May 9, 2005

STATE WATER RESOURCES CONTROL BOARD
BOARD WORKSHOP – DIVISION OF WATER RIGHTS
MAY 18, 2005

ITEM: 4

SUBJECT:.

PROPOSED CEASE AND DESIST ORDER AGAINST REDWOOD VALLEY COUNTY WATER DISTRICT

DISCUSSION:

On February 9, 2005, the State Water Board conducted a hearing on draft Cease and Desist Order No. 262.31-11. The draft Cease and Desist Order, issued to Redwood Valley County Water District (Redwood) on October 26, 2004, alleges violations of Permit 17593 and unauthorized diversions of water. Redwood requested a hearing.

Based on the hearing, the proposed water right order concludes:

1. That Redwood is delivering water for domestic use in four locations that are outside the place of use authorized under Permit 17593. The order requires Redwood to cease delivering or using water appropriated under Permit 17593 outside of the place of use.

2. Redwood is not serving water for irrigation use to more than the 3,300 acres authorized under Permit 17593.

3. Redwood is delivering water for irrigation that it takes by direct diversion from Lake Mendocino under Permit 17593. This is a violation of Permit 17593, which authorizes irrigation uses only from stored water. The order requires that Redwood immediately cease using water appropriated by direct diversion for irrigation unless and until the State Water Board approves a change in purpose of use of water appropriated by direct diversion to allow irrigation use.

4. Redwood is diverting water from Lake Mendocino during periods when diversions are not authorized by Permit 17593. During these periods, Redwood must demonstrate that it has an alternative supply of water if it takes water from Lake Mendocino. Redwood has a dispute with Mendocino as to whether the water it diverted in November and December 2002 was available to it under Mendocino's Permit 12947B. This order requires that Redwood provide verification of all of the occasions when it obtained alternative water supplies.

POLICY ISSUES:

Should the SWRCB adopt the proposed order?

FISCAL IMPACT:

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of approving this item.

REGIONAL BOARD IMPACT:

None

STAFF RECOMMENDATION:

Staff recommends that the SWRCB adopt the proposed order.

May 9, 2005

D R A F T

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2005 -

In the Matter of
Permit 17593 (Application 24955)
Cease and Desist Order No. 262.31-xx
Redwood Valley County Water District

SOURCE: East Fork Russian River at Lake Mendocino

COUNTY: Mendocino County

ORDER ADOPTING CEASE AND DESIST ORDER

BY THE BOARD:

1.0 INTRODUCTION

In this order, the State Water Resources Control Board (State Water Board) orders Redwood Valley County Water District (Redwood) to cease and desist its violations of water right Permit 17593 issued on water right Application 24955.

On February 9, 2005, the State Water Board conducted a hearing on draft Cease and Desist Order No. 262.31-11, issued by the Chief of the Division of Water Rights to Redwood on October 26, 2004. The hearing was an adjudicative hearing governed by certain provisions regarding administrative adjudication in the Administrative Procedure Act (Gov. Code, §§ 11400, et seq.), as specified in the State Water Board's regulations at title 23, California Code of Regulations, section 648. The State Water Board issued a

D R A F T

Notice of Public Hearing for this proceeding on December 17, 2004, and issued a Re-Notice of Public Hearing on January 7, 2005.[1]

In this hearing, a staff Enforcement Team presented the case for adopting the draft Cease and Desist Order. The parties in the hearing were the Enforcement Team and Redwood, the respondent. Several other persons and entities also appeared as interested parties. The State Water Board has considered all of the evidence and arguments in the hearing record, and the findings and conclusions herein are based on the evidence in the hearing record.

2.0 BACKGROUND

2.1 Authority to Issue a CDO

The State Water Board is authorized to issue a cease and desist order (CDO) when it determines that any person is violating or threatening to violate any requirement described in Water Code section 1831, subdivision (d). Under subdivision (d), the State Water Board may issue a CDO in response to a violation or threatened violation of any of the following:

> "(1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division.
> (2) Any term or condition of a permit, license, certification, or registration issued under this division.
> (3) Any decision or order of the board issued under this part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order." (Wat. Code, § 1831(d).)

