



State Water Resources Control Board

VIA ELECTRONIC MAIL

September 19, 2011

To: Enclosed Service List

Ladies and Gentlemen:

DRAFT ORDER ISSUING A CEASE AND DESIST ORDER AGAINST MILLVIEW COUNTY WATER DISTRICT TO PREVENT THE THREATENED UNAUTHORIZED DIVERSION AND USE OF WATER – RUSSIAN RIVER IN MENDOCINO COUNTY

Enclosed is draft order in which the State Water Resources Control Board (State Water Board) issues a cease and desist order (CDO) to Millview County Water District to prevent the threatened unauthorized diversion and use of water. This order is tentatively scheduled for consideration by the State Water Board at its regularly scheduled October 18, 2011 meeting. The State Water Board will issue a public notice of this meeting at least ten days in advance.

All interested persons and parties to the proceeding will have the opportunity to comment on the draft order at the State Water Board meeting. Comments should be limited to the general acceptability of the draft order or possible technical corrections. Parties may not introduce evidence at the State Water Board meeting.

Interested persons and parties are encouraged to submit their comments in writing. In order to be fully considered, written comments concerning the draft order must be received by the State Water Board by **12 Noon, Monday, October 3, 2011.**

Written comments are to be addressed and submitted to:

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

You may also submit your comments to Ms. Townsend by fax at (916) 341-5620, by email at commentletters@waterboards.ca.gov, or by hand delivery to the following location:

Jeanine Townsend, Clerk to the Board
Executive Office
State Water Resources Control Board
Cal/EPA Headquarters
1001 "I" Street, 24th Floor
Sacramento, CA

Couriers delivering comments must check in with lobby security and have them contact the Executive Office on the 24th floor at (916) 341-5600.

Please include the subject line, "**COMMENT LETTER – 10/18/11 BOARD MEETING: Millview CDO.**" Any faxed or emailed items must be followed by a mailed or delivered hard copy with an original signature.

If you have any questions, please contact me at (916) 341-5359 or by e-mail at emona@waterboards.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Ernest Mona". The signature is fluid and cursive.

Ernest Mona
Hearings Unit
Hearings & Special Programs Section
Division of Water Rights

Enclosures: Service List
Draft Order

MAILING SERVICE LIST
(September 19, 2011)

In the Matter of the Threat of Unauthorized Diversion and Use of Water
by Thomas Hill, Steven Gomes, and Millview County Water District

PARTICIPANT - PARTIES

THOMAS HILL AND STEVE GOMES
c/o Jared Carter, Brian Carter
and Matisse Knight
Carter & Monsen, LLP
444 North State Street
Ukiah, CA 95482
jaredcarter@pacific.net
bcarter@pacific.net
mknight@pacific.net

DIVISION OF WATER RIGHTS
PROSECUTION TEAM
c/o David Rose
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
DRose@waterboards.ca.gov

SONOMA COUNTY WATER AGENCY
c/o Alan B. Lilly
Bartkiewicz, Kronick & Shanahan, P.C.
1011 22nd Street
Sacramento, CA 95816-4907
abl@bkslawfirm.com

MILLVIEW COUNTY WATER DISTRICT
c/o Christopher J. Neary, Counsel
110 S. Main Street, Suite C
Willits, CA 95490
cjneary@pacific.net
jennifer_m_obrien@yahoo.com

PARTICIPANTS – POLICY STATEMENT ONLY

CALIFORNIA DEPARTMENT OF FISH AND
GAME
c/o Regional Manager
Northern Region
601 Locust Street
Redding, CA 96001
jarnold@dfg.ca.gov

MENDOCINO COUNTY RUSSIAN RIVER
FLOOD CONTROL AND WATER
CONSERVATION IMPROVEMENT DISTRICT
c/o Marc Del Piero, Counsel
4062 El Bosque Drive
Pebble Beach, CA. 93953-3011
mjdelpiero@aol.com

INTERESTED PARTIES

Lee Howard
3900 Parducci Road
Ukiah, CA 95482
lohoward@sonic.net

Michael R. Woods
18880 Carrieger Rd.
Sonoma, CA 95476
mwoods@mrwlawcorp.com

DRAFT – September 19, 2011

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

ORDER 2011-00XX

In the Matter of the Threat of Unauthorized Diversion and Use of Water
by Thomas Hill, Steven Gomes, and
Millview County Water District

Participants

Water Rights Prosecution Team
Thomas Hill, Steven Gomes, and
Millview County Water District
Sonoma County Water Agency

Interested Parties

Mendocino County Russian River Flood Control and Water Conservation Improvement District
California Department of Fish and Game

Source: Russian River and Russian River Underflow

County: Mendocino County

CEASE AND DESIST ORDER

TABLE OF CONTENTS

- 1.0 INTRODUCTION
- 2.0 PROCEDURAL AND FACTUAL BACKGROUND
 - 2.1 Complaint Investigation
 - 2.2 Litigation
 - 2.3 Notice of Proposed CDO
 - 2.4 Evidentiary Hearing
- 3.0 LEGAL BACKGROUND
 - 3.1 Riparian Water Rights
 - 3.2 Appropriative Water Rights
 - 3.3 The Reasonable Use Doctrine
 - 3.4 Relationship Between Riparian and Appropriative Rights
 - 3.5 Forfeiture of Water Rights
 - 3.6 Cease and Desist Authority for Water Right Violations
- 4.0 HISTORY OF THE WALDTEUFEL PRE-1914 APPROPRIATIVE CLAIM OF RIGHT
- 5.0 DISCUSSION
 - 5.1 The State Water Board Has Authority to Determine the Validity and Extent of the Waldteufel Claim of Right to the Extent Necessary to Decide Whether a Threat of Unauthorized Diversion Exists
 - 5.1.1 The *North Kern* Case Does Not Support Millview and Messrs. Hill and Gomes's Contention Regarding the State Water Board's Jurisdiction
 - 5.1.2 The Board's Determination Concerning Its Jurisdiction Does Not Amount to Adoption of an Illegal New Policy
 - 5.2 The Validity and Extent of the Waldteufel Claim of Right
 - 5.2.1 No Appropriative Right Could Have Been Developed Because Water Was Used Consistent with a Riparian Right
 - 5.2.2 Perfection of the Waldteufel Claim of Right
 - 5.2.3 Partial Forfeiture of the Waldteufel Claim of Right
 - 5.2.3.1 The *North Kern* Case Does Not Preclude a Finding of Forfeiture
 - 5.2.3.2 Non-use During the Forfeiture Period Was Not Due to a Lack of Water Availability
 - 5.2.3.3 The Prosecution Team Met Its Burden of Proof

DRAFT – September 19, 2011

5.2.3.4 Policy Considerations Favor a Determination that the Waldteufel Claim of Right Has Been Forfeited

5.3 Unauthorized Diversion and Use Under the Waldteufel Claim of Right

5.3.1 Millview’s Diversion and Use Has Exceeded the Scope of the Right

5.3.2 Increased Diversion and Use Is Likely to Have Resulted in Injury

5.4 The Board Has Afforded Millview and Messrs Hill and Gomes Due Process of Law

6.0 CONCLUSION

ORDER

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

ORDER 2011-00XX

In the Matter of the Threat of Unauthorized Diversion and Use of Water
by Thomas Hill, Steven Gomes, and
Millview County Water District

Participants

Water Rights Prosecution Team¹
Thomas Hill, Steven Gomes, and
Millview County Water District
Sonoma County Water Agency

Interested Parties

Mendocino County Russian River Flood Control and Water Conservation Improvement District
California Department of Fish and Game

Source: Russian River and Russian River Underflow

County: Mendocino County

CEASE AND DESIST ORDER

BY THE BOARD:

1.0 INTRODUCTION

By this order, the State Water Resources Control Board (State Water Board or Board) requires Millview County Water District (Millview) to cease and desist the threatened unauthorized diversion of water under a claimed pre-1914 appropriative right, referred to herein as the Waldteufel claim of right. We find that, to the extent that an appropriative right could have been developed, the right to divert more than approximately 243 acre-feet per annum (afa) was not perfected, and the right to divert more than 15 afa between April and September has been forfeited for non-use.

¹ The Water Rights prosecutorial team members included: (1) David Rose, Staff Counsel; (2) Charles Rich, Senior Water Resource Control Engineer; (3) John O'Hagan, Enforcement Section Manager; and (4) James Kassel, Assistant Deputy Director for Water Rights.

DRAFT – September 19, 2011

It is uncertain whether a pre-1914 right has been perfected at all. The hearing record suggests that the diversion and use that occurred on the property subject to the Waldteufel claim of right was authorized under riparian right to the West Fork of the Russian River, which would indicate that no pre-1914 right has been perfected. But a ruling on this issue appears to be outside of the issues fairly raised by the Hearing Notice and Proposed Cease and Desist Order (CDO) issued by the Division of Water Rights. The notice and proposed CDO raise issues concerning the nature and extent of the Waldteufel claim of right, including whether a pre-1914 right had been perfected and not forfeited for non-use in an amount greater than 15 acre-feet per year. They did not put the parties on notice that it could be decided that no pre-1914 was ever perfected -- even for an amount of 15 acre-feet per year or less. Because the parties were not on notice that these proceedings might include this issue, the parties have not had an opportunity to present evidence as to whether the diversion and use would have been authorized under riparian right, and we do not know what evidence they might have presented. Accordingly, this order is based on the extent to which a pre-1914 right could have been perfected, and has not been forfeited for non-use, assuming that a pre-1914 right could have been perfected by the diversion and use established in the hearing record.

Historically, water was used under the Waldteufel claim of right for purposes of irrigating crops on a 34-acre parcel of land located adjacent to the West Fork of the Russian River. Since acquiring an interest in the Waldteufel claim of right in 2002, Millview has expanded the place of use from the 34-acre parcel to Millview's entire service area, which is 8 to 10 square miles, and has relocated the point of diversion downstream to a point below the confluence of the West and East Forks of the Russian River. Millview has taken the position that it may divert approximately 1,450 acre-feet per annum (afa) under the right. Millview has supplied water to its customers under the Waldteufel claim of right and other rights, year-round, to meet residential, commercial, industrial and irrigation water demands within its service area.

The purpose of use, place of use, and point of diversion of an appropriative right may be changed, provided that the changes do not amount to the initiation of a new right, or result in injury to other legal users. In this case, Millview has exceeded the scope of the Waldteufel claim of right by diverting more water than authorized under the right, diverting water outside the authorized season of diversion, and diverting water when it was not available from the West Fork of the Russian River. Millview's diversion and use outside the scope of the right is

unauthorized and constitutes a trespass against the State. In addition, Millview's increased diversion and use under the right is likely to have resulted in injury to other legal users.

In the absence of enforcement action, Millview is likely to continue its unauthorized diversion and use under the Waldteufel claim of right. Accordingly, issuance of this cease and desist order is warranted. Because Millview was not on notice that the validity of the Waldteufel claim of right in its entirety was at issue, this order does not require Millview to cease its diversion under the right altogether. Instead, this order requires Millview to cease its diversion and use of water in a manner inconsistent with the parameters of the right, assuming a valid right exists. In order to ensure compliance with this order, we also will require Millview to maintain a record of its diversions under the Waldteufel claim of right, as well its diversions under the other water rights and the water supply contract that Millview holds.

2.0 PROCEDURAL AND FACTUAL BACKGROUND

2.1 Complaint Investigation

By letter dated February 27, 2006, Lee O. Howard filed an administrative complaint with the State Water Board, Division of Water Rights. (Millview Ex. 11.) The complaint alleged that Millview was supplying water to a subdivision with 350 homes pursuant to the Waldteufel claim of right. In his complaint, Mr. Howard alleged that the right no longer existed because it had not been used continuously since 1914. Mr. Howard also stated that there had been a change in the purpose of use, from irrigation to domestic supply, and a change in the point of diversion, from a point on the West Fork of the Russian River to a point 400 feet downstream on the East Fork of the Russian River.

In response to the complaint, staff from the Complaint Unit within the Division of Water Rights conducted an investigation. Staff prepared a report, dated June 1, 2007, which documented their investigation and summarized their findings and recommendations. (Prosecution Team (PT) Ex. 10.) As described in the staff report, the subdivision identified in Mr. Howard's complaint was developed after two individuals, Thomas P. Hill and Steven L. Gomes (Messrs. Hill and Gomes), acquired a parcel of land comprised of approximately 32 acres from the Robert Wood Living Trust in 1998. (*Id.* at p. 1; PT Ex. 7.) The parcel is located adjacent to the West Fork of the Russian River, immediately south of Lake Mendocino Drive, and upstream of the confluence of the West and East Forks of the Russian River. (PT Exhibit 10, pp. 1, 4.) In 2001,

DRAFT – September 19, 2011

Messrs. Hill and Gomes sold most of the parcel of land to Creekbridge Homes L.P., which constructed 125 homes on the property. (*Id.* at p. 1.)

When Messrs. Hill and Gomes acquired the parcel from the Robert Wood Living Trust, they also acquired all water rights associated with the parcel, including the Waldteufel claim of right. (PT Ex. 10, p. 1; PT Ex. 7.) This right, which is discussed in greater detail in section 4.0, below, is referred to as the Waldteufel right because it was initiated by J.A. Waldteufel, who recorded a notice of appropriation on March 24, 1914. (PT Ex. 10, p. 1, Millview Ex. 2.) The notice claimed the right to divert 100 miners inches under a 4-inch pressure, or 2 cubic feet per second (cfs), from the West Fork of the Russian River for domestic and culinary purposes and for irrigation. (Millview Ex. 2.)

