, and to subterranean streams flowing through known and definite channels." This definition includes all of the waters involved in this matter, that is, the surface waters and underflows of the West Fork and mainstem Russian Rivers.

Hill and Gomes rely on a statement regarding the SWRCB's authority to determine the validity of vested rights that appears in their Exhibit AA, a Division of Water Rights publication. (See Hill & Gomes, pre-hearing brief, p. 8.) However, this publication is not a binding or precedential statement of the SWRCB.

Hill and Gomes also cite several reported California court decisions to support their jurisdiction argument (see Hill & Gomes, pre-hearing brief, pp. 8-9), but none of these decisions actually supports their argument. Their reliance on *California Farm Bureau Federation v. California State Water Resources Control Bd.* (2007) 146 Cal.App.4th 1126, 1152, is misplaced because: (a) the cited page refers only to the SWRCB's lack of authority to impose annual fees on pre-1914 appropriative rights, not to the SWRCB's authority over such rights under Water Code sections 1052 and 1831; and (b) the California Supreme Court has granted the SWRCB's petition for review of this decision, so it no longer is precedential (see Cal. Rules of Ct., rules 8.1105, subd. (e)(1) & 8.1115). The parts of *Nicoll v. Rudnick* (2008) 160 Cal.App.4th 550, 557, *People v. Shirokow* (1980) 26 Cal.3d 301, 309, and *People v. Murrison* (2002) 101 Cal.App.4th 349, 359, that are cited by Hill and Gomes all just discuss the scope of the SWRCB's authority to issue permits to appropriate water, not the scope of the SWRCB's authority to issue cease-and-desist orders.

Hill and Gomes also cite and quote the SWRCB's Order WR 2001-22. (Hill & Gomes, pre-hearing brief, pp. 8-9.) However, they ignore the sentences in this order immediately following the sentences they quote. These sentences state:

> Water Code section 1051 expressly authorizes the SWRCB to investigate, take testimony, and ascertain whether water attempted to be appropriated is appropriated in accordance with state law. (See also Wat. Code § 1825 [declaring intent of the Legislature that the SWRCB take vigorous action to prevent the unlawful diversions of water]; Wat. Code § 183 [expressly authorizing the SWRCB to hold any hearings and conduct any investigations necessary to carry out the powers vested in it].) PG&E's assertion that a prima facie showing of a pre-1914 water right ends the SWRCB's jurisdiction lacks legal support and is inconsistent with the SWRCB's statutory mandate to ensure that unauthorized diversions do not take place.

(Order WR 2001-22, p. 26, brackets in original.)

Hill and Gomes also cite Water Code section 1831, subdivision (e), which provides:

> 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.

(Underlines added.) This "article" is Water Code sections 1825-1836. This "part" is Water Code sections 1200-1851. And, as discussed above, Water Code section 1200, which is in "this part," provides that this part extends to all surface water and subterranean streams flowing through known and definite channels.

II

HILL, GOMES AND MILLVIEW HAVE NOT MET THEIR BURDEN OF PROVING THAT THE ALLEGED "WALDTEUFEL" RIGHT EVER WAS PERFECTED OR OF QUANTIFYING THE AMOUNT OF THIS ALLEGED RIGHT

In his testimony, Hill and Gomes attorney Jared Carter states that the alleged "Waldteufel" right "is embodied in" the notice of appropriation that was recorded in March 1914. (Hill & Gomes exh. B, p. 2.) Similarly, Mr. Gomes testified that he believed that the recording of this notice created a water right. (RT 220-221.)[1]

[1]"RT" refers to the reporter's transcript of the January 26, 2010 hearing in this matter.

As discussed in the following section of this brief, the applicable law is more complicated. The recording of a notice of appropriation was only one step in the process to perfect a pre-1914 appropriative right, and the notice itself did not create any water right. Under California water-rights law, there were three separate required elements to perfect a pre-1914 appropriative right, and the parties claiming the right have the burden of proving that all of these elements were satisfied, and the burden of proving the maximum authorized diversion rates under any perfected right. Hill, Gomes and Millview have not met these burdens of proof.

A. Hill, Gomes and Millview Have The Burden Of Proving All Of The Required Elements For Perfection And Quantification Of The Alleged Pre-1914 Appropriative Right

As the court stated in *Simons v. Inyo Cerro Gordo Min. & Power Co.* (1920) 48 Cal.App. 524, 537:

> To constitute a valid appropriation of water, three elements must always exist: (1) An intent to apply it to some existing or contemplated beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for the purpose; and (3) an application of the water within a reasonable time to some beneficial use.

