Proposed Cease and Desist Order Hearing

Thomas Hill, Steven Gomes, and
Millview County Water District
Russian River and Russian River Underflow
In Mendocino County

scheduled to commence
January 26, 2010

PRE-HEARING BRIEF
MILLVIEW COUNTY WATER DISTRICT

I. ISSUE

The threshold issue in this proceeding is whether or not the State Water Resources Control Board ("SWRCB") has sufficient subject matter jurisdiction to adopt the Draft Cease and Desist Order ("CDO"). This jurisdictional issue depends entirely upon the sub-issue as to whether or not the SWRCB has jurisdiction to declare that a Pre-1914 Appropriative Right established pursuant to the Civil Code procedures has been forfeited in whole or in part.

The answer to this sub-issue is that while the Superior Court does have jurisdiction to declare such a water right forfeited, the SWRCB does not. Because the central assumption for both the complaint filed by Lee Howard and the Draft CDO is that this particular water right was forfeited from 1445 ac/ft/yr to 15 ac/ft/yr, the Draft CDO cannot be adopted by the SWRCB.

Because this is purely a legal issue, and not a factual issue, it should be resolved at the outset to avoid the unnecessary expenditure of scarce resources by all parties.

II. FACTUAL BACKGROUND

In preparing the proposed Draft CDO the Division of Water Rights for the most part correctly summarized the relevant facts. The relevant facts governing the jurisdictional issue are stated by the Division at Paragraphs 1, 2, 5, 6,7 and 8, the third sentence of Paragraph 3, and the first two sentences of Paragraph 13. If those facts as stated by the Division are taken as being stipulated to, there is then sufficient factual basis for the Board to summarily dismiss this proceeding for want of subject matter jurisdiction.[1]

III. SUMMARY OF LEGAL ARGUMENT

A. Factual Basis.

The Waldteufel Water Right was claimed by J.A. Waldteufel by compliance with the statutory procedure set forth in Civil Code §§ 1410 to 1422 which statutorily provided a method for establishing an appropriative right between March 1, 1872 and December 19, 1914 when the Water Commission Act became effective. That Mr. Waldteufel complied with the statutory procedure to perfect the water right is not contested by the Division, mostly because it is not subject to question.

On March 14, 1914, Mr. Waldteufel recorded a notice which asserted the water right (see Ex. Mil-002) pursuant to Civil Code §1415 for a 165 acre parcel near Ukiah, California to divert 1445 ac/ft/yr from the Russian River. (Also see Draft CDO facts in ¶¶ 1 and 2). There is evidence that water was already in beneficial use at the time the Water Right Notice was

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[1] Millview does not address the balance of the factual assertions and conclusions, some of which are true and some of which are not, because they are not relevant to the jurisdictional issue. To protect the record in the event that the Board erroneously rules on the jurisdictional issue, Millivew has included rebuttal evidence in its pre-hearing designation of evidence.

recorded because when Mr. Waldteufel purchased the property in April 1913 the property was already in agricultural production for alfalfa. (See Ex. Mil-001, by which the sellers reserved for themselves "all fruit produced on said premises during the year 1913, together with the first cutting of alfalfa grown thereon in said year with full right to ingress thereon for the purpose of harvesting said fruit and alfalfa."). Furthermore, the means of diversion was completed at the time of the recordation of the notice (see Ex. Mil-002) and was sufficient to divert the claimed amount (see Testimony of Don McEdwards, Ex. Mil-009).

These facts establish that the Waldteufel Water Right was appropriated within the legal meaning thereof. As supplementary evidence, it is shown that the Waldteufel Right has been in continuous use within the boundaries of Millview since at least April 1913 to the present (see facts stated by the Division in the Draft CDO, ¶¶ 3 to 7, inclusive; Testimony of Tim Bradley and Steven Gomes). The right is now owned by Millview which, since 2001, has diverted the appropriated water to serve the residents of the District.

B. The Appropriation of the Waldteufel Right was Complete and Vested with a Priority Date of March 24, 1914.

Hutchins in his treatise *Water Rights Laws in the Nineteen Western States* (1970) U.S. Dept. Agriculture, Vol.2, p. 367, recognized that as to non-statutory appropriations (those claimed by mere appropriation without compliance with the procedures of Civil Code §§ 1410, *et seq.*) "conflicting statements appear in the opinions of the California courts as to when a non-statutory appropriation with its principle of relation-back was deemed complete. Expressions from time to time differed as to whether the final act was the completion of the ditch, or diversion of water, or application of the water to beneficial use."

As for requirements of a valid appropriation, Hutchins cites to *S.C. Simons v. Inyo Cerro Gordo Mining and Power Co.* (1920) 48 Cal.App. 524, 537 (*ibid* at p. 364). In *Cerro Gordo* the court stated:

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

Fortuitously, our analysis does not require the reconciliation of conflicting opinions as to when the appropriation was complete because the Waldteufel Right was claimed under the statutory procedure set forth in Civil Code §§ 1410-1422 which is succinct and unambiguous. The Division, in recitation of the facts for the Draft CDO, does not contest that Mr. Waldteufel perfected an appropriation under the Civil Code procedure. (See Draft CDO ¶1, and the first sentence of ¶13). Therefore in analyzing the threshold jurisdictional issue we start with the principle that Mr. Waldteufel completed an appropriation of 1445 ac/ft/yr with a priority date of March 24, 1914 pursuant to the Civil Code provisions governing between 1872 and December 19, 1914.