In 2002, Messrs. Hill and Gomes entered into an agreement with Millview, whereby the Waldteufel claim of right was transferred to Millview for four years, except for 125,000 gallons of water per day, which was reserved by Messrs. Hill and Gomes, and Millview acquired an option to purchase the right. (PT Ex. 9.) Subsequently, Millview exercised its option to purchase all of the right from Messrs. Hill and Gomes. (Millview Ex. 14, pp. 3-4.)² Millview supplies water to the Creekbridge Homes subdivision pursuant to the claim of right. (PT Ex. 10, pp. 3-5.)³ Millview's point of diversion is located on the mainstem of the Russian River, below the confluence of the West and East Forks of the Russian River. (*Id.* at p. 4.) In 2006, the Creekbridge Homes Subdivision was annexed into Millview's service area. (R.T. at pp. 192:15-25, 193:1-10.)

The June 1, 2007 staff report evaluated the validity of the Waldteufel claim of right. After examining the information available concerning the history of the claim of right, including the history of water use on the 32-acre parcel acquired by Messrs. Hill and Gomes, staff concluded that the claim of right had a valid basis, but that the extent of the right was substantially less than the full face value of the claim set forth in the 1914 notice of appropriation. (PT Ex. 10,

² It is unclear whether Messrs. Hill and Gomes transferred all or a portion of the 125,000 gallon per day reservation to Creekbridge Homes L.P., or to individual homeowners within the subdivision, or whether Messrs. Hill and Gomes sold the reservation to Millview. (See PT Ex. 3; R.T. at pp. 169-171.) Millview has taken the position, however, that Millview acquired the entire claim of right. (See PT Ex. 10, p. 5; R.T. at p. 171.)

³ Although Messrs. Hill and Gomes retained a portion of the right, at least initially, Millview has diverted all of the water used under the right since it was acquired by Messrs. Hill and Gomes. Accordingly, and for ease of reference, we refer in this order only to Millview's diversion and use under the Waldteufel claim of right.

p. 16.) Specifically, staff concluded that the right had been forfeited in part due to non-use, “to the point where the maximum authorized diversion is 15 acre-feet per annum at a maximum instantaneous rate not to exceed 500 gpm or 1.1 cfs” (*Ibid.*) Staff did not recommend enforcement action against Millview, however, because Millview also diverts water from the Russian River pursuant to a water right permit, a water right license, and a water supply contract, and Millview’s diversions had not exceeded the total amount of water Millview is authorized to divert under its combined rights. (PT Ex. 10, p. 17; PT Ex. 1, p. 13.)

2.2 Litigation

Millview and Messrs. Hill and Gomes submitted comments to the Complaint Unit seeking changes to the June 1, 2007 staff report. (Messrs. Hill & Gomes Ex. N; Messrs. Hill & Gomes Ex. O.) When the report remained unchanged, they filed a petition, seeking reconsideration of the report by the State Water Board pursuant to Water Code section 1122. (Messrs. Hill & Gomes Ex. R.) In their comments and petition, Millview and Messrs. Hill and Gomes asserted that the report had engendered uncertainty concerning the validity of the Waldteufel right, which precluded them from completing the sale of the right from Messrs. Hill and Gomes to Millview, and placed Millview at risk if Millview were to exercise the full face value of the right.

By letter dated April 17, 2008, the Chief of the Division of Water Rights explained that the staff report was not an order or decision subject to reconsideration pursuant to section 1122. For this reason, among others, the Division Chief stated that no further action could or would be taken on the petition for reconsideration. (Messrs. Hill & Gomes Ex. S.)

Subsequently, Millview and Messrs. Hill and Gomes filed a lawsuit against the State Water Board in Mendocino County Superior Court, seeking to have the staff report set aside, or to require the State Water Board to hold a hearing and take final action on the issues raised in Mr. Howard’s complaint and addressed in the report. In an order dated January 14, 2009, the court denied the relief requested because the State Water Board had not made a final determination subject to judicial review. (Messrs. Hill & Gomes Ex. V.) The court also stated, however, that the State Water Board’s inaction had effectively clouded the validity of the Waldteufel right, frustrated the ability of Millview and Messrs. Hill and Gomes to complete a business transaction, and left them with little recourse other than to defy the State Water Board and risk the consequences. The court stated that the State Water Board should either disavow the

conclusions contained in the staff report, or “pursue a due process course to reviewable finality.” (*Id.* at p. 2.)

2.3 Notice of Proposed CDO

On April 10, 2009, the Assistant Deputy Director for Water Rights issued a notice of proposed cease and desist order to Millview and Messrs. Hill and Gomes. (Messrs. Hill & Gomes Ex. W.) The notice included a draft CDO, which if adopted would require Millview and Messrs. Hill and Gomes to restrict diversions from the Russian River or its tributaries under the Waldteufel claim of right to (1) an instantaneous rate of 1.1 cfs; (2) an annual amount of 15 acre-feet; and (3) a rate no greater than the rate of flow available from the West Fork Russian River as measured at U.S. Geological Survey (USGS) gage number 11461000. The draft CDO also would require Millview and Messrs. Hill and Gomes to maintain daily records of diversions under the Waldteufel right, Millview’s water right license (License 492, Application A003601), Millview’s water right permit (Permit 13936, Application A017587) and Millview’s water supply contract with the Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino District).

The notice of proposed CDO advised Millview and Messrs. Hill and Gomes that if they disagreed with the facts or corrective actions set forth in the draft CDO, they could request a hearing within 20 days from the date of receipt of the notice.

2.4 Evidentiary Hearing

Both Millview and Messrs. Hill and Gomes submitted timely requests for a hearing on the proposed CDO. On September 3, 2009, the State Water Board issued a notice of public hearing. The State Water Board held the hearing on January 26, 2010. The key hearing issues were as follows: 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?

Adjudicative proceedings before the State Water Board are governed by California Code of Regulations, title 23, sections 648.8, 649.6, and 760, and the statutes specified in the regulations, including applicable provisions of chapter 4.5 of the Administrative Procedure Act (commencing with Government Code section 11400) (APA). As required by the APA, the State Water Board has separated its adjudicative function from its investigative and prosecutorial

DRAFT – September 19, 2011

functions in this proceeding. During the hearing, a staff prosecution team presented the case for adopting the draft CDO. The hearing notice identified the members of the prosecution team and specified that the prosecution team would be treated like any other party to the hearing. A staff hearing team was assigned to assist the hearing officer in conducting the hearing, provide advice to the State Water Board Members, and prepare a draft order. None of the staff who were involved in the investigation of Mr. Howard's complaint or the preparation of the draft CDO were assigned to the hearing team. Like other interested persons, the prosecution team was prohibited from having ex parte communications with the members of the State Water Board and members of the hearing team regarding substantive and controversial procedural issues pertaining to the hearing. The separation of functions described above also applied to the supervisors of each team.

The following entities or individuals participated in the evidentiary portion of the hearing: the prosecution team, Millview, Messrs. Hill and Gomes, and Sonoma County Water Agency (SCWA). The Mendocino District and the California Department of Fish and Game presented non-evidentiary policy statements.

3.0 LEGAL BACKGROUND

3.1 Riparian Water Rights

This proceeding involves the two principal types of surface water rights recognized under California law: riparian rights and appropriative rights. Generally, riparian rights authorize the diversion and use of water from a stream on land that is contiguous to the stream and located within the watershed of the stream. (*Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 774-775.) Riparian rights are limited to the natural flow of the stream, and do not authorize the diversion of "foreign water" that would not be present in the stream under natural conditions. (*Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75-76.) In addition, water may not be seasonally stored under a riparian right. (*City of Lodi v. East Bay Mun. Utility Dist.* (1937) 7 Cal.2d 316, 335.)

A riparian right attaches only to the smallest parcel held under one title in the chain of title leading to the present owner. (*Pleasant Valley Canal Co. v. Borrer, supra*, 61 Cal.App.4th at pp. 774-775.) When a riparian parcel is subdivided, such that a parcel is no longer contiguous to the stream, the riparian right formerly attached to the noncontiguous parcel is lost, absent proof of intent to retain the riparian right. (*Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327,

331.) Once it has been lost, the riparian right cannot be regained by reuniting the noncontiguous and contiguous parcels under common ownership. (*Ibid.*)

Relative to other riparian rights, riparian rights are correlative. When the natural flow of a stream is insufficient to satisfy all the riparian rights to use the waters of the stream, the riparian right holders must reduce their diversions proportionately. (*Prather v. Hoberg* (1994) 24 Cal.2d 549, 560.) Relative to an appropriative right, a riparian right has a priority date based on when the riparian parcel was patented. (*Pleasant Valley Canal Co. v. Borrer, supra*, 61 Cal.App.4th at p. 774.)

3.2 Appropriative Water Rights

Appropriative rights are acquired by diverting water from a stream and applying it to beneficial use. Appropriative rights are not dependent on land ownership, and may authorize the use of water outside the watershed. (*Crandell v. Woods* (1857) 8 Cal. 136, 142; *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256, 280-281.) Unlike riparian rights, appropriative rights are not necessarily limited to the natural flow of the stream, and water may be seasonally stored under an appropriative right. (*Bloss v. Rahilly, supra*, 16 Cal.2d at pp. 75-76; *City of Lodi v. East Bay Mun. Utility Dist., supra*, 7 Cal.2d at p. 335.) The point of diversion, place of use, or purpose of use of an appropriative right may be changed, provided that the change does not amount to the initiation of a new water right, or result in injury to any other legal user of water. (Wat. Code, §§ 1701, 1702, 1706 [changes permissible subject to no injury rule]; *Senior v. Anderson* (1896) 115 Cal. 496, 501-504 [change in place of use permissible but appropriative right limited in quantity to amount of water used to irrigate original place of use].)

The maxim “first in time, first in right,” governs the relative priority of appropriative rights. The priority of an appropriative right is based on the date when the development of the right was initiated. When the flow of a stream is insufficient to satisfy all the appropriative rights to use the waters of the stream, senior appropriators are entitled to satisfy their rights in full before junior appropriators may satisfy their rights. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.)

Before December 19, 1914, the effective date of the Water Commission Act, an appropriative right could be obtained in two different ways: non-statutory and statutory. The non-statutory method entailed simply diverting water and applying it to beneficial use, after having made some

DRAFT – September 19, 2011

sort of objective manifestation of the intent to appropriate the water. (See *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 311-312.) The statutory method of obtaining a pre-1914 appropriative right entailed following the requirements of Civil Code sections 1410 through 1422, which were enacted in 1872. Civil Code section 1415 required the posting and recording of a notice that contained specified information about a proposed appropriation. Civil Code section 1416 required construction of the diversion works to be commenced within 60 days of posting the notice, and required the work to be conducted and completed with diligence.

Since December 19, 1914, obtaining a water right permit from the State Water Board (or its predecessor agency) pursuant to division 2 (commencing with section 1000) of the Water Code has been the exclusive means to acquire an appropriative water right. (Wat. Code, § 1225; *People v. Shirokow* (1980) 26 Cal.3d 301, 308-309.) Division 2 of the Water Code sets forth a comprehensive regulatory scheme designed to ensure that water rights are exercised in an orderly fashion, and that the water resources of the State are put to beneficial use to the fullest extent possible. Part 2 of division 2 (commencing with section 1200) provides for the appropriation of water. Among other things, part 2 defines water subject to appropriation (sections 1200-1203), establishes a registration program for small domestic and livestock stockpond uses (sections 1228-1229.1), authorizes the Board to act on applications for permits to appropriate water (sections 1250-1491), and authorizes the Board to issue water right licenses confirming the right to appropriate the amount of water beneficially used by permittees in accordance with their permits (sections 1600-1675.2).

Both pre-1914 and post-1914 appropriative rights are perfected by applying water to reasonable, beneficial use. The measure of the right is the amount of water actually applied to reasonable, beneficial use, not the amount of water listed in a notice of appropriation, the capacity of an appropriator's diversion works, the amount of water actually diverted, or the amount of water authorized to be diverted in a water right permit. (*Haight v. Costanich* (1920) 184 Cal. 426, 431; *Trimble v. Heller* (1913) 23 Cal.App. 436, 443-444; *Akin v. Spencer* (1937) 21 Cal.App.2d 325, 328; Wat. Code, §§ 1240, 1390, 1610.)

Appropriative rights must be developed with due diligence. (*Maeris v. Bicknell* (1857) 7 Cal. 261, 263; Wat. Code, §§ 1395, 1396, 1397; Cal. Code Regs., tit. 23, § 840.) Under the doctrine of progressive use and development, the development of an appropriative right that was initiated before December 14, 1914, may be completed after that date without obtaining a water

right permit, provided that any increase in the diversion and use of water after December 14, 1914, is within the scope of the original plan of development, and the plan is carried out with due diligence. (*Haight v. Costanich, supra*, 184 Cal. at pp. 431-433.)

3.3 The Reasonable Use Doctrine

All water rights are subject to the reasonable use doctrine set forth in Article X, section 2 of the California Constitution and Water Code sections 100-101. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351, 366-367.) Both article X, section 2 of the Constitution and Water Code section 100 establish the state policy that the water resources of the state should be put to beneficial use to the fullest extent possible. In addition, article X, section 2 and section 100 establish the following general rules:

1. Water rights are limited to the amount of water reasonably required for the beneficial use to be served.
2. Water rights do not extend to the waste of water.
3. Water rights do not extend to the unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.