(See also *California Trout, Inc. v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 816, 820; W. Hutchins, The California Law of Water Rights, p. 108 (1956).)

The person or entity claiming the right has the burden of proving: (a) that all of these elements were satisfied; (b) the amount of water actually diverted and applied to beneficial use; and (c) if a riparian right was available, that the diversions and uses were not pursuant the riparian right:

> The burden was upon appellant, to establish by sufficient evidence the fact of appropriation by him, and the quantity of water appropriated and applied by him to beneficial use upon his land. [Citation.] On this issue plaintiff's evidence is defective and incomplete. It fails to show the quantity of water diverted by plaintiff from Bear Creek, or how much, if any, of the water taken by him out of Bear Creek was taken as an appropriator and not in the exercise of his rights as a riparian owner.

(*Crane v. Stevenson* (1936) 5 Cal.2d 387, 398.)

> In a case, such as the present one, where prior appropriators are attempting to secure an injunction against a subsequent one, the action is in effect one to quiet the title of the prior appropriator. The burden of proof is on the prior appropriator, in such action, to show by a preponderance of the evidence, every element of the right claimed by him.

(*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 547-548.)

Although Hill and Gomes repeatedly cite *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555 (see Hill and Gomes pre-hearing brief, pp. 2, 3, 10, 11, 12), *North Kern* concerned only the forfeitures of pre-1914 appropriative water rights, and not the issue of initial perfections of such rights. This was because, in *North Kern*, a 1901 court decree, referred to as the "Shaw Decree," already had confirmed and quantified each appropriator's right. (See 147 Cal.App.4th, at pp. 561-562.) In contrast, there is no court decree confirming or quantifying the alleged "Waldteufel" right. Hill, Gomes and Millview therefore have the burden of proving: (a) that all three of the required elements for an appropriative right were satisfied; (b) the amounts of the instantaneous and annual diversions that quantified this right; and (c) that these diversions were not made pursuant to riparian rights. The issue of forfeiture will be relevant in this proceeding only if Hill, Gomes and Millview first can meet their burden of proving all of these facts.

B. Hill, Gomes and Millview Have Not Met Their Burden Of Proving That Any Pre-1914 Right Ever Was Perfected Pursuant To Mr. Waldteufel's Notice of Appropriation

The March 24, 1914 notice that was recorded by J. A. Waldteufel (Hill & Gomes, exh. C; Millview exh. 2) indicates that Mr. Waldteufel intended to divert water from the West Fork of the Russian River and to apply the diverted water to beneficial use. While this notice may demonstrate that Mr. Waldteufel intended, when he signed and recorded the notice, to perfect an appropriative right, this notice does not provide any evidence: (a) that any water ever actually was diverted or used; (b) of the amounts of any such diversions; or (c) that any such diversions were not pursuant to riparian rights.

The April 4, 1913 deed from C. J. and Mollie Chandon to Mr. Waldteufel (Millview exh. 1) contains a reservation and exception for any fruit that was produced on the 33.88 acres of conveyed land in 1913 and for the first cutting of alfalfa grown on that land in 1913. However, this deed does not state: (a) whether or not any fruit or alfalfa actually was produced or grown in 1913; (b) whether or not any fruit or alfalfa was produced or grown any time after March 1914, when the notice of appropriation was signed and recorded; and (c) whether or not any water was diverted from the West Fork of the Russian River to irrigate any such crop. The fact that an old pipe now exists near the West Fork of the Russian River (see Millview exh. 9) also does not demonstrate that any diversions pursuant to the March 1914 notice ever occurred (see RT 164-165). Also, if any such diversions occurred, they may not have started until many years after 1914, and they all may have been made pursuant to riparian rights.

Hill, Gomes and Millview may not rely on the August 2, 2006 statement of Floyd Lawrence (Hill & Gomes exh. J). This statement is hearsay, and is subject to the provisions of Government Code section 11513. (See Cal. Code Regs., tit. 23, § 648.5.1.) Government Code section 11513, subdivision (d) provides:

> (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

Here, timely objections were made during the hearing (see RT 129-130, 132-133, 229-232) and are reiterated here. Millview could have followed the provisions of Code of Civil Procedure sections 2035.010-2035.060 by taking a deposition of Mr. Lawrence, with proper advance notice to interested parties. If Millview had done this, then the transcript of that deposition would have been admissible under Code of Civil Procedure section 2025.620 and Evidence Code section 1290, subdivision (c), and section 1292. But Millview did not do this, and the transcript of Mr. Lawrence's statement is not admissible in civil actions. Moreover, because of the significant limitations in the probative

value of the 1913 deed and the evidence of the old pipe discussed above, the Lawrence statement may not be used to "supplement or explain" this deed or this evidence.