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[1] The December 17, 2004, notice included not only the cease and desist order against Redwood, but also draft Cease and Desist Order No. 262.31-12 against Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino). Mendocino, however, agreed to accept a revised cease and desist order and to waive its right to a hearing on the revised cease and desist order. Accordingly, the January 7, 2005, notice included only the issues regarding the cease and desist order against Redwood.

The State Water Board may issue a CDO only after notice and an opportunity for hearing. Such notice shall be by personal notice or certified mail, and shall inform the person allegedly engaged in the violation (respondent) that he or she may request a hearing within 20 days after the date of receiving the notice. The notice shall contain a statement of facts and information showing the violation. On October 26, 2004, in accordance with Water Code section 1834(a), the Division of Water Rights (Division) of the State Water Board issued notice to Redwood of the draft CDO for the violation and threatened violation of (1) terms and conditions of a water right permit, and (2) the prohibition against unauthorized diversion and use of water. By letter dated October 28, 2004, Redwood requested a hearing. As explained above, the State Water Board conducted the requested hearing on February 9, 2005.

If Redwood violates this CDO, the State Water Board may proceed pursuant to Water Code section 1845(a). Under Section 1845, the penalties for a violation of a CDO are injunctive relief issued by a superior court and liability for a sum not to exceed $1000 for each day in which the violation occurs. Either the court or the State Water Board may impose civil liability against a violator of a CDO.

2.2 Physical Setting and Sources of Water for Redwood's Use

Redwood's service area is located in Mendocino County north of Ukiah, between the East Fork Russian River and the West Fork Russian River, and northwest of Lake Mendocino. Redwood's service area is primarily within the drainage of the West Fork Russian River.

Redwood currently obtains water for users within its service area from the East Fork Russian River at Lake Mendocino under its Permit 17593 and pursuant to a Stipulated Judgment which serves as a water supply contract with Mendocino County Russian River Flood Control and Water Conservation Improvement District (Mendocino) for water supplies during periods when Permit 17593 does not authorize diversions of water from

the river at Lake Mendocino.[2] Redwood obtained Permit 17593 in 1979. Only a small portion of the southernmost part of Redwood's service area is within the service area of Mendocino. (WR 1-29.) In 1979, in Order WR 79-15, the State Water Board added Redwood's service area to Mendocino's place of use under Mendocino's water right permit 12947B to facilitate a water supply contract between Mendocino and Redwood under which Mendocino would provide up to 4000 acre-feet of water per year to Redwood. (MCRRF & WCID 1.) On May 29, 1980, Mendocino and Redwood obtained a Stipulated Judgment from the Mendocino County Superior Court in Case No. 42059. (RVCWD 2.) The Judgment stipulates that it supersedes the earlier agreements under which Redwood had obtained water from Mendocino. Under the Judgment, Mendocino will sell Redwood water available under Mendocino's 8000 acre-feet per annum (afa) water right (Permit 12947B) that is deemed surplus to the needs of Mendocino. The Judgment sets a formula for determining the purchase price of surplus water, requires reporting of Redwood's diversions of water, sets the payment dates, allocates responsibilities, and establishes a procedure under which Mendocino will notify Redwood at such time as it no longer has surplus water available for Redwood's use. The judgment includes provisions for resolution of disputes through arbitration and includes termination provisions. (RVCWD 2.)

In Decision 1610 (D-1610), adopted in 1986, the State Water Board also added Redwood's service area to the place of use of Sonoma County Water Agency (Sonoma) under Permit 12947A, and authorized Sonoma to deliver up to 7500 afa to Redwood, subject to terms and conditions that include curtailment of deliveries to Redwood when the stored water in Lake Mendocino drops below 30,000 acre-feet. (RVCWD 7.) Delivery to Redwood under Permit 12947A also is subject to the approval by the State Water Board of a water conservation plan for Redwood within one year after the signing of a contract between Redwood and Sonoma, pursuant to Condition 11 on page 56 of D-

[2] Redwood has filed additional applications, but has not yet received permits on them.