(See *Peabody v. Vallejo, supra*, 2 Cal.2d. at p. 367.)

3.4 Relationship Between Riparian and Appropriative Rights

As a general rule, it is not possible for a riparian water right holder to develop an overlapping appropriative right that authorizes the diversion and use of the same amount of water as the riparian right, and is subject to the same limitations. Water is not subject to appropriation to the extent that it may be used pursuant to a riparian right. (*Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 252 [only water in excess of that required to satisfy riparian rights subject to appropriation]; Wat. Code, § 1201 [defining unappropriated water to exclude water reasonably needed for useful and beneficial purposes on riparian lands]; see also *Crane v. Stevinson* (1936) 5 Cal.2d 387, 398 [plaintiff in quiet title action failed to prove appropriative claim of right by showing, among other things, that water was diverted as an appropriator and not in the exercise of plaintiff's rights as riparian owner].) Accordingly, a riparian right holder cannot appropriate water by diverting and using it consistent with the right holder's riparian right.

This conclusion is further supported by the provision of Article X, section 2 of the California Constitution that limits water rights to the amount of water reasonably required for the beneficial use to be served. If a beneficial use is or may be served through the exercise of a riparian right, then no additional amount of water is reasonably required to serve that use, and therefore an appropriative right to serve the same use cannot be obtained consistent with article X, section 2. (See also Hutchins, *The California Law of Water Rights* (1956) p. 209 [“[T]he privilege of claiming dual water rights cannot be made a vehicle for acquiring the right to more water than can be put to reasonable beneficial use . . .”].)

A riparian right holder may obtain an appropriative right, however, to the extent that the appropriative right would authorize a use that the riparian right does not authorize. (See, e.g., *City of Lodi v. East Bay Mun. Utility Dist.*, *supra*, 7 Cal.2d at p. 335 [riparian landholder needed appropriative right in order to store water]; *Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at pp. 774-775 [appropriative right used on non-riparian lands].) Similarly, it may be possible to hold both an appropriative and a riparian right if the appropriative right confers a higher priority of right. (*Pleasant Valley Canal Co. v. Borrer*, *supra*, at p. 774.)

3.5 Forfeiture of Water Rights

Case law has established that pre-1914 appropriative rights are subject to forfeiture in whole or in part if water is not used under the right for a five-year period. (*Smith v. Hawkins* (1898) 110 Cal. 122, 1127-128; *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 582.) Similarly, the Water Code authorizes the State Water Board to revoke water right permits and licenses for nonuse. (Wat. Code, §§ 1390, 1410, 1675.) In addition, Water Code section 1240 provides that an appropriative right ceases when the right ceases to be used, and Water Code section 1241 provides that appropriative rights are subject to forfeiture for failure “to use beneficially all or any part of the water claimed . . . for which a right of use has vested . . . for a period of five years . . .” Section 1241 provides further that unused water shall revert to the public and be regarded as unappropriated water “upon a finding by the Board following notice to the permittee, licensee, or [holder of a small domestic use or stockpond right] and a public hearing if requested by the permittee, licensee, [or holder of the small domestic use or stockpond right].”⁴

⁴ It is unclear whether the section of the Water Commission Act later codified as section 1241 of the Water Code was originally intended to apply to both pre-1914 and post-1914 appropriative rights, or just

DRAFT – September 19, 2011

The purpose of both the forfeiture doctrine and the due diligence requirement, discussed in section 3.2, above, is to ensure that appropriators do not hold water rights in “cold storage,” thereby preventing water resources from being put to beneficial use. (See *Smith v. Hawkin, supra*, 110 Cal. at p. 127 [“Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the water therein, while failing to apply the same to some useful or beneficial purpose.”]; see also State Water Board Order WR 2008-0045, p. 3 [discussing the purpose of the due diligence requirement].) Accordingly, the forfeiture doctrine and the due diligence requirement are in furtherance of the fundamental public policy embodied in article X, section 2 of the California Constitution and Water Code section 100, which require the water resources of the State to be put to beneficial use to the fullest extent of which they are capable, and limit all water rights to the amount of water reasonably required for the beneficial use to be served. (See *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 577, 600 [stating that allowing a diverter to freeze an entitlement to appropriated water, regardless of nonuse, would contravene the important public policy embodied in article X, section 2 of the California Constitution].)

Unlike appropriative rights, riparian rights are not lost through non-use. (*In re Waters of Long Valley Creek Stream System* (1979) 23 Cal.3d 339, 347, 358.) When the Board conducts an adjudication of all the rights to a stream system, however, as authorized by Water Code sections 2500-2868, the Board may subordinate the priority of unexercised riparian rights relative to otherwise junior water rights to the extent reasonably necessary to promote the State’s interest in fostering the most reasonable and beneficial use of scarce water resources. (*Id.* at pp. 358-359.)

to post-1914 appropriative rights. (See Code Com. Notes, 68 West Ann. Wat. Code (2009 ed.) foll. § 1241, p. 107; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 933-934; *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 566, fn. 5.) It is clear, however, that in its current form the Water Code is intended to create a uniform five-year forfeiture period for both pre-1914 and post-1914 appropriative rights. (See Governor’s Commission to Review California Water Rights Law, Final Report (1978) pp. 60, 71; Stats. 1980, ch. 1100, Stats. 1980, ch. 933, § 5, p. 2955; see generally Sawyer, *Improving Efficiency Incrementally: The Governor’s Commission Attacks Waste and Unreasonable Use* (2005) 36 McGeorge L. Rev. 1, 222-225.)

3.6 Cease and Desist Authority for Water Right Violations

The State Water Board may issue a CDO in response to a violation or threatened violation of (1) the prohibition against the unauthorized diversion or use of water, (2) a term or condition of a water right permit, license, certification, or registration, or (3) a State Water Board order or decision issued pursuant to specified provisions of the Water Code. (Wat. Code, § 1831, subs. (a) & (d)(1-3).) The State Water Board may require compliance immediately or the State Water Board may set a time schedule for compliance. (*Id.*, § 1831, subd. (b).)

Before issuing a CDO, the Board must provide notice and an opportunity for hearing to the person allegedly engaged in the violation. (Wat. Code, §§ 1831, subd. (c), 1834, subd. (a).) The notice must contain “a statement of facts and information that would tend to show” the alleged violation. (*Id.*, § 1834, subd. (a).)

Water Code section 1845, subdivision (b) provides that any person who does not comply with a CDO may be liable for an amount not to exceed one thousand dollars for each day in which the violation occurred. In addition to imposing administrative civil liability pursuant to this provision, the State Water Board may request the Attorney General to petition the superior court for injunctive relief. (*Id.*, § 1845, subd. (a).)

4.0 HISTORY OF THE WALDTEUFEL PRE-1914 APPROPRIATIVE CLAIM OF RIGHT

As described briefly in section 2.1, above, J.A. Waldteufel recorded a notice of appropriation on March 24, 1914, pursuant to Civil Code section 1415. (Millview Ex. 2.) The notice claimed the right to divert 100 miners inches under a 4-inch pressure from the West Fork of the Russian River “for domestic and culinary purposes upon the lands owned by me, hereinafter described, contiguous to said River and for the irrigation of said lands” (*Ibid.*) The notice provided that “the place of intended use is on Lot #103 of Healeys survey and Map of Yokayo Rancho” (*Ibid.*) The notice also provided that J.A. Waldteufel intended to divert the water using an electric motor and six inch centrifugal pump. (*Ibid.*)

According to the expert witness for the prosecution team, 100 miners inches is equivalent to 2 cfs. (R.T. at p. 120.) Millview and Messrs. Hill and Gomes have taken the position that approximately 1,450 afa may be diverted and used under the Waldteufel claim of right. (PT Ex. 9; R.T. at p. 172.)

DRAFT – September 19, 2011

According to a map submitted by Millview, Lot 103 of the Yokayo Rancho was a 165-acre parcel located on the west side of the West Fork of the Russian River to the north and south of what is now Lake Mendocino Drive. (PT Ex. 1, p. 4; PT Ex. 3 [Millview submittal with map of Lot 103 attached]; R.T. at pp. 120-121.) The administrative record also includes a copy of a deed dated April 4, 1913, that conveyed a 33.88-acre portion of Lot 103 of the Yokayo Rancho from C. J. Chandon and Mollie Chandon to J. A. Waldteufel. (Millview Ex. 1.) This is the same parcel that was acquired by Messrs. Hill and Gomes in 1998. (Compare Millview Ex. 1 [1913 deed] to PT Ex. 7 [1998 deed].) The record does not contain any evidence that J.A. Waldteufel ever owned more than the 33.88-acre portion of Lot 103 that he acquired from the Chandons in 1913. Accordingly, the record supports the conclusion that the 33.88-acre parcel was the intended place of use for the Waldteufel claim of right.

Both the prosecution team and Millview appear to have assumed that J.A. Waldteufel owned all of Lot 103, and therefore the entire 165-acre lot was the intended place of use for the Waldteufel claim of right. The prosecution team and Millview may have based this assumption on the notice of appropriation, but the language of the notice is ambiguous. The notice claimed the right to use water “upon the lands owned by me,” and provided that the intended place of use was “on Lot #103.” This language can be interpreted to mean that the intended place of use was on all of Lot #103, as the prosecution team and Millview assumed, or just on that portion of Lot #103 that was owned by J.A. Waldteufel. On cross-examination, the witness for the prosecution team admitted that he had no information to support his assumption that J.A. Waldteufel owned all of Lot 103. (R.T. at p. 121.) Given this lack of evidence, the better interpretation of the notice is that the intended place of use was the 33.88-acre parcel that J.A. Waldteufel owned.

The 33.88-acre parcel changed hands many times between 1913, when J.A. Waldteufel acquired it, and 1998, when it was acquired by Messrs. Hill and Gomes. (PT Ex. 4.) Presumably, the Waldteufel claim of right was conveyed along with the land. The administrative record contains evidence that water was diverted from the West Fork of the Russian River for purposes of irrigation on the parcel during this period, but the record contains very little evidence quantifying how much water was used, as discussed in greater detail in section 5.2.2, below.

DRAFT – September 19, 2011

Lester Wood and Bertha Wood acquired the Waldteufel parcel in 1945. (PT Ex. 4.) In 1965, a new law was enacted which required most diverters to file a statement of water diversion and use with the State Water Board. (See Wat. Code, §§ 5100-5107.) Pursuant to this new requirement, Lester Wood filed statement of water diversion and use number S000272 in 1967. (PT Ex. 6.) Lester Wood also filed supplemental statements for the following periods: 1970-1972, 1979-1981, and 1985-1987. (*Ibid.*) As discussed in section 5.2.3, below, these statements are evidence that water use under the Waldteufel claim of right did not exceed 15 afa during the irrigation season during the period between 1967 and 1987.

Robert Wood acquired the Waldteufel parcel from Lester and Bertha Wood in 1988, and sold it to Messrs. Hill and Gomes in 1998. Robert Wood did not file any supplemental statements of diversion and use, and the record does not contain any reliable evidence concerning whether or to what extent Robert Wood diverted or used water under the Waldteufel claim of right between 1988 and 1998.⁵

Water use under the right changed after Messrs. Hill and Gomes sold most of the Waldteufel parcel to Creekbridge Homes in 2001 and leased most of the water right to Millview in 2002. As stated earlier, the point of diversion was moved approximately 400 feet downstream to Millview's existing point of diversion below the confluence of the West Fork and the East Fork of the Russian River. The purpose of use changed from irrigation to domestic and municipal use. The place of use also changed. Between 2001 and 2004, the parties claim to have used water under the right solely to supply the Creekbridge Homes subdivision, which is located on the former Waldteufel parcel. Subsequently, however, Millview claims to have used water under the right elsewhere in its service area. (R.T. at pp. 173-180, 194.) Millview provides water diverted from the Russian River to approximately 1,500 water service connections within its service area, which consists of an 8 to 10 square mile unincorporated area north of Ukiah in Mendocino County, to meet residential, commercial, industrial and irrigation water demands. (Millview Ex. 14, p. 1; SCWA Ex. 5; R.T. at p. 168.) Millview also supplies water to the Calpella County Water District. (Millview Ex. 14.)

⁵ The administrative record contains the written declaration of Floyd Lawrence, who grew up near the Waldteufel parcel. In his declaration, Mr. Lawrence stated that the parcel was in agricultural production until construction began on the new housing development. (PT Ex. 5, p. 35.) But Mr. Lawrence's declaration was admitted into the record subject to a hearsay objection, as explained below.

As discussed in greater detail in section 5.3, below, water use under the Waldteufel claim of right increased significantly after 2001, but it is unclear exactly how much water has been used under the right since that time. Creekbridge Homes filed a single statement of water diversion and use, projecting that it would use 21.85 acre-feet in 2001 for purposes of irrigation, construction dust control, and domestic use. Messrs. Hill and Gomes filed a supplemental statement for the 2002-2004 period, claiming to have used 15.11 acre-feet in 2002, 31.73 acre-feet in 2003, and 43.84 acre-feet in 2004 for domestic use. (PT Ex. 6; PT Ex. 10, p. 12.) Millview also claims to have used water under the right since 2001. Millview did not file any supplement statements, but according to its accounting sheets, the amount used by Millview ranged from 3.76 acre-feet in 2001 to 1,174.75 acre-feet in 2005. (PT Ex. 1, p. 11; PT Ex. 11.)