Even if the SWRCB considers the details of Mr. Lawrence's statement, the statement has several defects that seriously limit its probative value. First, because Mr. Lawrence was born on November 30, 1914 (see Hill & Gomes, exh. J, p, 3), he obviously had very little, if any, memory of what occurred during 1914 or the next several years when he made his statement in 2006. In fact, Mr. Lawrence stated that he did not remember anything before he was about five or six years old, which would have been in November 1919 or November 1920. (*Id.*, at p. 27.) Mr. Lawrence's statement therefore does not discuss any diversions or use of water during 1914 through 1919 or 1920, when Mr. Waldteufel would have had to have been diligently working to develop facilities to divert and beneficially use water to perfect any pre-1914 appropriative right. Second, this statement refers to and discusses three exhibits that are not attached to the statement. (See Hill & Gomes exh. J, pp. 9-20, 45-46.) The omission of these exhibits seriously reduces the probative value of the statement.

Even if the SWRCB concludes that Mr. Waldteufel or one of his successors made some diversions and use of West Fork Russian River water, the properties on which Mr. Waldteufel and his successors allegedly used water diverted from the West Fork Russian River border on and are in the watershed of the West Fork Russian River. (See SCWA exh. 6.) All of the alleged diversions and uses therefore could have been made pursuant to riparian rights. (See *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 774-775.) Unless Hill, Gomes and Millview can meet their burden of proving that the diversions were not pursuant to riparian rights (which they have not yet done), they cannot satisfy their burden of proving that any appropriative right ever was perfected. (See *Crane v. Stevenson, supra,* 5 Cal.2d, at p. 398.)

For all of these reasons, Hill, Gomes and Millview have not met their burden of proving the required elements for perfection of a pre-1914 appropriative right. The SWRCB therefore should conclude that they do not have any valid pre-1914 appropriative right.

C. If The SWRCB Concludes That The Alleged "Waldteufel" Right Was Perfected, Then The SWRCB Should Quantify That Right, Based On Historical Diversion And Use Rates

Contrary to the suggestions of Hill, Gomes and Millview, even if the SWRCB concludes that some pre-1914 appropriative right was perfected pursuant to the 1914 Waldteufel notice, that does not automatically mean that the SWRCB must, or even should, conclude that the right was perfected for a year-round diversion of 2 cfs (the equivalent rate for the 100 miner's inches under 4 inches of pressure that was stated in the 1914 notice, see RT 119-120). Instead, Hill, Gomes and Millview have the burden of proving the rate at which water actually was diverted and beneficially used pursuant to any such right. (See *Crane v. Stevenson, supra*, 5 Cal.2d, at p. 398.)

Even if Hill, Gomes and Millview can prove that some diversions and use occurred and were not pursuant to the available riparian rights, the evidence that they have submitted still leaves significant uncertainties regarding the amounts of any actual historical diversion rates and beneficial uses. Mr. Waldteufel's 1914 notice states that the place of intended use "is on Lot # 103 of Healey's survey and Map of Yokayo Rancho." (Hill & Gomes, exh. C; Millview exh. 2.) This lot contained 165 acres. (PT exh. 1, p. 4.) However, this notice does not state that Mr. Waldteufel intended to irrigate this entire lot, and there is no evidence that he ever owned the entire lot or had access to it. Moreover, Millview exhibit 1 indicates that Mr. Waldteufel purchased only 33.88 acres in this area in 1913. As Charles Rich, the Prosecution Team's witness testified, it is "certainly possible" that Mr. Waldteufel owned significantly less than 165 acres in 1914. (RT 121.)