1610. Currently, no contract has been executed under which Sonoma will deliver water to Redwood.

2.3 Permit 17593

Permit 17593 authorizes Redwood to appropriate up to 4,900 afa from the East Fork Russian River at Lake Mendocino. (RVCWD 8.) By direct diversion, Redwood is authorized to appropriate water (1) at the maximum rate of 26.6 cubic feet per second (cfs) from March 1 to April 30 of each year for frost protection purposes, and (2) at the maximum rate of 1.9 cfs from November 1 to April 30 of each year for domestic purposes. By diversion to storage, Redwood is authorized to appropriate up to 2800 afa from November 1 of each year to April 30 of the following year. The maximum rate of diversion to offstream storage under Permit 17593 is 26.6 cfs. Redwood is authorized to provide irrigation water to a net area of up to 3300 acres within a gross area of 5000 acres.

Relevant to this order, conditions 16 and 17 of Permit 17593 make the permit subject to (1) an agreement between Redwood and Sonoma to limit diversions to periods when the water level in Lake Mendocino cannot be increased due to the requirement to preserve flood control capacity, and (2) an agreement between Redwood and the Department of Fish and Game to limit diversions to periods when the surface level of water in Lake Mendocino is above the conservation pool. (RVCWD 8.)

2.4 Positions of the Hearing Participants

The Enforcement Team, in the draft CDO, alleges that Redwood is violating or threatening to violate Permit 17593 and the prohibition in Water Code section 1052 against the unauthorized diversion or use of water. The draft CDO alleges that Redwood is violating Permit 17593 by delivering water for domestic use outside the place of use, delivering water for irrigation of more acres than is authorized under the permit, and using water appropriated by direct diversion for irrigation. The draft CDO also alleges

that Redwood is making unauthorized diversions of water from the Lake Mendocino conservation pool at times when Permit 17593 does not authorize diversions. The draft CDO proposes that Redwood be required to do the following: 1. Cease to divert water outside the authorized place of use or for purposes not authorized by Permit 17593 unless and until the State Water Board approves a water right change petition. 2. In connection with the change petition, prepare a contingency plan that identifies alternative sources of water for periods when no water is available under Permit 17593. 3. Diligently pursue approval of the change petition and petition for extension of time. 4. Immediately cease violation of terms 16 and 17 of Permit 17593. 5. Provide evidence that the water Redwood diverted since 1999 outside of Permit 17593 was diverted under another basis of right. 6. Establish a plan for determining whether Mendocino had surplus water available for the year 2002. 7. Develop a compliance plan to ensure that diversions claimed to be under Mendocino's right are under Mendocino's right and submit the compliance plan within 60 days of this order.

Redwood, in responding to the draft CDO, argues: 1. The place of use under Permit 17593 includes the annexations that Redwood has made, and there is no requirement that Redwood seek a change of place of use when it annexes new territory. Nevertheless, Redwood points out that it has filed a petition for change of place of use. 2. The maximum irrigated acreage is less than the 3300 acres on which the permit allows irrigation. 3. The petition for a change in place of use should be adequate to satisfy the requirement in the draft CDO for a contingency plan for serving the areas outside the place of use. 4. Redwood is not in violation of terms 16 and 17 because it uses water available under Mendocino's permit. Redwood here seems to assert that Mendocino has more water available under its permit because Mendocino cannot serve some areas that it serves. In effect, Redwood seeks to take on the burden of proving that Mendocino has unused water as a defense to the draft CDO's allegation that Redwood may not be taking water under Mendocino's permit. Redwood also inexplicably suggests that Mendocino's failure to enter into a Pooling Agreement between Mendocino and Sonoma so that

Redwood can obtain water from Sonoma is to blame if Mendocino does not have surplus water for Redwood.