5.0 DISCUSSION

5.1 The State Water Board Has Authority to Determine the Validity and Extent of the Waldteufel Claim of Right to the Extent Necessary to Decide Whether a Threat of Unauthorized Diversion Exists

Millview and Messrs. Hill and Gomes contend that the State Water Board does not have jurisdiction to determine the validity of a pre-1914 appropriative right, including whether a pre-1914 right has been forfeited for non-use. In support of their contention, they argue that Water Code sections 1240 and 1241 do not apply to pre-1914 rights. In addition, they argue that, by their terms, Water Code sections 1052 and 1831 do not authorize the Board to issue a cease and desist order against a diverter who claims to hold a pre-1914 right because pre-1914 rights are not subject to regulation pursuant to division 2 of the Water Code. Millview and Messrs. Hill and Gomes also cite to *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, *supra*, 147 Cal.App.4th 555 in support of the argument that any challenge to a pre-1914 claim of right on the grounds of forfeiture must be brought in court through a quiet title or declaratory relief action by a water right holder with a competing claim of right. Similarly, Millview cites to *Smith v. Hawkins*, *supra*, 110 Cal. 122 in support of the argument that pre-1914 rights are subject to dispossession only through the doctrines of prescription, adverse possession, or abandonment, all of which are within the exclusive jurisdiction of the courts.

The contention that the State Water Board does not have authority to evaluate the validity of a pre-1914 claim of right is inconsistent with the Board's statutory authority to investigate and take enforcement action against the unauthorized diversion or use of water. Water Code section 1051 authorizes the Board to investigate, take testimony, and ascertain whether water

DRAFT – September 19, 2011

attempted to be appropriated is appropriated in accordance with state law. (See also Wat. Code, § 183 [authorizing the Board to hold hearings and conduct investigations to the extent necessary to carry out the powers vested in it].) If the Board finds that a person has diverted or used water without authorization, the Board may impose administrative civil liability in an amount not to exceed five hundred dollars for each day during which the unauthorized diversion or use occurred. (Wat. Code, § 1052, subs. (a) & (b).) As discussed in section 3.6, above, the Board also has authority to issue a cease and desist order in response to a violation or threatened violation of the prohibition against the unauthorized diversion or use of water. (Wat. Code, § 1831, subd. (d)(1).) The Legislature has directed the Board to take vigorous action to prevent the unlawful diversion of water. (*Id.* § 1825.)

The State Water Board's authority to evaluate the validity of a pre-1914 appropriative claim of right, including whether the right has been forfeited in whole or in part, is inherent to the Board's statutory authority to investigate and take enforcement action in response to the actual or threatened unauthorized diversion or use of water. In cases where a diversion is not authorized by a water right permit or license, but the diverter claims to hold a pre-1914 appropriative right, ascertaining whether the water diverted in accordance with State law, as expressly authorized by Water Code section 1051, necessarily will entail evaluating and deciding whether the pre-1914 appropriative claim of right is valid. Similarly, taking enforcement action as authorized by Water Code section 1052 or 1831 necessarily will entail evaluating any pre-1914 appropriative claim of right advanced by a diverter. Otherwise, the mere assertion of a pre-1914 appropriative claim of right, without providing information to support such an assertion, would effectively thwart the Board's ability to exercise its enforcement authority, and to fulfill its statutory mandate to prevent illegal diversions. (See Wat. Code, § 1825 [directing State Water Board to take vigorous action to prevent the unlawful diversion of water].) In this case, the State Water Board must evaluate whether and to what extent the Waldteufel claim of right is valid in order to determine whether Millview's diversions under the claim of right are unauthorized, and therefore subject to enforcement action.

The argument that, by their terms, Water Code sections 1052 and 1831 do not authorize the State Water Board to issue a cease and desist order against a diverter who claims to hold a pre-1914 appropriative right lacks merit as well. Section 1831, subdivision (d)(1) authorizes the Board to issue a cease and desist order in response to a violation or threatened violation of the prohibition set forth in section 1052 against the unauthorized diversion or use of water "subject

DRAFT – September 19, 2011

to [division 2 of the Water Code (commencing with section 1000)].” Section 1831, subdivision (e) provides that the Board’s authority to issue a cease and desist order does not authorize the Board to regulate the diversion or use of water “not otherwise subject to regulation of the board under [part 2 of the Water Code (commencing with section 1200)].” Millview and Messrs. Hill and Gomes argue that pre-1914 appropriative rights are not subject to regulation under division 2 of the Water Code (which includes part 2), and therefore Water Code sections 1052 and 1831 do not authorize the State Water Board to issue a cease and desist order against a diverter who claims to hold a pre-1914 appropriative right.

This argument is flawed because it begs the question, namely whether a given diversion claimed to be authorized by a pre-1914 appropriative right is in fact authorized by a valid pre-1914 appropriative right. If it is not, the diversion is unauthorized, and therefore subject to enforcement action. Millview and Messrs. Hill and Gomes are correct that the diversion of water consistent with a valid pre-1914 appropriative right would not constitute an unauthorized diversion of water subject to division 2 of the Water Code. (See Wat. Code, §§ 1201, 1202.) Accordingly, the diversion of water as authorized under a valid pre-1914 appropriative right would not be subject to enforcement pursuant to Water Code sections 1052 and 1831, subd. (d)(1). But if the claimed pre-1914 appropriative right in question is not valid, then the diversion of water under the claimed right would constitute an unauthorized diversion of water subject to division 2 of the Water Code, and the diversion would be subject to enforcement pursuant to Water Code sections 1052 and 1831, subdivision (d)(1). Similarly, a diversion would be unauthorized and subject to enforcement action to the extent that it exceeds the amount of water that may be diverted under a valid right, or is otherwise inconsistent with the parameters of the right.⁶

Essentially, Millview and Messrs. Hill and Gomes claim that Millview’s diversions are authorized by the Waldteufel claim of right, and argue on this basis that the State Water Board lacks the authority to decide whether Millview’s diversions under the right are authorized or not. The U.S.

⁶ Another problem with Millview and Messrs. Hill and Gomes’s interpretation of Water Code section 1831 is that their assertion that pre-1914 appropriative rights are not subject to regulation under division 2 is overbroad and incorrect. Although water diverted and used under valid pre-1914 appropriative rights is not subject to appropriation pursuant to part 2 of the Water Code (see Wat. Code, §§ 1201, 1202), pre-1914 appropriative rights are not completely unregulated under division 2. (See, e.g., Wat. Code, §§ 1707 [authorizing the Board to approve a petition to change any type of right for purposes of protecting instream, beneficial uses], 2500-2900 [authorizing the Board to determine all the rights to a stream system], 5101 [requiring all diverters to file statements of water diversion and use, unless certain exceptions apply].)

DRAFT – September 19, 2011

Supreme Court rejected a similar argument that an entity can avoid an agency’s jurisdiction by claiming to be exempt from the agency’s jurisdiction in *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609. In that case, the Court rejected the contention that the Food and Drug Administration (FDA) lacked jurisdiction to determine the validity of a manufacturer’s claim that a certain drug was not a “new drug,” within the meaning of the Federal Food, Drug, and Cosmetic Act, and therefore the manufacturer was exempt from the Act’s requirement to submit substantial evidence of the drug’s effectiveness to the FDA, and obtain FDA approval of a new drug application (NDA). (*Id.* at pp. 623-627.) The Court held:

It is clear to us that FDA has power to determine whether particular drugs require an approved NDA in order to be sold to the public. FDA is indeed the administrative agency selected by Congress to administer the Act, and it cannot administer the Act intelligently and rationally unless it has authority to determine what drugs are ‘new drugs’ . . . and whether they are exempt from the efficacy requirements

(*Id.* at p. 624.) Likewise, the State Water Board cannot administer the water right permit system effectively, or carry out its statutory mandate to prevent the unlawful diversion of water, unless the Board has authority to decide the validity of a diverter’s claim to be exempt from the permitting system. In many cases, such as this one, this will entail evaluating the validity of a diverter’s pre-1914 appropriative claim of right.

The Court of Appeal’s holding in *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89 lends further support to the conclusion that the State Water Board has authority to evaluate the validity of a pre-1914 appropriative claim of right to the extent necessary to decide whether to take enforcement action against the claimant. The *Phelps* case involved administrative enforcement proceedings similar to this proceeding. In that case, the State Water Board concluded that certain individuals had diverted and used water illegally, and issued an order imposing administrative civil liability against them. (State Water Board Order WRO 2004-0004.) In reaching the conclusion that the individuals had diverted water illegally, the Board addressed the individuals’ riparian and pre-1914 appropriative claims of right, and concluded that the individuals’ diversion and use of water was not authorized by valid riparian or pre-1914 appropriative rights. (*Id.* at pp. 23-29, 34.)

On appeal, the Court upheld the State Water Board's conclusions regarding the individuals' riparian and pre-1914 appropriative claims. (*Phelps v. State Water Resources Control Board*, *supra*, 157 Cal.App.4th at pp. 116-119.) Although the Board's authority to decide the validity of the individuals' claims was not challenged in *Phelps*, so the Court did not expressly address that issue, the conclusion that the State Water Board did not exceed its authority by addressing the individuals' claims is implicit in the Court's holding. (See also *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1589 [holding that the State Water Board's interpretation of the statutory definition of a subterranean stream was entitled to judicial deference because the Board's permitting authority over groundwater is limited to water flowing in subterranean streams and the Board has the power to determine whether groundwater is subject to the Board's permitting authority].)

5.1.1 The *North Kern* Case Does Not Support Millview and Messrs. Hill and Gomes's Contention Regarding the State Water Board's Jurisdiction

As stated above, Millview and Messrs. Hill and Gomes cite to *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, *supra*, 147 Cal.App.4th 555 in support of their argument that any challenge to a pre-1914 claim of right on the grounds of forfeiture must be brought in court through a quiet title or declaratory relief action by a water right holder with a competing claim of right. In the *North Kern* case, the holder of junior pre-1914 appropriative rights filed an action against the holder of senior pre-1914 appropriative rights, seeking to establish that a portion of the senior appropriator's rights had been forfeited for nonuse. In its opinion, the Court of Appeal stated that "[f]orfeiture of the right to appropriate water from a natural watercourse *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 watercourse." (*Id.* at p. 560, emphasis added.)

Contrary to Millview and Messrs. Hill and Gomes's argument, the Court did not hold that forfeiture of a pre-1914 appropriative right *must* be established through a judicial challenge because the courts have exclusive jurisdiction to determine whether a pre-1914 appropriative right has been forfeited. The Court did not address the State Water Board's authority to evaluate whether a pre-1914 right has been forfeited in an administrative enforcement proceeding because that was not an issue in the case.

Millview's reliance on *Smith v. Hawkins* (1898) 110 Cal. 122 is misplaced for the same reason. In that case, plaintiffs brought an action against a junior water right holder to quiet title to their pre-1914 appropriative claim of right. The California Supreme Court held, however, that plaintiffs had not used water under their right for five years or more before they commenced their action, and therefore they had forfeited their right. (*Id.* at pp. 127-128.) As with the *North Kern* case, *Smith v. Hawkins* stands for the proposition that forfeiture of a pre-1914 appropriative right may be established through a judicial challenge brought by one water right holder against another, but the Court did not hold that a judicial challenge is the exclusive means to determine whether a pre-1914 appropriative right has been forfeited, and the case has no bearing on the issue of whether the State Water Board may evaluate the validity of a pre-1914 appropriative claim of right to the extent necessary to carry out the Board's statutory duties. Indeed, the case was decided well before the Water Commission Act was enacted, and long before the State Water Board even existed.

5.1.2 The Board's Determination Concerning Its Jurisdiction Does Not Amount to Adoption of an Illegal New Policy

Messrs. Hill and Gomes argue that the State Water Board has consistently taken the position that it does not have jurisdiction over pre-1914 appropriative rights, except to the extent necessary to determine waste or unreasonable use. In support of this argument, they cite to statements contained in two informational documents that were posted on the Board's website: a 1990 document entitled "Information Pertaining to Water Rights in California," (Messrs. Hill and Gomes Ex. AA), and a 2005 document entitled "Information Pertaining to Investigating Water Right Complaints in California" (Messrs. Hill and Gomes Ex. BB). They also cite to a statement contained in a brief filed by the State Water Board in litigation filed by the California Farm Bureau Federation against the Board, and to a statement contained in State Water Board Order WR 2001-22. Messrs. Hill and Gomes argue further that if the Board were to change its position regarding its jurisdiction over pre-1914 appropriative rights in this proceeding, such a change would amount to the adoption of a new policy in violation of due process requirements and the Administrative Procedure Act.