If, notwithstanding the limitations on the use of hearsay evidence discussed above, the SWRCB decides to consider the Lawrence statement, then the SWRCB should recognize that this statement does not contain any clear statements regarding the numbers of acres of different crops that may have been irrigated with Russian River water in the years immediately following 1914. Mr. Lawrence's statements about the property owned by Mr. Waldteufel and then sold to Mr. Dowling do not contain any statements or estimates of the size of the property. (See Hill & Gomes exh. J, pp. 6-7.) Mr. Lawrence stated that Mr. Dowling, who, according to Millview's attorney, bought the property in 1918 (*id*., p. 7), grew, at some unspecified time, "probably between three and

four acres" of pear trees (*id.*, p. 29) and "about the same area" of oat hay (*id.*, p. 30), which "didn't take so much water" (*id.*, p. 34), and some unspecified area of alfalfa (*id.*, p. 30). Mr. Lawrence's statement goes on to state that subsequent property owners grew a few acres of some other crops, but his statement is not clear regarding who owned the property when, or who grew what crops when. (*Id.*, pp. 30-34.) Mr. Lawrence's statement does not provide any clear information regarding the amounts of water that were diverted and beneficially used within a reasonable time after 1914, as was necessary to perfect a pre-1914 appropriative right for irrigation. Mr. Lawrence's statement also does not demonstrate that any such diversions were not pursuant to riparian rights.

The SWRCB should not rely on the estimated water demands for irrigation of 162 acres of alfalfa that were calculated by Millview's witness Daniel Putnam (see Millview exh. 10), because there is no foundation for his assumption that 162 acres of alfalfa ever were irrigated with West Fork Russian River water diverted pursuant to the alleged pre-1914 right. (See RT 144-145, 149-151.)

The statements of water diversion and use that were filed in 1967 and later years (PT exhs. 6 & 8) cannot be used as evidence for the perfection of any pre-1914 appropriative right. The earliest year of diversion and use that is described in these statements is 1966, which was 52 years after 1914. This was far to late for diligent development of a pre-1914 appropriative right.

If Hill, Gomes and Millview repeat the argument that Millview, as a municipality, was authorized to increase the diversion rates to perfect the claimed pre-1914 right (see Hill & Gomes exh. N, p. 5), then that argument should be rejected. While a municipality may, under the doctrine of progressive development, take considerable time to perfect a pre-1914 appropriative right as the population of its service area grows, this rule does not apply to pre-1914 appropriative rights for irrigation. (See SWRCB Order WR 2006-0001, p. 14.) Here, Millview did not obtain any interest in the alleged pre-1914 right until 2001 or 2002 (see Millview exh. 15; RT 34). This was far too late to apply the doctrine of progressive development for municipalities to the alleged pre-1914 right.

In conclusion, for the reasons discussed in section II.B above, the SWRCB should conclude that Hill, Gomes and Millview do not have any pre-1914 appropriative right. If the SWRCB concludes that some such right exists, then the SWRCB should quantify the maximum instantaneous

and annual diversion rates of that perfected right. This quantification must be based on competent evidence of the maximum diversion rates that occurred under this alleged right within a reasonable time after 1914. It would not be appropriate to quantify this right at the 100 miner's inches rate stated in the 1914 notice of appropriation, because there is no competent evidence that water ever actually was diverted and used at this rate.

III

IF THE SWRCB CONCLUDES THAT SOME PRE-1914 RIGHT WAS PERFECTED PURSUANT TO THE 1914 NOTICE, THEN THE SWRCB SHOULD DETERMINE HOW MUCH OF THIS RIGHT WAS FORFEITED

For the reasons discussed above in part II of this brief, SCWA contends that Hill, Gomes and Millview have not met their burden of proving that any pre-1914 appropriative right was perfected pursuant to the notice that Mr. Waldteufel recorded in 1914, and SCWA contends that, if the SWRCB concludes that such a right was perfected, then its maximum instantaneous and annual diversion rates should be quantified at amounts substantially less than the 100 miner's inches rate in the notice. If the SWRCB concludes that some appropriative right was perfected, and determines the maximum instantaneous and annual diversion rates of such right, then the SWRCB must consider whether that right was partially forfeited because of subsequent lower rates of diversion and use.

Some court decisions state that, to determine whether a pre-1914 appropriative right was completely or partially forfeited, the court should consider the rates of diversion and use that occurred under that right only during the five-year period immediately preceding the filing of the complaint that initiated the court action. (See, e.g., *Smith v. Hawkins* (1895) 110 Cal. 122, 127-128; *North Kern Water Storage Dist., supra*, 147 Cal.App.4th, at p. 560.) On the other hand, other court decisions state more broadly that a pre-1914 appropriative right may be completely or partially forfeited by any "subsequent failure to maintain the beneficial use" for five years. (See, e.g., *Crane v. Stevenson, supra*, 5 Cal.2d, at p. 398.)