3.0 ALLEGED VIOLATIONS OF PERMIT 17593

3.1 Water deliveries outside the place of use

Redwood has expanded its service area outside the boundaries of the place of use designated on the map of its authorized place of use in Permit 17593 and is serving water to the new parts of its service area outside the place of use boundaries of Permit 17593. (R.T., p. 20-21; WR 02.) The Enforcement Team presented a copy of the place of use map (WR 29) and a colored map showing both the authorized place of use and the four areas that have been annexed to Redwood's service area but have not been added to Redwood's place of use under its water right permit. (WR 22.) Redwood does not deny that it is serving water for domestic use in the four areas that are outside the boundary on the place of use map. The Enforcement Team also presented four Local Agency Formation Commission (LAFCO) maps showing the four annexations; Redwood's April 21, 2001, response to a complaint filed against Redwood for serving water outside its place of use; and a copy of the water service agreement between Redwood and the Redwood Valley Rancheria to serve water in one of the four annexed areas. (WR 23, 24, 25, 26, 27, and 28.)

The place of use of Permit 17593 is described in condition 4 of the permit as "Irrigation of a net area of 3,300 acres within a gross area of 5,000 acres and other given uses within the boundaries of the Redwood Valley County Water District in T16 and 17N, R12W, MDB&M." and "The place of use is shown on map filed with the State Water Resources Control Board." Redwood argues, based on the first of these two sentences, and ignoring the second sentence, that it can serve water anywhere within its district so long as the water is served within T16 and 17N, R12W, MDB&M. Redwood argues that the map does not control. The Enforcement Team, on the other hand, argues that Redwood is in violation of Permit 17593 because it is serving water outside the boundary on the map of its place of use. For the following reasons, the State Water Board finds that both

sentences together define the place of use, with the first sentence placing a restriction of 3,300 acres on the place of use in the case of irrigation use of the appropriated water. In effect, Redwood is arguing that it can change the place of use of the water right permit issued to it by the State Water Board without seeking the permission of the State Water Board.[3] This argument is based on the first sentence in condition 4 of the permit, quoted above. Redwood argues that the second sentence quoted above is not part of the place of use designation because it is at the bottom of the first page of the permit, not in the lined columns for place of use on the first page of the permit form. It is necessary, however, to consider both sentences. The purposes of the first sentence are to limit the number of acres that can be irrigated under Permit 17593 within the place of use, which is 5,000 acres, to no more than 3,300 acres, and to generally allow the other purposes of use to be applied anywhere within the place of use. The second sentence actually designates the place of use.

Not only is Redwood incorrect as to the construction of the permit itself, Redwood ignores the legal requirements for the place of use in a water right permit. Under the Water Code, a water right application shall set forth the place where it is intended to use water. (Wat. Code, § 1260(f).) Further, the application must contain all maps required by the State Water Board, and the maps are part of the application. (Wat. Code, § 1261.) When the State Water Board issues a permit, it must find that all of the information required for an application has been provided, including the specific place of use.

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[3] Redwood may also be arguing that the LAFCO can change the place of use under the water right permit. There is evidence that Redwood's manager assumed that the LAFCO approval was the only approval required. The LAFCO can change only the service area, however, and not the place of use of the water right. As recognized in *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 974, the service area, which is set locally, and the place of use, which is set by the State Water Board, are set under separate authorities. A water right permittee cannot use water appropriated under the water right permit outside of the place of use, but it is under no obligation under the permit to use water in all places within the authorized place of use. (*Id.*) The State Water Board has exclusive authority over changes in water right permits, and the right to take and use water cannot exceed the extent allowed in the permit. (Wat. Code, §§ 1225, 1381.) The place of use is a primary element of an appropriative water right and changes in the place of use are subject to the permission of the State Water Board. (Wat. Code, §§ 1260, 1261, 1701.)

(*Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245, 257; Wat. Code, § 1375.)

The State Water Board's regulations require, for a project of the size of Redwood's, a map prepared by a licensed engineer or surveyor showing the place of use and other specified features. The regulations require that the place of use on the map shall be identified by reference to the subdivision, section, township, range, and meridian of a public land survey or projection. (Cal. Code Regs., tit. 23, §§ 715, 717.) (Emphasis added.) Using the references to the townships, ranges, etc. to identify the part of the county or state within which the place of use is located does not, however, displace the map, which shows the specific place of use within these broader areas. The requirement to use these references simply ensures that the mapped place of use is located within the geographically designated areas.

