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State Water Resources Control Board

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Arnold Schwarzenegger
Governor

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Via U.S. Mail and email

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Dear Mr. Knight:

REQUEST FOR INTERROGATORIES, ADMISSIONS AND INSPECTION DEMANDS PURSUANT TO CIVIL DISCOVERY ACT REGARDING DRAFT CEASE AND DESIST ORDER – THOMAS HILL, STEVEN GOMES, AND MILLVIEW COUNTY WATER AGENCY

On November 24, 2009 I received the above-referenced requests from you, on behalf of your clients Thomas Hill and Steven Gomes. Specifically you propound a number of special interrogatories, requests for admissions and inspection demands. These requests are based on the Civil Discovery Act. (Code Civ. Proc., § 2016.010 et seq.)

As explained in the State Water Resources Control Board's (State Water Board or Board) Notice of Public Hearing issued on September 3, 2009, adjudicative proceedings before the State Water Board are governed by the Board's regulations. The Board's regulations governing adjudicative proceedings incorporate Chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. (Cal. Code Regs., title 23, §648, subd. (b).) The Board's regulations do not incorporate any provisions of the Civil Discovery Act.

California courts have also held that the Civil Discovery Act does not apply to administrative adjudications. (*Romero v. Cal. State Labor Comm'r* (1969) 276 Cal.App.2d 787, 790, 81 Cal.Rptr. 281, 284, citing *Shively v. Stewart* (1966) 65 Cal.2d. 475, 55 Cal.Rptr. 217; *Everett v. Gordon* (1968) 266 Cal.App.2d 667, 72 Cal.Rptr. 379.) As expressed at Code of Civil Procedure section 2017.010, the Civil Discovery Act pertains to "actions," defined in section 2016.020 to mean "a civil action and a special proceeding of a civil nature." Instead, "the courts provided a limited form of discovery in administrative proceedings, somewhat akin to discovery allowed in criminal proceedings." (*Romero v. Cal. State Labor Comm'r*, 276 Cal.App.2d at 290.) The right to discovery in criminal proceedings is very limited, and in no way analogous to the rights you request pursuant to the Civil Discovery Act.

In your request for special interrogatories you refer to a request submitted jointly by you and the Millview County Water Agency (Millview) to the hearing officer and hearing team to allow for pre-hearing discovery pursuant to the otherwise inapplicable Civil Discovery Act. In this request you assert, essentially, that you would be deprived of due process and be unable to "determine what evidence the Board's staff relied upon in making the determination that a significant portion of the Waldteufel Water Right was forfeited." (Millview et al, Request for Exemption to Procedural Requirements to Allow for Pre-Hearing Discovery Pursuant to Civil Discovery Act, Nov. 10, 2009.) This contention ignores evidence that has already been provided to you in the context of the initial complaint investigation, and upon reasonable request. Furthermore, Draft Cease and Desist Order 2009-00XX provides a substantial recitation of the facts and information upon which it was based.

At this time, the Prosecution Team has received no indication that your request for pre-hearing discovery pursuant to the Civil Discovery Act has been granted. The Prosecution Team sees no reason why the Board's procedures are not adequate in this case, and intends to provide all information on which it relied in issuing Draft Cease and Desist Order 2009-00XX by the deadline specified in the Notice of Public Hearing, pursuant to that notice and the Board's regulations. Any evidence that you have not already been provided in the context of the initial complaint investigation, or upon reasonable request, will be forthcoming with the Prosecution Team's submission of testimony and evidence pursuant to the Notice of Public Hearing.

One other point you raise in your request to the hearing team is worth addressing. In claiming that the Civil Discovery Act should be applicable to this administrative adjudication, you repeatedly refer to the Waldteufel Right as a "vested property right." The California courts have long recognized in the context of water rights that "Title to the right does not vest until the appropriation is completed." (Hutchins, *The California Law of Water Rights* (1956), p. 88, citing *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282.) Put another way, "The right to the water, or water right, as it is commonly called, is only acquired by an actual appropriation and use of the water. (*Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. at 310.) Whether your clients have in fact put the claimed amount of water to beneficial use is an issue to be decided at hearing, and it is not sufficient for purposes of your request for pre-hearing discovery to treat this issue as already decided.

Sincerely,



David Rose
Staff Counsel

cc: See next page

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