SCWA will defer to the SWRCB to decide which five-year period or periods should be applied to the forfeiture issue in this proceeding. SCWA notes that, as a matter of policy, limiting

forfeiture actions to the five-year period immediately preceding a complaint leading to a cease-and-desist order proceeding would be virtually unworkable for either the SWRCB or SCWA. This is because neither the SWRCB nor SCWA normally will receive any notice that about the rate of diversion or use under an alleged pre-1914 right until that rate substantially increases, as it did in the present matter. As one of the Hill and Gomes attorneys stated at the hearing, "nobody[] paid any attention to this water right" for many years. (RT 207.) Entities like the SWRCB and SCWA normally will become aware of such largely ignored pre-1914 appropriative rights only when diversions are increased after many years of limited or no diversions and use. If the forfeiture period is limited to the five years immediately preceding the initiation of a forfeiture action, then the SWRCB and SCWA normally will not be able to stop such increases in diversion rates with forfeiture arguments.

If the SWRCB concludes that it may consider the rates of diversion and use that occurred during the late 1960's under the alleged pre-1914 appropriative right, then the SWRCB may rely on the statements of diversion and use that were prepared and filed by Lester Wood in 1967, 1970, 1982 and 1987. (PT exh. 6.) Although these statements are hearsay, they would be admissible in court under the exception to the hearsay rule specified in Evidence Code section 1225. (See *Griseza v. Terwilliger* (1904) 144 Cal. 456, 462 (acknowledgment of abandonment of water right by previous appropriator admissible against party claiming the existence of that right).) These statements therefore are not subject to the use limitations in Government Code section 11513, subdivision (d). While these statements do not cover every year between 1966 and 1987, they show that, during the 10 years of this 22-year period for which diversions and use were reported, the numbers of acres irrigated and the amounts of water diverted never exceeded the maximum rates described in the draft CDO. From this evidence, and in the absence of any contrary evidence, the SWRCB reasonably may infer that diversions and use under this alleged right never exceeded these rates during this period. (See Evid. Code, § 600, subd. (b); see RT 114.) The SWRCB also reasonably may infer that sufficient water was available in the West Fork Russian River during at least five years of this 22-year period for diversions at the maximum rates authorized by this alleged right, and that forfeiture

therefore is not barred by the non-availability of water. (Cf. *Huffner v. Sawday* (1908) 153 Cal. 86, 92 (appropriative right not lost through non-use when water was not available for diversion).)

IV

IF THE SWRCB CONCLUDES THAT THE ALLEGED "WALDTEUFEL" RIGHT WAS PERFECTED, THEN THE SWRCB SHOULD RULE THAT THE RIGHT IS LIMITED TO THE DIVERSION RATES THAT COULD OCCUR AT THE PREVIOUS POINT OF DIVERSION FOR IRRIGATION OF LANDS WITHIN THE PREVIOUS PLACE OF USE

Water Code section 1706 provides:

> The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, . . .

Here, it is undisputed that, if the alleged pre-1914 appropriative right was perfected, then it was perfected by the diversion of water from the West Fork Russian River for irrigation uses on some of the lands depicted in SCWA exhibit 6. No water ever was diverted or used pursuant to this alleged right at any other location until 2001 or 2002, when Millview started claiming that it was diverting water pursuant to this alleged right at its diversion facility on the Russian River mainstem. This action by Millview resulted in three changes: (a) a change in the point of diversion; (b) a change in the purpose of use; and (c) a change in the place of use. As discussed in the following paragraphs, each of these changes resulted in injury to SCWA, and therefore was not authorized by Water Code section 1706.

If the authorized point of diversion for this alleged right is moved to Millview's diversion facility on the Russian River mainstem, and if no additional restrictions are imposed on the amounts of water that may be diverted under this alleged right at this new point of diversion, then the total amounts of water that could be diverted under this alleged right would be substantially higher than the amounts that could be diverted under this alleged right at the previous point of diversion, because flows in the West Fork Russian River normally drop to very low levels during the summer, while flows in the Russian River mainstem at Millview's diversion facility do not. (SCWA exh. 1, p. 5, ¶ 17; exhs. 7, 9 & 10; RT 241-243.)

If the authorized purpose of use for this alleged right is changed from irrigation to municipal, then the total amount of water that could be diverted pursuant to this alleged right would substantially increase, from the rate of 7.5 to 15 af/yr that occurred for irrigation during 1967 through at least 1982, to as much as 62.5 af/yr for the homes in the Creek Bridge subdivision. (SCWA exh. 1, pp. 5-6, ¶ 18.) Also, the return flows from municipal uses probably would be substantially lower than the return flows from irrigation uses, further reducing Russian River flows to the detriment of SCWA. (See RT 145-149.)

