

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-0027-EXEC

In the Matter of Order WR 2011-0016 issuing a Cease and Desist Order for the Threatened Unauthorized Diversion and Use of Water by Millview County Water District from the Russian River in Mendocino County

and

In the Matter Order WR 2012-0001 Denying Reconsideration of Order WR 2011-0016

ORDER SETTING ASIDE ORDER WR 2011-0016 AND ORDER WR 2012-0001

BY THE EXECUTIVE DIRECTOR¹

This Order sets aside Order WR 2011-0016 and Order WR 2012-0001 as required by a peremptory writ of mandate issued by the Mendocino County Superior Court. The State Water Resources Control Board (State Water Board) adopted Order WR 2011-0016, a cease and desist order (CDO), on October 18, 2011. The CDO required Millview County Water District (Millview) to cease and desist the threatened unauthorized diversion and use of water under a pre-1914 appropriative claim of right, which is referred to as the Waldteufel claim of right, based on the name of the original claimant.

In the CDO, the State Water Board addressed Millview's contention that the Waldteufel claim of right authorized the diversion of approximately 1,450 acre-feet per annum (afa) from the Russian River, at a rate of 2 cubic feet per second (cfs), year-round. Contrary to Millview's contention, the Board found that the right to divert and use more than 243 afa of water during the irrigation season never had been perfected. (Order WR 2011-0016, pp. 25-28.) The Board also found that the right to divert and use more than 15 afa had been forfeited for non-use. (*Id.* at pp. 23-30.) In addition, the Board questioned whether an appropriative right could have been developed in the first instance because the diversion and use of water on the Waldteufel parcel had been consistent with the exercise of a riparian right. (*Id.* at pp. 24-25, 43-44.) The Board did not order Millview to

¹ State Water Resources Control Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to set aside a decision or order, in whole or in part, of the State Water Board, as commanded by a peremptory writ of mandate issued to the State Water Board.

cease diverting and using water under the Waldteufel claim of right altogether, however, because the issue of whether a riparian right holder could have developed an overlapping appropriative right had not been properly noticed. The Board denied petitions for reconsideration of the CDO in Order WR 2012-0001.

Millview filed a petition for writ of mandate in Mendocino County Superior Court, seeking to compel the State Water Board to set aside the CDO. The superior court issued a decision granting the writ. The court concluded, without explanation, that the Board had proceeded in excess of its jurisdiction, and that the findings essential to the CDO were not supported by the weight of the evidence. The State Water Board appealed.

The Court of Appeal affirmed the superior court's issuance of a writ, but held that the superior court's ruling on several issues was erroneous. Preliminarily, the Court of Appeal held that the State Water Board has jurisdiction under Water Code section 1831 to determine the validity and scope of a pre-1914 appropriative claim of right, and to issue a CDO precluding the diversion of more water than authorized under a valid pre-1914 appropriative right. (*Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 893-895.) In addition, the Court of Appeal held that the Board had properly determined that the right to divert more than 243 cfs had not been perfected under the Waldteufel claim of right. (*Id.* at pp. 896-899.) The Court of Appeal also agreed with the Board that an appropriative right could not have been developed by using water on the Waldteufel parcel because it was riparian, and that Millview had not presented any evidence that water had been used under the Waldteufel claim of right on land that was not riparian. (*Id.* at p. 905.) The Court did not affirm the CDO on this basis, however, because the Board had not relied on Millview's failure to present evidence of non-riparian use as a basis for the CDO. (*Ibid.*)

Although the Court of Appeal held that the State Water Board had not erred with respect to the issues described above, the Court concluded that the Board had applied an incorrect legal standard in evaluating whether the Waldteufel claim of right had been forfeited for non-use. Specifically, the Court concluded that forfeiture for non-use does not occur, and an appropriator can resume use under a previously unexercised right, in the absence of a conflicting claim to the unused water. (*Millview County Water District v. State Water Resources Control Board, supra*, 229 Cal.App.4th at pp. 899-903.) In addition, the Court determined that the evidence in the record was insufficient to demonstrate the existence of a conflicting claim to the water unused under the Waldteufel claim of right. (*Id.* at pp. 903-904.)

The Court of Appeal directed the State Water Board to set aside the CDO and reconsider the matter consistent with its decision. The Court specified three options for the State Water Board on remand:

- 1.) The Board can set aside the present CDO and enter a new CDO limiting Millview's diversion under the Waldteufel claim to 243 afa, between the months of April and October;
- 2.) The Board can set aside the present CDO and conduct further evidentiary hearings on the issue of forfeiture. While there was no substantial evidence of a conflicting claim presented to the Board before it adopted the CDO, such evidence might be developed; or
- 3.) The Board can begin again by issuing an amended notice of draft CDO addressing the issue of the perfection of the Waldteufel claim as a right of appropriation and conduct new administrative hearings directed at this issue, alone or in combination with the issue of forfeiture.

On June 5, 2015, the superior court issued an amended peremptory writ of mandate consistent with the Court of Appeal's decision. The amended writ of mandate directs the State Water Board, within 60 days of receipt of the writ, to set aside Order WR 2011-0016 and Order WR 2012-01, and thereafter to reconsider the matter in light of the Court of Appeal's decision. The State Water Board received service by mail of the amended writ of mandate on July 22, 2015.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT: as required by the amended peremptory writ of mandate issued by the Mendocino County Superior Court, Order WR 2011-0016 and Order WR 2012-01 are set aside. State Water Board enforcement staff are directed to consider initiating enforcement action to address Millview's diversion and use of water under the Waldteufel claim of right in accordance with the options outlined by the Court of Appeal.

8/28/15
Date:

Thomas Howard
Thomas Howard
Executive Director