In effect, Redwood argues that it should not have to file a petition for the State Water Board's approval of a change of place of use before it changes its place of use by annexing new areas and delivering water there. Under Water Code section 1701 and under other Water Code provisions, however, Redwood must obtain the permission of the State Water Board before it changes the place of use from that specified in the permit. These laws specify the requirements and procedures for obtaining changes in water right permits or licenses on either a temporary or permanent basis. (See Wat. Code, §§ 1435-1442; 1700-1707; 1725-1732; 1735-1737; 1740.) Considering the foregoing matters, Redwood's argument is without merit.

As a backup, Redwood filed, in 2004, a petition for change of place of use changing the exterior boundaries of the place of use to be coextensive with the current service area. The State Water Board takes official notice of the file on Permit 17593 (A024955), which includes a request dated August 2004 for additional information before processing the petition. The file does not contain the requested additional information. This order

requires immediate compliance with the existing permit. Redwood may not serve water outside its authorized place of use unless the State Water Board approves the petition.

3.2 Amount of acreage irrigated with water appropriated under Permit 17593

The draft CDO alleges that Redwood may be serving more than the authorized 3,300 acres of land with irrigation water. In the hearing, Redwood denied this allegation and Redwood's witness testified that the area currently served irrigation water is approximately 2,800 acres, based on a survey of users. (R.T., page 107.) The evidence does not support a finding that Redwood is serving more than 3,300 acres of land with irrigation water appropriated under Permit 17593.

3.3 Direct diversion of water for irrigation in November and April

Under Permit 17593, Redwood is authorized to deliver water for irrigation to a maximum of 3,300 acres of land within its approximately 5,000-acre place of use. The permit does not, however, allow Redwood to use water for irrigation that is taken by direct diversion. Condition 5 of the permit limits the water that can be taken by direct diversion to frost protection during March and April of each year and domestic uses from November 1 to April 30 of each year. The permit allows the collection to storage of up to 2,800 acre-feet per annum from November 1 to April 30. Under the permit, this stored water is the only water the permit authorizes to be used for irrigation. Redwood has not built a reservoir for the 2,800 acre-feet of water it is authorized to store, nor has it made contractual arrangements for using existing reservoirs for this storage. (R.T., pp. 22, 125; WR 01, pp. 3-4.)

Redwood points out that it has a 67 or 68 acre-foot reservoir after its pumping station. (R.T., pp. 49, 109.) The purpose of this reservoir is to serve water for domestic use. (R.T., pp. 49-50.) Irrigation water can be either run through the reservoir or diverted by a pipe before it reaches the reservoir and delivered to customers. (R.T., pp. 49-50.) Redwood argues that if the water is run through the reservoir, it should be considered to

have been stored. Redwood argues that water does not need to be held in an offstream reservoir for a minimum of 30 days before it can be considered stored water and therefore available for irrigation use. Redwood is correct that the Water Code does not specify a period of time during which water must be impounded before it can be considered "stored." "Storage of water" is defined in California Code of Regulations, title 23, section 658 as follows:

> "Storage of water means the collection of water in a tank or reservoir during a time of higher stream flow which is held for use during a time of deficient stream flow. For licensing purposes, all initial collections within the collection season plus refill, in whole or in part, held in a tank or reservoir for more than 30 days shall be considered water diverted for storage except as provided in Section 735(c)."