If the authorized place of use for this alleged right is expanded from the historical place of use, which was at most the 165-acre area described in Mr. Waldteufel's 1914 statement, to Millview's much-larger service area, then diversions under this right could expand to up to 1,450 af/yr. (SCWA exh. 1, p. 6, ¶ 19; exh. 5.)

All of these increases would injure SCWA by reducing the amounts of water stored in Lake Mendocino that would be available to SCWA for delivery to its customers. (SCWA exh. 1, pp. 3-4, ¶¶ 12-13.) All of these increases also potentially could impact the Russian River fisheries that depend on the minimum streamflows that SCWA maintains in the Russian River through releases of water stored in Lake Mendocino. (*Id.*) As one of the Hill and Gomes attorneys stated at the hearing, SCWA has "a reasonable and valid claim." (RT 205.)

Accordingly, even if the SWRCB concludes that some portion of the alleged pre-1914 appropriative right was perfected and not forfeited, the SWRCB should include conditions in its final CDO that ensure that future diversions under this alleged right will be limited to the amounts that would have occurred if the point of diversion, purpose of use and place of use had not been changed. These conditions also should address any reductions in return flows that occurred because of these changes.

V

THE SWRCB'S ORDER SHOULD REQUIRE MILLVIEW TO REPORT AND ACCOUNT FOR ITS DAILY DIVERSIONS

Paragraph 2 on page 7 of the draft CDO would require Hill, Gomes and Millview to maintain a record of all of their diversions of water on a daily basis, and for this record to identify the amounts of water diverted each day under: (a) the alleged "Waldteufel" pre-1914 appropriative right; (b) Millview's water-right License 492; (c) Millview's water-right Permit 13936; and (d) Millview's contract with the Mendocino County Russian River Flood Control and Water Conservation Improvement District. This paragraph also would require Millview to separately report the amounts of any water that Millview wheeled for other entities like the Calpella County Water District or the City of Ukiah. This paragraph would require Millview to update this record at least weekly and to make it available for inspection the next business day after receipt of a written request from any interested party.

During the hearing, Hill, Gomes and Millview did not object to this proposed requirement. The SWRCB and other interested parties like SCWA will need to know the amounts of Millview's diversions, Millview's allocations of these diversions among the various rights that are available to it, and the basis for these allocations. The SWRCB therefore should include a requirement like this in its final order in this proceeding. This requirement also should direct Millview's accounting to explain how Millview allocated its diversions among these rights. The SWRCB should require Millview to use the same allocation method each year, subject to Millview's right to change this method for good cause, with the advance approval of the SWRCB's Deputy Director for Water Rights. This requirement is necessary to avoid a repeat of Millview's past allocations, which varied wildly from year to year. (See PT exh. 11, SCWA exh. 8; RT 172-180.)

CONCLUSION

For the reasons discussed in this brief, the Sonoma County Water Agency requests that the SWRCB issue a final cease-and-desist order in this proceeding, and that this order conclude that Hill, Gomes and Millview have not met their burden of proving that the alleged "Waldteufel" right ever was perfected. If the SWRCB concludes that this alleged right was perfected, then the SWRCB

should conclude that the right's maximum instantaneous and annual diversion rates are substantially less than rates based on the 100 miner's inches rate in the 1914 notice of appropriation. The SWRCB's order should specify maximum authorized diversion rates that are based on competent evidence of actual historical diversion and use rates.

If the SWRCB concludes that this alleged right was perfected, then the SWRCB should rule that the right has diversion limits that are based on the amounts that could be diverted for irrigation use at the original place of use. The SWRCB's order should prevent the substantial increases in these limits that otherwise could occur through the change in point of diversion to Millview's diversion facility, the change in purpose of use from irrigation to municipal and the change in place of use to Millview's entire service area. These conditions also should address any reductions in return flows that occurred because of these changes.

The SWRCB should require Hill, Gomes and Millview to maintain daily records of all diversions under the alleged pre-1914 right and all other rights available to Millview, to prepare an accounting that allocates these diversions among these rights and explains the basis for the allocation, and to make these records and this accounting available to all interested parties.

Dated: April 5, 2010

BARTKIEWICZ, KRONICK & SHANAHAN
A Professional Corporation

By _____
Alan B. Lilly

Attorneys for Sonoma County Water Agency