Where the premise of the Draft CDO ventures off course is its adoption of the Complaint filed herein conferring investigation jurisdiction concluding that the Waldteufel Water Right was forfeited by non-use (see Ex. Mil-011). While the Division uses a hedge word by concluding that the Waldteufel Water Right has "degraded," the essence of the proposed Draft CDO is that all but 15 ac/ft/yr has been forfeited for non-use. The evidence referenced by the Division is not only defective to support the notion of non-use (see Hill and Gomes Pre-Hearing Brief to which Millview joins), but the conclusion of non-use is absolutely irrelevant in the absence of evidence that a competing user wrested the vested Waldteufel Right away from the holder by establishing prescription. Such evidence would require a decree of a Superior Court extending due process to the holder and making factual and legal conclusions to such effect. No such decree is referenced by the Complaint filed herein, or the Division's factual recitation because no such decree exists.

C. Forfeiture of Pre-1914 Statutory Appropriations Is Not Within the Jurisdiction of the SWRCB.

The concept of "forfeiture" was introduced in the Water Commission Act which went into effect after the subject water right was appropriated and vested. The Water Commission Act provisions relating to forfeiture now embodied in Water Code § 1241 are not applicable to rights established by the Civil Code provisions effective prior to the adoption of the Water Commission Act.

This notion is best understood by the evolution of water rights law in California.

The doctrine of appropriation was established by common usage during the 1849 Gold Rush.

The Legislature resolved issues arising under the common law appropriations by adopting Civil Code §§1410, *et seq.* and providing a procedure for memorializing the appropriator's intent - recordation and posting of a written notice - when the diversion works was completed to apply the water to beneficial use.[2]

Lastly, the Water Commission Act was adopted in 1914 to replace the written notice of appropriation with a Permit Application and replace the actual diversion requirement with a license procedure and introduce a regulatory procedure for establishing forfeiture.

In the instant matter, the subject right vested under the Civil Code procedure and is not subject to the forfeiture provisions of the Water Commission Act. While the Division Staff properly responded to the Complaint pursuant to its investigative authority to determine whether there was an unlawful appropriation, the investigation should have been terminated once the Division determined that the appropriation was lawful by a valid Civil Code Pre-1914

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[2] Civil Code §1419 provided for forfeiture only for failure to comply with the Civil Code provisions, or by use by a competing claimant who complies with the Civil Code provisions subsequently, the Water Commission provided for forfeiture of Water Commission rights for non-use.

Appropriation and the absence of any judicial decree determining that the pre-Water Commission Act appropriation had been lost by the procedures for establishing the loss of a vested right.

The Division is in legal error when it asks this Board to adopt a Cease and Desist Order improperly premised upon forfeiture principles applicable to Water Commission Act appropriations - which this water right clearly is not. Without weighing the adequacy of the Division's evidence, the Board should dismiss this proceeding with prejudice for want of subject matter jurisdiction.

There is no ambiguity in the cases as to the legal principles relating to non-use of a Pre-1914 Appropriation. Although many of the cases are old, the issue was reviewed recently in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555 at 560 where forfeiture of such a use requires judicial resolution of a clash of rights between competing users. Here, the complainant is not shown to have complied with the procedures to establish non-use through a competing use, notice and judicial resolution of the controversy. Furthermore, it is not asserted that Mr. Waldteufel failed to comply with the statutory procedures. Not only was there no competing use or notice thereof, but most glaringly there is no judicial decree.

Furthermore, the Division's analysis for the premise of the Draft CDO confused the methodology that a Court would follow to determine whether or not a forfeiture was properly imposed by a competing user. First, the Division incorrectly assumed that forfeiture could occur without a competing use upon notice; secondly, it incorrectly assumed that a portion of the use could degrade by non-use; thirdly, it incorrectly assumed that the period of non-use could be any five year period. If the Division has the jurisdiction of the court, which it does not, it would look only to the five years immediately preceding the notice of competing use *North Kern* at p.560 and *Smith v. Hawkins* (1895) 110 Cal.122, 127-128.

Even if the Complaint filed herein could be construed as a "formal claim," it does not even refer to a competing use (see Ex. Mil-011). Furthermore, the record in this case shows that there has been continuous use of the right since 1913 to the present (see Draft CDO ¶¶1-6) which is certainly inclusive of the five years next preceding February 2006 when the claim was filed. Indeed, Millview started using the Waldteufel Water Right when it was designated for the subdivision and when it started using it in 2001 to supplement its more tenuous summertime rights.[3]

IV. CONCLUSION

The SWRCB does not have the jurisdiction through the procedural vehicle of an investigation to degrade or declare forfeited all or any portion of a Pre-1914 Water Right. This has already been established by the Superior Court (see Ex. Mil-013). The institution of a Draft CDO does not confer any further jurisdiction upon the SWRCB because the Draft CDO is premised entirely upon the jurisdiction of the investigation. The Draft CDO should be dismissed with prejudice for want of subject matter jurisdiction. The filer of the Complaint would then have recourse to the court to establish forfeiture - but the evidence of this record demonstrates that such recourse would be doomed for want of colorable claim.

DATED: January 4, 2010

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[3] See Testimony of Tim Bradly, p.2 for explanation as to how the SWRCB's predecessor denied Millview's petition for summertime supply in D-1110 in 1963 upon the assumption that Millview would receive a dependable allotment under complainant's Permit 12947-B. That assumption has proven to be elusive.