By its terms, this regulation applies the 30-day holding period only to the process of deciding how much water has been appropriated to storage when the State Water Board issues a water right license after a permittee has appropriated to beneficial use the maximum amount of water that actually can be diverted in accordance with the conditions of the permit. As applied to licensing, this rule results in a conservative determination as to the amount of water proved up under a storage right.
Assuming for sake of argument that water can be considered stored if it is impounded for a shorter period than 30 days, this does not help Redwood justify its delivery of water by direct diversion for irrigation purposes under Permit 17593. To store water means that the water is impounded for later use. Usually water is stored to hold it from one season to another drier period when water otherwise is not available. There is no reason to assume that moving water through a water treatment reservoir, however, involves storage. Redwood has not established that the water appropriated for irrigation under Permit 17593 is impounded for any significant period that would constitute storage before it is applied to irrigation.

Accordingly, to deliver water for irrigation use under Permit 17593, Redwood needs either a change in its permit to authorize appropriation of water by direct diversion for irrigation or it needs a reservoir or reservoirs to store the water for later irrigation use.

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4.0 ALLEGED UNAUTHORIZED DIVERSIONS OF WATER

Permit 17593, condition 5, authorizes diversions from the East Fork Russian River at Lake Mendocino from November 1 to April 30 of the succeeding year. By direct diversion, Redwood can take up to 26.6 cfs for frost protection from March 1 to April 30 of each year and up to 1.9 cfs for domestic uses from November 1 to April 30. By diversion to storage, Redwood can take up to 2,800 afa to be collected from November 1 to April 30, subject to various restrictions. The total maximum amount of water to be taken for all uses is 4,900 afa.

The draft CDO alleges that Redwood is taking water from Lake Mendocino both outside its diversion season and during its diversion season at times when conditions 16. and 17.A. of Permit 17593 do not authorize diversions. Conditions 16. and 17.A. of Permit 17593 are the result of protest dismissal agreements. Condition 16. provides in pertinent part:

> "Diversions by Redwood Valley County Water District under this permit may be made only during those times when the water level in Lake Mendocino cannot be increased due to the requirements of preserving storage capacity for flood control as determined by the U.S. Army Corps of Engineers."

Condition 17.A. provides in pertinent part:

> "A. Permittee will not divert water for use or storage under this permit or any license issued pursuant to this permit except under the following circumstances: 1. When, during the period from October 1 through April 30, the surface level of the water in lake Mendocino is above the conservation pool as established by the U.S. Corps of Engineers."

Under conditions 16. and 17.A., Redwood is prohibited from diverting water during its diversion season except when there are flows that cannot be impounded in Lake Mendocino because the lake is at or above the upper limit of its authorized capacity. Further, the season of diversion restricts Redwood's diversions to periods between November 1 and April 30. When these conditions restrict Redwood's diversions, Redwood's only alternative is to obtain water from an alternative source. Due to the

Stipulated Judgment entered in 1980 (Redwood 2), Mendocino is Redwood's current alternative source of water from Lake Mendocino when Redwood cannot divert under Permit 17593.

Redwood regularly takes water from Lake Mendocino during periods when Permit 17593 does not authorize diversions. In accordance with the terms of the Stipulated Judgment, Mendocino historically has billed Redwood for the water diverted from Lake Mendocino outside of the limits of Permit 17593. In August 2002, Redwood paid Mendocino for the summer water it had diverted during the 2000-2001 and 2001-2002 fiscal years, but disputed a bill for winter diversions. (WR 15, 16.) In November 2002, Mendocino notified Redwood that it did not have any surplus water remaining under its Permit 12947B for the remainder of the year. Redwood diverted water during this period nevertheless, including 37.5 acre-feet of water during December 2002 after Mendocino notified Redwood that it had no surplus water. This water also was not available under Permit 17593. Redwood disputed Mendocino's determination that there was no surplus water and requested arbitration, but the arbitration has not been pursued. Since August 2002, Redwood has continued to divert water from Lake Mendocino as needed, and Mendocino has billed Redwood for summer water diversions, but Redwood has not paid the bills. (WR 30.) Until and unless Redwood obtains a determination in the arbitration process or from the Superior Court that the water taken in November-December 2002 was appropriated under Mendocino's permit, the State Water Board will consider the water to have been illegally appropriated.