These arguments lack merit for a number of reasons, as explained below. First, the State Water Board has not adopted a policy or rule of general applicability concerning the Board's jurisdiction over pre-1914 appropriative rights. To the extent that Messrs. Hill and Gomes rely on the informational documents and the brief filed in the *California Farm Bureau* case as an

DRAFT – September 19, 2011

expression of the State Water Board's recent position or policy, their reliance is misplaced because those documents are not regulations that have been adopted by the Board, and therefore they cannot be used as guidance in this or any other proceeding. (See Gov. Code, §§ 11340.5, subd. (a), 11342.600 [prohibiting an agency from using a guideline, manual, or other standard of general application that has not been adopted as a regulation for purposes of implementing or interpreting the law administered by the agency].)⁷

In addition, Messrs. Hill and Gomes overlook the fact that, in a number of recent, precedential decisions, the State Water Board has exercised its authority to evaluate the validity of claimed riparian and pre-1914 appropriative rights to the extent necessary to prevent the unauthorized diversion or use of water. (See, e.g., State Water Board Order WR 2001-22 at pp. 25-26 [requiring a report substantiating a claimed pre-1914 appropriative right]; Order WRO 2004-0004 at pp. 23-29, 34-35 [imposing administrative civil liability after concluding that diverters did not hold valid riparian or pre-1914 appropriative rights]; Order WR 2006-0001 at pp. 12-16, 20-21 [imposing administrative civil liability and issuing a cease and desist order after determining the validity and extent of a claimed pre-1914 right and concluding that the diverter had diverted more water than authorized under the right]; Order WR 2009-0060 at pp. 5-6, 57 [issuing a cease and desist order for diversions in excess of total amount authorized to be diverted under both permitted and licensed rights and riparian and pre-1914 appropriative rights previously quantified by the Board].)⁸ Thus, the assertion of the Board's authority to evaluate the validity of the Waldteufel claim of right in this proceeding does not represent an impermissible change in policy, but the application of the law to the facts of this proceeding, consistent with prior Board precedent. (See Gov. Code, § 11425.60 [authorizing an agency to designate a decision reached in an adjudicative proceeding as precedent; State Water Board Order WR 96-1 at p. 17, n. 11 [designating as precedent all State Water Board orders and decisions adopted by the Board at a public meeting, unless an order or decision indicates otherwise].)

⁷ In addition, their reliance on the brief is unavailing because it is not part of the record in this proceeding, nor is it the subject of a request for official notice.

⁸ Messrs. Hill and Gomes's reliance on Order WR 2001-22 in support of their argument is puzzling. In that decision, the State Water Board required El Dorado Irrigation District (EID) to submit a report substantiating a claimed pre-1914 appropriative right. The Board asserted that it had the authority to require the report to the extent necessary to ascertain whether the claimed right was valid, or whether EID's diversion and use under the right was unauthorized. (Order WR 2001-22 at pp. 25-26.) The Board also rejected the argument that its authority to inquire into the validity of a claimed pre-1914 right ends once a prima facie showing of the validity of the right is made. (*Ibid.*)

DRAFT – September 19, 2011

Finally, assuming for the sake of argument that the informational documents cited by Messrs. Hill and Gomes should be afforded any weight in this proceeding, it merits note that the documents themselves are ambiguous, and do not clearly stand for the proposition that the State Water Board has taken the position that it does not have the authority to determine the validity of pre-1914 appropriative rights in the context of an enforcement proceeding. For example, Messrs. Hill and Gomes quote selectively from a paragraph in the 2005 document, which indicates that the Board may not process a complaint involving claimed riparian or pre-1914 water rights if the Board decides that the issues more appropriately fall under the jurisdiction of the courts. (Messrs. Hill and Gomes Ex. BB, p. 3.) But the 2005 document also provides that the Division of Water Rights will investigate a complaint against an alleged unauthorized diversion to determine if the diverter has a permit, license, riparian, pre-1914, or other type of right, and take appropriate action if Division staff determine that the diverter does not have a valid water right. (*Id.* at p. 2.)

Messrs. Hill and Gomes also point to a statement in the 1990 informational document to the effect that the State Water Board does not have the authority to determine the validity of riparian and pre-1914 appropriative rights, but may assist the courts in such determinations. (Messrs. Hill and Gomes, Ex. AA, pp 7-8.) This statement is correct to the extent that it was intended to mean that the Board's adjudication of riparian and pre-1914 appropriative rights in a statutory stream adjudication or court reference must be confirmed by the appropriate court. (See Wat. §§ 2016-2019, 2075-2076, 2750-2774.) If on the other hand this statement was intended to mean that the Board does not have the authority to evaluate the validity of claimed riparian and pre-1914 appropriative rights to the extent necessary to decide whether there has been an unauthorized diversion or use of water, then this statement is inconsistent with the Board's statutory enforcement authority, as discussed above.⁹

⁹It also merits note that in 1990, the date of this document, the State Water Board did not have authority to issue a cease and desist order in response to the unauthorized diversion or use of water, and the Board did not have authority to administratively impose penalties for violation of Water Code section 1052 except for violations occurring during critically dry years. (See Stats. 2002, ch. 652, § 6; Wat. Code, § 1052, subd. (b), as amended by Stats. 1987, ch. 756.) Although the document may be incorrect if it is interpreted as a statement about the Board's enforcement authority under existing law, as applied to the Board's enforcement authority in 1990 it amounts to nothing more than a generalization made without expressly recognizing an exception to that generalization.

5.2 The Validity and Extent of the Waldteufel Claim of Right

This proceeding presents the following issues concerning the validity and extent of the Waldteufel claim of right: (1) whether an appropriative right could have been developed in light of the fact that the Waldteufel parcel appears to have been riparian to the West Fork of the Russian River; (2) assuming that an appropriative right could have been developed, whether and to what extent the right was perfected; and (3) assuming the right was perfected, the extent to which it was forfeited in part for non-use. These issues are addressed in turn, below.

5.2.1 No Appropriative Right Could Have Been Developed Because Water Was Used Consistent with a Riparian Right

Consistent with the authority discussed in section 3.4, above, it is not possible for a riparian water right holder to develop an overlapping appropriative right that authorizes the diversion and use of the same amount of water as the riparian right, and is subject to the same limitations. In this case, the 33.88-acre parcel that J.A. Waldteufel acquired from the Chandons appears to have been riparian to the West Fork. (Millview Ex. 1 [1913 deed describing parcel boundary as extending along a portion of the center of the channel of the “west branch” of the Russian River]; PT Ex. 3 [map of Lot 103 of the Yokayo Rancho submitted by Millview indicating Lot 103 was contiguous to the West Fork.]¹⁰ In addition, the record does not contain any evidence that an appropriative right was necessary to satisfy the demand for domestic and irrigation water use on the Waldteufel parcel. The West Fork contains only natural flow, and does not include any “foreign water” that a riparian right holder would not be entitled to divert. (See SCWA Ex. 1, p. 5.) And J.A. Waldteufel did not seek to seasonally store water, for which an appropriative right would have been required. Finally, it does not appear that an appropriative right would have conferred any advantage on J.A. Waldteufel, such as a higher priority of right. The patent for the 33.88-acre parcel pre-dated 1913, so the riparian right attached to the parcel would have been senior to any appropriative right developed after that date. In light of the above, the diversion and use of water by J.A. Waldteufel and his successors-in-interest that might

¹⁰ The record does not include a complete chain of title dating back to the patent, and it is possible that the parcel was severed from the West Fork and reunited under common ownership prior to 1913. That possibility seems unlikely, however, in light of the slow rate of development in the area, and the prosecution team and Messrs. Hill and Gomes appear to be in agreement that the Waldteufel parcel was riparian. (See PT Ex. 10, p. 8; Messrs. Hill and Gomes Ex. N, p. 2.)

otherwise have resulted in the perfection of an appropriative right should be considered to have been an exercise of the riparian right attached to the parcel.¹¹

Notwithstanding the foregoing, staff from the Complaint Unit concluded in the 2007 staff report that it was possible for an overlapping appropriative right to be developed through the diversion and use of water on the Waldteufel parcel. (PT Ex. 10, pp. 8-9.)¹² Accordingly, staff concluded that a pre-1914 appropriative right had been developed, but forfeited in part due to nonuse. Similarly, the draft CDO would require Millview to restrict its diversions under the Waldteufel claim of right, but would not require Millview to cease its diversions under the claim of right altogether. This order does not require Millview to cease its diversions under the Waldteufel claim of right altogether, based upon the Notice in this proceeding. Millview should be on notice, however, that the validity of the Waldteufel claim of right in its entirety is questionable.

5.2.2 Perfection of the Waldteufel Claim of Right

Assuming for the sake of argument that an overlapping appropriative right could have been developed through the diversion and use of water on the Waldteufel parcel, the record does not support the conclusion that an appropriative right to the full “face value” of the 1914 notice of appropriation – approximately 1,450 afa – ever was perfected. As discussed in section 3.2, above, appropriative rights are perfected by applying water to reasonable, beneficial use. The measure of the right is the amount of water actually applied to reasonable, beneficial use, not the amount of water listed in a notice of appropriation, or the capacity of the appropriator’s diversion works. An appropriative right initiated before December 14, 1914, may be perfected after that date, provided that the original plan of development is carried out with due diligence.

¹¹ When Creekbridge Homes acquired most of the parcel from Messrs. Hill and Gomes, all but a narrow strip of land retained by Messrs. Hill and Gomes appears to have been severed from the West Fork. (PT Ex. 10, pp. 1-2.) It is unclear whether riparian rights have been retained on the parcels within the Creekbridge Homes subdivision that are no longer contiguous to the West Fork. In a statement of water diversion and use filed by Creekbridge Homes in 2001, Creekbridge Homes claimed to have acquired a portion of the Waldteufel claim of right, but did not claim to have a riparian right. (PT Ex. 8.)

¹² The prosecution team based this conclusion in part on the advice of legal counsel. (PT Ex. 10, p. 8; Millview Ex. U, document 32.) Upon closer examination of applicable law and the facts of this case, this advice appears to have been incorrect. Moreover, legal counsel advised that any increase in water use under both rights due to a transfer of the appropriative right and simultaneous use of water under the previously dormant riparian right would be subject to the no injury rule codified in Water Code section 1706. As explained in section 5.3, below, the changes in purpose of use, place of use, and point of diversion instituted by Millview have lead to an increase in use that likely has resulted in injury to other legal users. Accordingly, the no injury rule likely precludes the exercise of both the Waldteufel claim of right and any riparian rights remaining on the parcels that used to be part of the 33.88-acre Waldteufel parcel.

The administrative record in this proceeding contains evidence that, several years after filing the notice of appropriation, J.A. Waldteufel or his successors-in-interest diverted water from the West Fork of the Russian River for purposes of irrigation on the 33.88-acre parcel, but the record contains very little evidence quantifying how much water was used. The 1913 deed conveying the parcel from the Chandons to J.A. Waldteufel reserved to the Chandons the fruit and first cutting of alfalfa produced on the parcel in 1913. (Millview Ex. 1.) The reservation indicates that the parcel was in agricultural production as early as 1913, but it does not necessarily mean that water was diverted from the West Fork for purposes of irrigation, nor does the reservation provide any information concerning how much water, if any, may have been used for purposes of irrigation.

The record also contains the written declaration of Floyd Lawrence, who was born in 1914 and raised on property on the east side of the West Fork of the Russian River near the Waldteufel parcel. (PT Ex. 5, pp. 3, 6.) Mr. Lawrence stated in his declaration that, since approximately 1917, J.A. Waldteufel and later his successors-in-interest diverted water from an eight-foot hole in the West Fork using a gasoline pump and 6-inch suction line. (*Id.* at pp. 19-22.) He stated that the gasoline pump was replaced at some point, but a pump continued to be used at the same location for at least 50 years. (*Id.* at p. 22.) Mr. Lawrence recalled that Mr. Dowling, who acquired the parcel in 1918, grew three or four crops of alfalfa in the area to the west of his house, which he flood irrigated, and he grew oat hay and had a three- or four-acre pear orchard in a narrow strip between the house and the West Fork. (*Id.* at pp. 21, 26, 29-30.) Mr. Lawrence also recalled that the area where alfalfa had been grown was later converted to vineyard. (*Id.* at pp. 31, 32.)

Mr. Lawrence's declaration was admitted into the record subject to a hearsay objection. (R.T. at pp. 129-130.) Accordingly, the declaration can be used to supplement or explain other evidence, but may not be relied upon as the sole basis for a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit. 23, § 648.5.1; Gov. Code, § 11513, subd. (d).)¹³ Mr. Lawrence's statement that water was diverted using a 6-inch suction

¹³ In its closing brief, Millview asserts that Mr. Lawrence's declaration would be admissible over an objection in a civil action because it was against his interest to provide sworn testimony supporting competing water usage. The record does not contain any evidence, however, that Mr. Lawrence diverted and used water from the West Fork of the Russian River, or that the diversion and use of water under the Waldteufel claim of right was against his interest.

DRAFT – September 19, 2011

line does supplement other evidence that such a pipe was used. Specifically, an expert witness for Millview testified that he visited the Waldteufel diversion site in 2009 and observed a remnant 6-inch steel pipe. (Millview Ex. 9; R.T. at p. 153.) In addition, Mr. Lawrence's statements concerning diversions from the West Fork and the crops grown on the parcel serve to explain the existence of the pipe, and supplement other evidence of agricultural activity on the parcel contained in the administrative record. (See Millview Ex. 1 [1913 deed conveying the parcel from the Chandons to J.A. Waldteufel]; PT Ex. 6 [statements of water diversion and use filed by Lester Wood].) Taken together, Mr. Lawrence's statements and other evidence in the record support the finding that some irrigation took place on the Waldteufel parcel within a reasonable period of time after J.A. Waldteufel filed a notice of appropriation. Mr. Lawrence's hearsay statements do not, however, support the finding that J.A. Waldteufel and his successors-in-interest diverted water from the West Fork for purposes of irrigation on a continuous basis since 1917, nor do Mr. Lawrence's statements establish how many acres were irrigated, or how much water was diverted and used.

In order to quantify the amount of water that might have been used to flood irrigate alfalfa on the Waldteufel parcel, Millview introduced the expert testimony of Dan Putnam, Ph.D. Dr. Putnam did not have any personal knowledge as to the amount of water that might of have been used on the Waldteufel parcel. Instead, he estimated water use based on his knowledge of historic irrigation practices, and the soil and weather conditions in the vicinity of the parcel. (Millview Exhibit 10.) Dr. Putnam assumed that irrigation would have occurred during the months of April, May, June, July, August, September, and early October, and that alfalfa would have been harvested four to six times during the year. (*Id.* at p. 1.) He also assumed 50 to 60 percent irrigation efficiency, which means that a significant percent of the water diverted could have returned to the stream system after having been applied to the crop. (*Id.* at p. 1; R.T. at pp. 146-148.) Dr. Putnam estimated that the amount of water required to flood irrigate 162 acres of alfalfa would have been 932 acre-feet on the low end, and 1,310 acre-feet on the high end. (Millview Ex. 10, p. 3.)

A significant problem with Dr. Putnam's estimate of water use on the parcel is that the record does not support his assumption that water was used under the Waldteufel claim of right to flood irrigate 162 acres of alfalfa. In fact, the record does not indicate how many acres of alfalfa may have been flood irrigated, but given the size of the parcel in question, it would be more reasonable to assume that no more than 30 acres of alfalfa were flood irrigated under the

Waldteufel claim of right. Based on Dr. Putnam's estimate, and assuming that all of his other assumptions are correct, the amount of water required to flood irrigate 30 acres of alfalfa would have been approximately 173 acre-feet on the low end (932 acre-feet of water ÷ 162 acres × 30 acres = 173 acre-feet of water), and approximately 243 acre-feet on the high end (1,310 acre-feet of water ÷ 162 acres × 30 acres = 243 acre-feet of water).

Thus, interpreting the evidence in the light most favorable to Millview and Messrs. Hill and Gomes, and assuming that 30 acres of alfalfa were flood irrigated on a continuous basis for a period of time beginning around 1917, we find that a right to divert more than approximately 243 afa, plus whatever amount of water may have been required to irrigate several acres of orchard, never was perfected. The right to divert that amount of water would have been limited to the irrigation season, which according to Dr. Putnam was April through September, with some irrigation occurring in early October.

5.2.3 Partial Forfeiture of the Waldteufel Claim of Right

Assuming for the sake of argument that an appropriative right to divert approximately 243 afa was perfected, the next issue is the extent to which the right may have been forfeited in part for nonuse. As explained below, we find that partial forfeiture occurred when the owner of the parcel switched from growing alfalfa to less water-intensive crops. This occurred during the period when Lester and Bertha Wood owned the parcel, between 1945 and 1988, if not earlier. Although the administrative record does not include records of the amount of water used before 1967, statements of water diversion and use filed by Lester Wood are evidence that Mr. Wood did not use more than 15 acre-feet, or divert at a rate greater than 1.1 cfs, during the irrigation season in any given year during the period between 1967 and 1987.

As stated in section 4.0, above, Lester Wood filed statement of water diversion and use number S000272 in 1967. According to the statement, which was dated February 14, 1967, Mr. Wood diverted water from the West Branch of the Russian River from mid-May through mid-July for purposes of irrigating 15 acres of grapes and 15 acres of walnuts. (PT Ex. 6.) He listed a maximum annual water use in recent years of 15 afa and a minimum annual use of 7.5 afa. (*Ibid.*) He indicated that the year of first use as nearly as known was 1914, and included a reference to the notice of appropriation recorded by J.A. Waldteufel. (*Ibid.*)

DRAFT – September 19, 2011

Lester Wood filed supplemental statements for the following periods: 1970-1972, 1979-1981, and 1985-1987. (PT Ex. 6.) The supplemental statements do not cover the entire 20-year period from 1967-1987, and they do not list the quantity of water diverted and used in acre-feet. The information contained in the supplemental statements, however, is consistent with the original statement, and the supplemental statements are evidence that Lester Wood's irrigation practices did not change for at least 20 years.

The supplemental statement for 1970-1972 indicates that sprinklers would be run at a rate of 500 gallons per minute (gpm) for 25 hours in May for purposes of frost protection, and for 100 hours in July and 24 hours in September for purposes of irrigation. (PT Ex. 6.) (The supplemental statement was dated February 12, 1970, so presumably these amounts were an estimate of future water use.) According to the expert witness for the prosecution team, 500 gpm equals 1.1 cfs, and if water was diverted at a rate of 500 gpm for 149 hours, a total of 13.7 acre-feet would be diverted. (PT Ex. 10, pp. 5, 12; R.T. at pp. 54, 112-113.)

The supplemental statements for 1979-1981 and 1985-1987 did not quantify the amount of water used. Consistent with earlier statements, however, the supplemental statement for 1979-1981 indicates that water was used from April through September for purposes of irrigating grapes and walnuts. (PT Ex. 6.) Similarly, the supplemental statement for 1985-1987 indicates that water was used from April through September for purposes of irrigating 30 acres. (*Ibid.*) Taking into consideration the consistency of the information reported in all of the statements of water diversion and use, the fact that grape vines and walnut trees are perennial crops, and the fact that the parcel owned by Lester Wood was not much larger than 30 acres, it is unlikely that Lester Wood's diversion and use of water varied significantly between approximately 1967 and 1987, or that he diverted and used more than 15 acre-feet, or that he diverted water at a rate greater than 1.1 cfs, during the irrigation season (April through September) in any given year during that period.¹⁴

¹⁴ In a brief submitted prior to the hearing, Messrs. Hill and Gomes argued that the statements of water diversion and use could not be relied upon because Water Code section 5108 provided that such statements were "for informational purposes only." Water Code section 5108 has been repealed. In addition, even if former section 5108 were applicable to the statements at issue in this proceeding, that section would not preclude reliance on the statements as evidence of Lester Wood's water use under the Waldteufel claim of right. Section 5108 provided in full as follows: "Statements filed pursuant to this part shall be for informational purposes only, and neither the failure to file a statement nor any error in the information filed shall have any legal consequences whatsoever other than those specified in this part." (Stats. 1965, ch. 1430, § 1, p. 3359) Water Code section 5107 provided (and continues to provide) that the making of a willful misstatement is a misdemeanor, and a person who makes a material misstatement

In determining whether a water right is forfeited for non-use, years during which there was insufficient flow available for the appropriator to exercise its right should be excluded in calculating the five-year forfeiture period. (See *Bloss v. Rahilly*, *supra* 16 Cal.2d at p. 78)

5.2.3.1 The North Kern Case Does Not Preclude a Finding of Forfeiture

Millview and Messrs. Hill and Gomes cite to *North Kern Water Storage Dist. v. Kern Delta Water Dist.*, *supra*, 147 Cal.App.4th 555, in support of the argument that, in order to establish forfeiture, non-use must be proven for a five-year period immediately preceding a “clash of rights” with a competing water right holder. They argue that forfeiture of the Waldteufel claim of right cannot be established based on non-use in 1967 because that single year was not a five-year period immediately preceding 2006, when Mr. Howard filed his complaint against Millview. They also argue that this proceeding does not involve a clash of rights because Mr. Howard is not a competing water claimant, and no other person or entity has asserted a competing claim to the water at issue.

These arguments lack merit for several reasons. Preliminarily, the basis for our determination of forfeiture in this proceeding is non-use during the 20-year period from 1967-1987, not during the single year of 1967. In addition, this proceeding is distinguishable from the *North Kern* case, as explained below. Finally, the holding in *North Kern* does not preclude a determination that the Waldteufel claim of right was forfeited in part because this proceeding does in fact involve a clash of rights between competing claimants.

In the *North Kern* case, a junior appropriator, North Kern Water Storage District (North Kern), filed a legal action against a senior appropriator, Kern Delta Water District (Kern Delta), seeking to establish that Kern Delta’s pre-1914 appropriative water rights had been forfeited in part due to non-use. The parties’ rights to the Kern River had been quantified and the priority of their rights had been established pursuant to a decree issued in 1901. (*North Kern*, *supra*, 147 Cal.App.4th at pp. 561-562.) The dispute between the parties arose shortly before 1976, when

is subject to administrative civil liability. Thus, section 5108 excused the failure to file a statement, or the filing of a statement with an immaterial error, but did not prohibit reliance on the information contained in a statement. Moreover, the fact that willful and material misstatements are subject to enforcement action indicates that statements can be relied upon as an accurate source of information concerning the diversion and use of water by the person who filed the statement.

DRAFT – September 19, 2011

Kern Delta acquired its rights from a third party, having announced its intention to increase water usage under the rights, over North Kern's objection.

The Court of Appeal issued two opinions in the case, the first of which was unpublished. In the first opinion, the Court stated that, in order to establish forfeiture, North Kern was required to prove that Kern Delta or its predecessors-in-interest had failed to use some portion of Kern Delta's entitlement under the decree continuously during a five-year period no later than the five years immediately preceding North Kern's assertion of its conflicting right to the water, resulting in a "clash of rights." (*North Kern Water Storage Dist. v. Kern Delta Water Dist.*, 2003 WL 215821 (Jan. 31, 2003, F033370) at p. 18.) The Court rejected the argument that the forfeiture period was the five-year period immediately preceding the lawsuit, and left the trial court some discretion to determine the appropriate forfeiture period, but stated that the period must bear a direct temporal relationship to the time when North Kern's competing claim was made. (*Ibid.*) In reaching this conclusion, the Court of Appeal reasoned that the doctrines of forfeiture, adverse possession, abandonment, and prescription are all related, and are all evaluated in the context of competing water right claims. In support of this reasoning, the Court cited to a number of cases in which a water right holder advanced a claim of forfeiture or prescription against a competing water right holder. (*Ibid.*) In its second, published, opinion, the Court of Appeal upheld the trial court's determination that the appropriate forfeiture period was the five-year period immediately preceding 1976, when Kern Delta acquired the rights that were the subject of its dispute with North Kern. (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 566-567.)

In reaching the conclusion that the forfeiture period must bear a temporal relationship to a "clash of rights," the Court of Appeal conflated the doctrines of forfeiture and prescription, and departed from prior precedent. (See, e.g., *id.* at p. 566.) Unlike forfeiture, which is based on non-use for a five-year period, prescription or adverse possession is based on adverse use for a five-year period. (See *City of Pasadena v. City of Alhambra*, *supra*, 33 Cal.2d at pp. 926-927 [a wrongful appropriation may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for a period of five years, and under claim of right].) Although all of the cases cited by the Court in support of its conclusion involved competing claimants, none of the cases held that the period used to establish forfeiture, as opposed to the period used to establish a prescriptive claim of right, must bear a temporal relationship to a clash of rights between the parties. (See also *Crane v.*

DRAFT – September 19, 2011

Stevinson, supra, 5 Cal.2d at p. 398 [stating that the failure to maintain beneficial use under a pre-1914 appropriative right for a five-year period would result in forfeiture of the right, without specifying that the five-year period must bear any relationship to a clash of rights].)

Unpublished opinions of California courts are not precedential. (See Cal. Rules of Court, rule 8.1115.) And the second, published opinion in the *North Kern* litigation reviewed whether the trial court acted in accordance with the first, unpublished opinion, not whether the first opinion was correctly decided. (See *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th at p. 566 & fn. 5.) As a result, it is unclear to what extent the legal conclusions reached in the *North Kern* are applicable outside of the context of the specific litigation involved in that case.

Irrespective of issues concerning the precedential value of the Court of Appeal's conclusions in the *North Kern* case and whether the case was properly decided as applied to the particular situation involved, the case is distinguishable from the instant proceeding because it involved an action among competing water right holders, and did not involve the State Water Board's authority. Because the Court of Appeal's "clash of rights" theory is based on principles governing prescription, the theory should not apply to the State Water Board for the same reasons that prescription does not apply to the State Water Board, including the potential for the doctrine to undermine the State Water Board's oversight of water diversion and use. (See generally *People v. Shirokow* (1980) 26 Cal.3d 301, 303.)

A number of situations may arise where it may be necessary for the Board to evaluate whether a right has been forfeited in the absence of a "clash of rights." For example, in an administrative enforcement proceeding such as this one, it may be necessary for the Board to evaluate whether a pre-1914 right has been forfeited in order to determine whether a diversion is unauthorized. The Board's authority to take enforcement action in response to an unauthorized diversion is not limited to situations where there is a competing claim to the water diverted. Accordingly, the issue of forfeiture could arise in an enforcement proceeding that does not involve a "clash of rights."

Similarly, it may be necessary for the Board to evaluate whether a pre-1914 right has been forfeited in determining whether surplus water is available for appropriation by a water right applicant, irrespective of whether a competing claimant has asserted a right to water unused

DRAFT – September 19, 2011

under the pre-1914 right in question. (See *United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102-104 [The Board must examine riparian and prior appropriative rights in order to determine whether surplus water is available for appropriation].) Finally, it may be necessary for the Board to determine whether a pre-1914 right has been forfeited in a statutory adjudication to determine all of the rights to water of a stream system. (See Wat. Code, §§ 2500-2900.) Again, the issue of forfeiture could arise in a statutory adjudication in the absence of a “clash of rights” with a competing claimant.