To avoid being penalized for taking water illegally, Redwood must demonstrate that the water it takes from Lake Mendocino during periods that are not covered by Permit 17593 is covered by another water right. Redwood claims that it is taking water under Mendocino's water right pursuant to the Stipulated Judgment. The State Water Board is charged with deciding what is adequate proof that Redwood is taking the water under another basis of right.

The Enforcement Staff, in the draft CDO, suggests that it would be sufficient for Redwood to present receipts for payment made to Mendocino for the water diverted outside the conditions of the permit. Redwood, on the other hand, argues that the State Water Board should not act as a bill collector for Mendocino, and that the payment or nonpayment of money does not prove that water is available to Redwood under Mendocino's permit.

In opposing the Enforcement Staff's suggestion that Redwood should provide proof that it has paid for the water, Redwood sought instead to prove that Mendocino is obligated to provide its surplus water to Redwood, and that Mendocino is illegally attempting to withhold surplus water from Redwood in violation of the Stipulated Judgment. Redwood alleges that Mendocino is serving water outside its proper place of use to use up water it should rightfully be allocating to Redwood. Redwood points out that under the 1980 Stipulated Judgment between Redwood and Mendocino, Mendocino must provide surplus water to Redwood. In effect, the Stipulated Judgment is a court-approved water supply contract.[4]

No condition in Mendocino's water right, however, requires Mendocino to provide its surplus water, if any, to Redwood. Mendocino's contractual obligation to Redwood is more properly before the court under the Stipulated Judgment, since it is outside the scope of the water right permits.[5] The State Water Board does not decide contractual disputes between water right holders (e.g., Mendocino) and their water supply

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[4] To demonstrate that Mendocino has surplus water that it is withholding, Redwood asserted that Mendocino is serving water outside its proper place of use. Mendocino's place of use, including the area that Redwood claims is outside the place of use, was approved by the predecessor of the State Water Board in Decision 1030 in 1959. Accordingly, this is an attempt to make an untimely collateral attack on Decision 1030.

[5] In response to objections to Redwood's attempt to convert the hearing into a hearing on Mendocino's water rights, the hearing officer ruled that Mendocino's place of use would not be considered in the hearing with respect to the issue of whether Redwood is illegally diverting water from Lake Mendocino. (R.T., pp. 79-82.)

contractors. (See Decision 1641, pp. 129-130; Order WR 2000-02, pp. 17-21 for a discussion of the contractor's rights before the State Water Board.)

We agree with the Enforcement Staff that Redwood must provide proof of an alternative water supply from Lake Mendocino for periods when diversions are outside the limits of Permit 17593. We also agree with Redwood, however, that requiring proof of full payment to Mendocino as provided in the Stipulated Judgment is not the appropriate form of proof of an alternative basis of right to take the water. The State Water Board is not a bill collector for its water right holders. The payment issue is a matter between the parties to the Stipulated Judgment. Either the parties or the court should decide the payment issue.

Mendocino's verification in each instance that water Redwood has taken is water that is appropriated under Mendocino's right and made available to Redwood will be adequate to establish that Redwood has used an alternative water supply. Redwood must have a form of written verification that the water it takes outside the limits of Permit 17593 is appropriated under another's water right. Mendocino's verification could be a bill issued to Redwood for the water, or it could be another written document verifying that the water was available to Redwood in the amounts and at the times when Redwood diverted it, and that the water was diverted and used within Mendocino's right. When Redwood has diverted water outside of Permit 17593 that Mendocino considers appropriated under Mendocino's permit, Mendocino has billed Redwood for the water. If Redwood obtains an additional or substitute contractual water supply from Sonoma, a similar verification from Sonoma likewise will be adequate to establish that Redwood is diverting an alternative water supply from Lake Mendocino.

5.0 CONCLUSIONS

1. Redwood is delivering water for domestic use in four locations that are outside the place of use authorized under Permit 17593. This order requires that Redwood

immediately cease delivering or using water appropriated under Permit 17593 outside of the place of use.

2. Redwood is not serving water for irrigation use to more than the 3,300 acres authorized under Permit 17593.

3. Redwood is delivering water for irrigation that it takes by direct diversion from Lake Mendocino under Permit 17593. This is a violation of Permit 17593, which authorizes irrigation uses only from stored water. This order requires that Redwood immediately cease using water appropriated by direct diversion for irrigation unless and until the State Water Board approves a change in purpose of use of water appropriated by direct diversion to allow irrigation use.

4. Redwood is diverting water from Lake Mendocino during periods when diversions are not authorized by Permit 17593. During these periods, Redwood must demonstrate that it has an alternative supply of water if it takes water from Lake Mendocino. Redwood has a dispute with Mendocino as to whether the water it diverted in November and December 2002 was available to it under Mendocino's Permit 12947B. This order requires that Redwood provide verification of all of the occasions when it obtained alternative water supplies.

ORDER

IT IS ORDERED that, pursuant to Water Code sections 1831 through 1836, Redwood shall take the following corrective actions and satisfy the following time schedules:

1. Commencing on the date of this Order and continuing until such time as the State Water Board approves a change in place of use, Redwood shall cease delivering or using water appropriated under Permit 17593 outside of the place of use specified on the map

on file with the State Water Board for Application 24955 that is dated November 24, 1975.

2. Commencing on the date of this Order and continuing until such time as the State Water Board approves a change in purpose of use of water appropriated by direct diversion, Redwood shall cease using water appropriated by direct diversion under Permit 17593 for irrigation.[6]

3. Within 90 days after the date of this Order, Redwood shall submit a contingency plan to the Chief of the Division of Water Rights for approval. The contingency plan shall identify any sources of water that are available to serve the areas not within the place of use of Permit 17593, a schedule for securing such sources, and measures to assure that Redwood will not deliver water appropriated under Permit 17593 except as authorized under Permit 17593. The Chief of the Division of Water Rights may direct Redwood to revise the contingency plan as necessary to meet the purposes of this Order, and Redwood shall revise the contingency plan as directed and within the period allowed by the Chief of the Division of Water Rights. Redwood shall implement the approved contingency plan.

4. Commencing on the date of this order, Redwood shall not divert water under Permit 17593 when such diversion is prohibited by condition 16. or term 17.A. of Permit 17593.

5. Within 30 days after the date of this Order, Redwood shall submit evidence to the Chief of the Division of Water Rights of its alternative supply or supplies of water during periods when Permit 17593 did not authorize diversions from January 1, 1999, until the present, but not including the winter of 2002. If Redwood relies on another water right permit as the basis for taking water from the East Fork Russian River, the place of use of

that permit must already include an authorized place of use that includes the places where Redwood delivers water.

6. Redwood shall obtain and submit to the Chief of the Division of Water Rights documentation showing whether or not water that Redwood diverted during 2002 other than under Permit 17593 was available to Redwood under another basis of right. Such documentation may consist of written verification from the water supplier from whom Redwood obtained the water that the water was available to Redwood in the amounts and at the times when Redwood diverted it, and that the water was diverted and used within the right relied upon by the water supplier. If such written verification is not available, Redwood may take any legal measures available to it to obtain such verification, including through court proceedings or arbitration. Within 30 days after the date of this order, Redwood shall submit a plan to the Chief of the Division of Water Rights for approval setting forth the procedures Redwood will use to obtain the documentation required by this condition, including time limits on steps in the process.

7. Within 60 days after the date of this order, Redwood shall submit to the Chief of the Division of Water Rights, for approval, a compliance plan that will provide assurance that any diversions to its service area Redwood claims are being made under a water right held by another water right holder are in fact being diverted under that other right and are verified by the other water right holder. In preparing the compliance plan, Redwood shall consult with any water right holder from which it expects to obtain water. The compliance plan shall include advance notice to the other water right holder of the diversion and shall include the filing of reports with the Chief of the Division of Water Rights.

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[6] If the State Water Board authorizes a change in the purposes of use under Permit 17593, the changed purposes of use will control the use of water thereafter until such time as a further change is approved in the future.

D R A F T

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 May 19, 2005.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

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Debbie Irvin
Clerk to the Board