The Board's ability to effectively administer water rights as authorized by statute would be thwarted if the Board were precluded from addressing whether a pre-1914 right has been forfeited when the issue arises in an administrative proceeding, unless a competing water right claimant has elected to challenge the right holder in some fashion. Moreover, to extend the holding in *North Kern* to administrative proceedings before the Board would be contrary to the constitutional maxim that the State's water resources should be put to beneficial use to the fullest extent possible. In effect, it would allow pre-1914 appropriative right holders to place their rights in “cold storage,” and retain unexercised rights unless and until a competing claim is advanced, thereby preventing other prospective appropriators from obtaining permits to appropriate the water unused under the rights. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 309 [“waters of the state be available for allocation in accordance with the code to the fullest extent consistent with its terms.”])

Assuming for the sake of argument that the holding in *North Kern* extends to this proceeding, the Court's holding does not preclude a forfeiture determination because this proceeding involves a clash of rights, not between Millview and Mr. Howard, but between Millview and the Mendocino District and SCWA. In its policy statement, the Mendocino District asserted that Millview's diversions under the Waldteufel claim of right conflict with the District's and SCWA's rights to store water in Lake Mendocino, which is located on the East Fork of the Russian River upstream of the confluence of the West and East Forks. Similarly, an expert witness for SCWA testified that unauthorized diversions under the Waldteufel claim of right, or increased diversions under the right, during periods when SCWA is releasing water from Lake Mendocino in order to meet instream flow requirements would adversely affect SCWA's ability to store water in Lake Mendocino under SCWA's permitted rights. (SCWA Ex. 1, pp. 3-6.)

Under *North Kern*, the forfeiture period is no later than the five years immediately preceding a clash of rights between competing claimants, and must bear a temporal relationship to the clash of rights. In this case, the clash of rights occurred sometime after 1998, when Messrs. Hill and Gomes acquired the Waldteufel claim of right and proposed to increase water usage under the right. Thus, consistent with the holding in *North Kern*, the appropriate forfeiture period would be no later than 1998, and must bear a temporal relationship to that date. In the *North Kern* case, the trial court was able to evaluate the extent to which Kern Delta's rights had been forfeited based on the five-year period immediately preceding the clash of rights between North Kern and Kern Delta because the parties had maintained complete records of their water use. (See *North Kern, supra*, 147 Cal.App.4th at pp. 572, 574.) In this case, by contrast, records of the amount of water used under the Waldteufel claim of right do not exist except for the original and supplemental statements of water diversion and use filed by Lester Wood between 1967 and 1987. Although this period does not immediately precede 1998, it is indicative of the use that occurred in the period immediately preceding 1998 because the record indicates that the Waldteufel parcel remained in agricultural production until 1998, and the record does not contain any evidence that water use under the Waldteufel claim of right increased between 1987 and 1998.

5.2.3.2 Non-use During the Forfeiture Period Was Not Due to a Lack of Water Availability

Messrs. Hill and Gomes contend that a determination of forfeiture would violate the holdings in *North Kern, supra*, 147 Cal.App.4th at pp. 580-582 and *Barnes v. Hussa* (2006) 136 Cal.App.4th 1358, 1372 because the prosecution team failed to show that sufficient water was available in the West Fork of the Russian River during the forfeiture period to fully satisfy the Waldteufel claim of right. Messrs. Hill and Gomes are correct that non-use due to a lack of water availability cannot be the basis of forfeiture. In this proceeding, however, there is no evidence that flows in the West Fork were insufficient to satisfy Lester Wood's annual demand for irrigation water from April through September during the 1967-1987 period.

USGS has maintained an instream surface flow gage immediately upstream of the point of diversion for the Waldteufel claim of right since 1952. (PT Ex. 1, p. 7; SCWA Ex. 1, p. 5; SCWA Ex. 6; R.T. at pp. 257-259; Millview Ex. U, tab. 30.) The gage data indicate that monthly-mean surface water flows in the West Fork at the location of the gage dropped below 2 cfs during August and September of most years during the forfeiture period, and during July of some

years. (Millview Ex. U, tab. 30; see also SCWA Ex. 1, p. 5 [flows in the West Fork typically drop below 2 cfs between mid-July and mid-September].) But the data also show that recorded surface flows were adequate to allow for the annual diversion of up to 243 afa (the maximum extent to which the right may have been perfected) during the course of each irrigation season during the forfeiture period. (Millview Ex. U, tab. 30.)

The declaration of Floyd Lawrence supports this finding. As stated earlier, Mr. Lawrence recalled that J.A. Waldteufel and later his successors-in-interest diverted water from an eight-foot hole in the West Fork. Mr. Lawrence also recalled a time in the 1930's when surface water flows disappeared in some locations, but even then water continued to flow from hole to hole in the gravel. (PT Ex. 5, pp. 24-25.) Mr. Lawrence did not recall the West Fork ever having run dry. (*Id.* at p. 24.) In addition to Mr. Lawrence's declaration, the record contains evidence that, in more recent years, water may have been diverted under the Waldteufel claim of right from a shallow well, which could have allowed water from the West Fork to be diverted even when surface water flows were low. (See Messrs. Hill and Gomes Ex. Z; R.T. at pp. 217-218.) Based on the foregoing evidence, we find that non-use during the 1967-1987 forfeiture period was not attributable to a lack of water availability. Instead, the amount of water used during that period likely was attributable to the irrigation demand of the less water-intensive crops being grown on the Waldteufel parcel at the time.

5.2.3.3 The Prosecution Team Met Its Burden of Proof

Millview and Messrs. Hill and Gomes contend that the Division improperly shifted the burden of proof by requiring them to prove that forfeiture of the Waldteufel right did not occur. Contrary to this contention, the prosecution team has met its burden of proving that the Waldteufel claim of right has been forfeited for non-use, and therefore a threat of unauthorized diversion under the Waldteufel claim of right exists.

Generally, in an enforcement action, the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation. (Evid. Code, § 550; Cal. Law Revision Com. Com., 29B, pt. 1 West's Ann. Evid. Code (1995 ed.) foll. § 550, pp. 631-632.) At that point, the burden shifts to the alleged wrongdoer to answer such evidence, including establishing affirmative defenses. (*Ibid.*; See e.g. *Phelps v. State Water Resources Control Board*, *supra*, 157 Cal.App.4th at pp. 119-120 [upholding trial court findings that diverters against whom the Board had imposed administrative civil liability for the unauthorized diversion of water had not

presented sufficient credible evidence in support of their claimed pre-1914 appropriative and riparian rights].)

Here, the prosecution team has established a prima facie case of threatened unauthorized diversion under the Waldteufel claim of right by presenting evidence that the right has been forfeited in part through non-use and Millview has diverted more water than authorized under the right. Specifically, the prosecution team presented evidence that water use under the right between 1967 and 1987 did not exceed 15 afa (PT Ex. 1, p. 5; PT Ex. 6), and that Millview's more recent use under the right has exceeded that amount (PT Ex. 1, pp. 11, 13; PT Ex. 11). Thus, the prosecution team effectively shifted the burden to Millview to produce evidence that a threat of unauthorized diversion does not exist. For the reasons discussed above, the evidence and arguments presented by Millview and Messrs. Hill and Gomes is insufficient to effectively rebut the evidence submitted by the prosecution team, and establish that the Waldteufel claim of right was not forfeited in part for non-use.

5.2.3.4 Policy Considerations Favor a Determination that the Waldteufel Claim of Right Has Been Forfeited

Messrs. Hill and Gomes contend that a determination that the Waldteufel claim of right has been forfeited would violate the constitutional requirement that water be applied to beneficial use to the maximum extent possible because it would prevent Millview from applying water to beneficial use. They also contend that a determination of forfeiture would violate Water Code section 106, which provides that the use of water for domestic purposes is the highest use of water, because Millview intends to supply water for domestic purposes.

Contrary to Messrs. Hill and Gomes's contention, however, and as discussed above, the constitutional mandate to maximize the beneficial use of water would be violated by a determination that the Waldteufel claim of right has *not* been forfeited. Such a determination would establish the precedent that unexercised rights can be resurrected after decades of non-use, thereby engendering uncertainty concerning the availability of unappropriated water, and precluding other prospective appropriators from obtaining permits to apply any unused water to reasonable, beneficial use. Because the statutory procedures for appropriation of water rights are in furtherance of the constitutional mandate to maximize the beneficial use of water, exceptions to those statutory procedures should not be made except to the extent expressly provided by the Water Code. (See *People v. Shirokow*, *supra*, 26 Cal.3d at pp. 309-310.)

Where a claimed pre-1914 right is otherwise subject to forfeiture for non-use, the forfeiture should not be ignored or overridden simply because, absent forfeiture, the claimed pre-1914 right would provide a vehicle to put water to beneficial use without having to comply with the statutory appropriation procedures.

In addition, in a fully appropriated stream system such as the Russian River, the issue is not whether water will be used, but by whom. As discussed in greater detail in section 5.3, below, the West and East Forks of the Russian River and a portion of the mainstem are fully appropriated from July 1 through October 31. This means that any water unused under the Waldteufel claim of right during that period is likely to be used to satisfy downstream water right holders, or to meet instream flow requirements imposed on SCWA pursuant to State Water Board Decision 1610. (See Order WR 2008-0045 at p. 19 [explaining that revocation of unexercised water right permits for the Auburn Dam Project would not reduce water supplies, but rather would serve to redistribute available supplies to junior appropriators and water right applicants].) Some of the water right holders who stand to benefit from a determination that the Waldteufel claim of right has been forfeited, including SCWA, also supply water for domestic purposes. (See SCWA Ex. 1, p. 1.) But even if that were not the case, the legal and policy considerations that favor a forfeiture determination in this proceeding outweigh the policy preference for domestic use.

5.3 Unauthorized Diversion and Use Under the Waldteufel Claim of Right

Assuming that the Waldteufel claim of right authorizes the diversion and use of 15 afa, the next issue is whether Millview's diversion and use under the right has exceeded or threatens to exceed the scope of the right. As explained in section 3.2, above, the holder of a pre-1914 appropriative right may change the point of diversion, purpose of use, or place of use of the right, provided that the changes do not amount to the initiation of a new right, or result in injury to any other legal user of water. (Wat. Code, § 1707; *Senior v. Anderson, supra*, 115 Cal. At pp. 501-504.)

In this case, the changes in point of diversion, purpose of use, and place of use instituted by Millview have lead to an impermissible expansion of the right. Specifically, the change in place of use, from the 32-acre Waldteufel parcel to Millview's 8 to 10 square mile service area, and the change in purpose of use, from irrigation to domestic, commercial, industrial and irrigation use, have resulted in a significant increase in the total amount of water diverted and used under

the right. (See SCWA Ex. 1, pp. 5-6; SCWA Ex. 5.) The change in purpose of use also has resulted in the diversion and use of water outside the irrigation season. And the change in point of diversion has allowed Millview to divert and use water from the Russian River below the confluence of the East Fork of the Russian River and West Fork of the Russian River when it was not available from the West Fork of the Russian River. (See SCWA Ex. 1, p. 5.) The diversion and use of water outside the scope of the right amounts to the initiation of a new right without authorization, and constitutes a trespass against the State. (See Wat. Code, § 1052, subd. (a).) In addition, to the extent that the changes to the right have led to an increase in diversion and use of water under the right, the changes are likely to have resulted in injury to other legal users in violation of Water Code section 1706.

The extent to which Millview's diversion and use under the Waldteufel claim of right has exceeded the scope of the right is discussed in section 5.3.1, below. Injury to other legal users as a result of increased diversion and use under the right is discussed in section 5.3.2.

5.3.1 Millview's Diversion and Use Has Exceeded the Scope of the Right

The total amount of water diverted and used by Millview under the Waldteufel claim of right has exceeded 15 afa since Millview entered into a lease agreement with Messrs. Hill and Gomes in 2002, and may have exceeded that amount in 2001 as well. Creekbridge Homes filed statement of water diversion and use number S015625 in 2001. (PT Ex. 8.) According to the statement, Creekbridge Homes projected that it would use 21.85 acre-feet in 2001 for purposes of irrigating 10.5 acres of fruit trees, construction dust control, and domestic use for 51 homes. (PT Ex. 8; PT Ex. 10, p. 12.) Creekbridge Homes did not file any supplemental statements.

For the 2002-2004 period, Messrs. Hill and Gomes filed a supplement to statement number 000272, which indicates that water was used under the Waldteufel claim of right for domestic use by 350 people. (PT Ex. 6; PT Ex. 10, p. 12.) The amounts claimed to have been used were 15.11 acre-feet in 2002, 31.73 acre-feet in 2003, and 43.84 acre-feet in 2004.

Millview did not file any statements of water diversion and use, but the prosecution team obtained accounting sheets from Millview for 2001-2008 pursuant to a Public Records Act request. The accounting sheets include the amount of water Millview claims to have used under the Waldteufel claim of right. (PT Ex. 1, pp. 10-11; PT Ex. 11.) Millview claims to have used a total of 3.76 acre-feet in 2001, 19.14 acre-feet in 2002, 40.12 acre-feet in 2003, 58.86 acre-feet

DRAFT – September 19, 2011

in 2004, 1,174.75 acre-feet in 2005, 55.167 acre-feet in 2006, 623.12 acre-feet in 2007, and 808.23 acre-feet in 2008. (PT Ex. 1, p. 11; PT Ex. 11.) Millview's General Manager testified at the hearing that Millview used the water for construction and domestic supply at the Creekbridge Homes subdivision in 2001-2004, but in later years, when Millview used larger quantities of water under the right, Millview used some of the water elsewhere within Millview's service area. (R.T. at pp. 173- 180,194.)

It is unclear whether the amounts of water that Millview claims to have used at Creekbridge Homes in 2001-2004 were in addition to the amounts that Creekbridge Homes and Messrs. Hill and Gomes claim to have used, or whether the amounts claimed by Millview included the amounts claimed by Creekbridge Homes and Messrs. Hill and Gomes. In either case, diversion and use under the Waldteufel claim of right has exceeded 15 afa every year from 2002 through 2008, and may have exceeded that amount in 2001.

Millview also diverted and used water outside the irrigation season. Between 1967 and 1987, Lester Wood reported that he used water for purposes of frost control or irrigation from April through September. (PT Ex. 6.) To the extent that the right to divert and use water outside that season may have been perfected, the right was forfeited for non-use. Inconsistent with this authorized season of diversion, Messrs. Hill and Gomes reported that water was used under the Waldteufel claim of right from May through November during the 2002-2004 period. (PT Ex. 6.) In addition, Millview's accounting sheets indicate that Millview used water under the claim of right year-round except in 2001, when Millview used water under the claim of right from May through December, and in 2008, when Millview used water under the claim of right from January through August. (PT Ex. 1, p. 11; PT Ex. 11.) The use of water outside the authorized season of diversion constitutes the initiation of a new right, and is unauthorized.

Another way in which Millview exceeded the scope of the Waldteufel claim of right was by diverting water from the mainstem of the Russian River below the confluence of the West Fork and the East Fork during periods when the water was not available at the original point of diversion on the West Fork. Unlike flows in the West Fork, which are entirely natural, flows in the mainstem below the confluence are augmented by water imported from the Eel River and releases from storage in Lake Mendocino. (PT Ex. 1, p. 13; SCWA Ex. 1, pp. 2, 5.) As discussed in section 5.2.3.2, above, surface water flows in the West Fork typically drop below 2 cfs in the summer months. Flows in the mainstem, by contrast, are maintained at much higher

levels. (SCWA Ex. 1, pp. 2-3, 5; SCWA Ex. 3; R.T. at pp. 242-243.) Thus, by moving the point of diversion downstream, Millview could divert water at a higher rate than would have been possible at the original point of diversion. The expert witness for the prosecution team estimated that Millview’s rate of diversion under the Waldteufel claim of right exceeded the flows at the original point of diversion on the West Fork over 22 percent of the time during the low flow period (June through November) between 2001 and 2008. (PT Ex. 1, p. 13.)

5.3.2 Increased Diversion and Use Is Likely to Have Resulted in Injury

Water Code section 1706 provides that a pre-1914 appropriative right holder “may change the point of diversion, place of use, or purpose of use if others are not injured by such change” In this case, to the extent that the changes to the Waldteufel claim of right instituted by Millview have lead to an increase in diversion and use under the right, the changes are likely to have resulted in injury to other legal users in violation of section 1706.

The State Water Board has determined that the West and East Forks of the Russian River and a portion of the mainstem within Mendocino County are fully appropriated from July 1 to Oct. 31. (State Water Board Order WR 98-08, Appen. A, p. 26.) Coincidentally, this determination was based in part on State Water Board Decision 1110. In that decision, which was adopted in 1963, the Board denied Millview’s application to appropriate 3 cfs from the West Fork of the Russian River during the months of July through October. The Board found that no water was available for appropriation from July through October because all of the water in the West Fork during those months was needed in most years to satisfy senior water rights and to maintain instream flows needed to protect fishery resources and recreation. (Decision 1110 at pp. 4-5.)

Consistent with the State Water Board’s finding in Decision 1110, any increase in diversion and use under the Waldteufel claim of right is likely to injure other legal users by reducing flows in the mainstem of the Russian River that are needed to satisfy other water right holders or to protect fishery resources and recreation.¹⁵ In particular, any increase in diversion and use under the right is likely to result in injury to SCWA and the Mendocino District, as explained below.

¹⁵ It is uncertain whether public trust resources, including fish and wildlife and recreation, are “legal users” within the meaning of the no injury rule codified in Water Code section 1706. (See State Water Board Order WR 95-9 at p. 29, fn. 10.) For purposes of this proceeding, however, we need not resolve this issue.

DRAFT – September 19, 2011

In addition to Decision 1110, the State Water Board's fully appropriated stream determination was based on State Water Board Decision 1610. Decision 1610 involved several water right permits held by SCWA, including permit number 12947A, which authorizes SCWA to store water in Lake Mendocino, and to directly divert and redivert previously stored water from points of diversion on the mainstem of the Russian River in Sonoma County. The Mendocino District also holds a permitted right to store water in Lake Mendocino. In Decision 1610, the Board included terms in SCWA's permits requiring SCWA to maintain specified instream flows in the Russian River for purposes of protecting fishery resources and recreational uses. (Decision 1610, pp. 19-21, 51-53.)

As explained by an expert witness for SCWA, under certain hydrologic conditions SCWA must augment natural flows with water released from storage in order to meet the instream flow requirements. (SCWA Ex. 1, pp. 2-3; R.T. at pp. 238-239.) Accordingly, if Millview increases its diversions under the Waldteufel claim of right during periods when SCWA is releasing water from storage in order to meet instream flow requirements, SCWA must release more water from storage in order to maintain the requisite flows, thereby reducing storage levels in Lake Mendocino and adversely affecting SCWA's and the Mendocino District's water supply. (SCWA Ex. 1, pp. 2-3; R.T. at p. 240.) Reduced storage levels also could adversely affect Chinook salmon, which depend on releases from storage to support upstream migration for spawning in the fall. (SCWA Ex. 1, p. 3; R.T. at p. 241.)

5.4 The Board Has Afforded Millview and Messrs Hill and Gomes Due Process of Law

Millview and Messrs. Hill and Gomes contend that the Division did not provide adequate notice before conducting the field investigation and issuing the staff report.

Millview and Messrs. Hill and Gomes were not deprived of a property interest by the staff report, which took no action. Before taking enforcement action by issuing this CDO, the Board provided Millview and Messrs. Hill and Gomes notice and an opportunity to be heard. The board held an evidentiary hearing, and afforded Millview and Messrs. Hill and Gomes the opportunity to present evidence and legal argument, cross-examine the prosecution team's witness, and present rebuttal evidence.

Millview and Messrs. Hill and Gomes contend that the staff report and draft CDO were based on the theory that the Waldteufel right was forfeited, but at the hearing the prosecution team

DRAFT – September 19, 2011

switched to a new theory that the right was never vested. Millview and Messrs. Hill and Gomes argue that this change of legal theory deprived them of the ability to prepare for the hearing.

Pursuant to Water Code section 1834, subdivision (a), a draft CDO must contain a statement of facts and information that would tend to show the proscribed action. Consistent with this requirement, the draft CDO put Millview and Messrs. Hill and Gomes on notice that that the proscribed action was the diversion of more than 15 afa under the Waldteufel right. The hearing notice also described the key hearing issue broadly as whether the draft CDO should be adopted, with or without modifications. The Board's hearing procedures are designed to prevent surprise testimony. The prosecution team's evidence was submitted in advance. The written testimony of the expert witness for the prosecution team put Millview and Hill and Gomes on notice before the hearing that the prosecution team questioned whether the Waldteufel right had ever vested (i.e. that the right had never been perfected). (PT Ex. 1, pp. 8-9.) There is no evidence that Millview and Messrs. Hill and Gomes needed to conduct discovery in order to prepare to cross-examine the prosecution's witness or present rebuttal concerning the prosecution's "new theory."

Finally, Millview and Messrs. Hill and Gomes contend that the Board did not adequately separate functions. Based on the testimony of the prosecution team's witness, Chuck Rich, concerning the Board's position with respect to its authority over pre-1914 rights, they infer that Chuck Rich has been a "confidant and policy maker" for the Board for many years, and that the Board would not want to disappoint or embarrass him by ruling against him in this proceeding.

The Board is required to separate the prosecutorial and advisory functions on a case-by-case basis. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 738.) There is no prohibition against an employee acting in a prosecutorial capacity in a particular proceeding, simply because that employee advises the Board on other matters. (*Ibid.*) The requirements for separation of functions were satisfied in this proceeding. The inference that Mr. Rich has a special status with the Board as "confidant or policy maker" is wholly unsubstantiated, as is the claim the Board is biased in his favor. Where, as here, the proceedings have been conducted consistent with the requirements for internal separation functions, "the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." (*Id.* at p. 741.) The speculative and unsupported claims made by

Millview and Messrs. Hill and Gomes that the Board could not impartially evaluate Mr. Rich's testimony fall far short of that standard.

6.0 CONCLUSION

Assuming that an appropriative right could have been developed based on water diverted for use on the Waldteufel parcel, the right to divert more than approximately 243 afa during the irrigation season could not have been perfected. Additionally, the right to divert any more than 15 afa has been forfeited due to non-use.

As set forth in section 5.3, above, Millview's diversion and use under the Waldteufel claim of right has exceeded the parameters of the right, and likely has resulted in injury to other legal users. During the hearing, Millview's general manager testified that Millview may relocate the point of diversion to the West Fork, but otherwise Millview has given no indication that it intends to cease its unauthorized diversion and use under the Waldteufel claim of right. (R.T. at pp. 188-191.) Accordingly, a threat of unauthorized diversion and use under the right exists, and issuance of this CDO to Millview is warranted.¹⁶

If Millview's diversions continue to expand and Millview continues to divert water in excess of the Waldteufel claim of right, the threat of unauthorized diversion exists. Therefore, to ensure compliance with this order, Millview should be required to record and report its diversions as set forth in the draft CDO. Specifically, we will require Millview to maintain a daily record of its diversions under the Waldteufel claim of right, Millview's water right license and permit, and Millview's water supply contract with the Mendocino District. In addition, we will require Millview to maintain a record of any water that Millview diverts on behalf of other entities. We will require Millview to submit the records of its diversions to the Division of Water Rights on an annual basis, and provide a copy of the records to the Division upon request.

¹⁶ The Draft Cease and Desist Order included Messrs. Hill and Gomes. Messrs. Hill and Gomes entered into a written "License and Assignment of Water Rights Agreement" with Millview. (PT-9) The agreement provides for Millview's lease and option to purchase the Waldteufel claim of pre-1914 appropriative right held by Messrs Hill and Gomes. The effective period of the agreement is listed as being from October 15, 2002, until October 14, 2006. The record is not clear, however, whether the agreement was extended. Regardless of the term of that agreement, to the extent that Messrs. Hill and Gomes maintain any interest in the Waldteufel claim of right, our analysis finding that the Waldteufel right is limited applies equally to their claim under the Waldteufel right, and would apply to any diversions thereunder.

DRAFT – September 19, 2011

As set forth in section 5.2 above, it appears that an overlapping appropriative right could not have been developed based on diversion and use on the Waldteufel parcel because the parcel was riparian. This order does not prohibit diversion and use consistent with the appropriative right that would have been established, and not forfeited for non-use, assuming that an appropriative right could have been developed, because the hearing notice did not adequately raise the issue, for purposes of this proceeding, of whether a pre-1914 right could have been established at all. This order should not be interpreted to confirm or validate that any pre-1914 right exists based on the Waldteufel claim of right, should the issue be raised in any later proceeding.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT, Millview County Water District shall take the following actions to prevent the threatened unauthorized diversion and use of water of which Millview County Water District was on notice in these proceedings, as set forth in section 1052 of the California Water Code.

1. Millview County Water District shall restrict all diversions from the Russian River, its tributaries or underflow, or a subterranean stream associated with the Russian River valley pursuant to the Waldteufel pre-1914 appropriative claim of right, to the diversion season of April through September, and to:
 - a. an instantaneous rate of 1.1 cfs;
 - b. an annual amount of 15 acre-feet; and
 - c. a rate no greater than the rate of flow available from the West Fork Russian River as measured at the USGS gage #11461000 (Russian River Near Ukiah, CA).
2. Millview County Water District shall maintain a record of all diversions of water on a daily basis. This record shall identify the amount of water diverted each day at Millview County Water District's points of diversion and the basis of right utilized to justify the diversion of water including, but not limited to:
 - a. the Waldteufel pre-1914 appropriative claim of right (as reported under Statements S000272 and S015625 or any other reporting document);
 - b. License 492 (Application A003601);
 - c. Permit 13936 (Application A017587); and
 - d. the contract with the MCRRFC&WCID pursuant to Permit 012947B (Application A012919B).

DRAFT – September 19, 2011

The record shall also identify any water wheeled for other entities (e.g., Calpella County Water District, the City of Ukiah, etc.) pursuant to a valid basis of right. This record shall be updated at least weekly and made available for inspection on the next business day after receipt of a written request from any interested party. A copy of the annual record for each calendar year shall be submitted to the following address no later than February 1st of each year:

Division of Water Rights
Attention Program Manager, Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

An electronic copy shall be submitted to a specified e-mail address if so directed in writing by the Deputy Director for Water Rights.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on _____.

AYE:

NAY:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board