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8 Attorney for  
9 MILLVIEW COUNTY WATER DISTRICT

10 BEFORE THE CALIFORNIA  
11 STATE WATER RESOURCES CONTROL BOARD

12 In the matter of Cease and Desist Order ) Ref. No. 363:JO:262.0 (23-03-06)  
13 No. WR 2011-0016 DWR against Thomas )  
14 Hill, Steven Gomes and Millview County ) PETITION FOR RECONSIDERATION  
15 Water District. ) (Water Code §1122)  
16 \_\_\_\_\_ )  
17 )

18 Millview County Water District (“Millview”) joins in the petition to the State Water  
19 Resources Control Board (the “Board”) for reconsideration of Order No. WE 2011-0016 (the  
20 “Order”) pursuant to Water Code §1122 presented by Thomas Hill and Steven Gomes on  
21 November 14, 2011. Millview also incorporates Millview’s Closing Brief and its Comments  
22 upon the Draft Order.

23 In addition, Millview petitions for reconsideration upon the following separate points:

24 **I. The Board’s interpretation of its jurisdiction offends state constitutional  
25 limitations.**

26 The Order self-proclaims the Board’s jurisdiction to adjudicate a forfeiture of the  
27 Waldteufel Right. Apart from the questions as to whether or not the expansion of the Board’s  
28 jurisdiction may rest upon the Board’s self-serving interpretation of its principal act and  
whether the Board’s interpretation is correct, is the larger question as to whether an act of the  
legislature might properly be construed to confer jurisdiction for adjudication of pre-1914  
appropriations by legislative act alone. The answer to this large question is “No.”

1 This is because the Board's principal act conferring all of its jurisdiction derives from  
2 the Water Commission Act approved by the electorate in a statewide election in November  
3 1914 and not upon a mere legislative act of the legislature. The Board interpretation of its  
4 authority as to forfeiture adjudication purports to rest upon its interpretation of Water Code  
5 §1241, a mere act of the legislature.<sup>1</sup> There is no provision in the Water Commission Act,  
6 approved by the People exercising its sovereignty at a statewide legislation conferring  
7 authority to the legislature to expand the reach of the Water Commission Act to pre-1914  
8 appropriations.

9 The legislature shares legislative power with the powers of initiative and referendum  
10 reserved to the People. Cal. Constitution, Art. 4, §1. The enactment of initiative and  
11 referendum laws withdraw from the legislature jurisdiction to act inconsistently with the  
12 legislative power exercised by the People. In that the Water Commission Act was adopted  
13 pursuant to the exercise of the People of its sovereign authority, a mere act of the legislature  
14 may not act inconsistently to such exercise.

15  
16 **II. Millview was not extended due process.**

17 **A. The Order is internally inconsistent.**

18 The Order at page 2 states that a ruling as to whether the Waldteufel Right was ever  
19 perfected "appears to be outside of the issues fairly raised by the Hearing Notice and Proposed  
20 Cease and Desist Order." Despite this acknowledgment the Order at page 28 states, "we find  
21 a right to divert more than approximately 243 afa, plus whatever amount may have been  
22 required to irrigate several acres of orchard, *was never perfected.*" (Emphasis added).

23 Findings made in support of the Order are acknowledged therein to be outside the  
24 "issues fairly raised." All of this is compounded by the fact that the Draft Order presented to  
25 Millview prior to the hearing which your hearing officer identified as being the legal basis for  
26

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27 Water Code §1241 derives entirely from an act of the legislature, Deering's Gen.  
28 Laws (1937), Act 9091, §20a.

1 the proceeding, acknowledged that the Waldteufel Right has a valid basis but had been  
2 forfeited. Perfection and forfeiture are different theories. Not only is confusion as to the  
3 specific issue before the Board apparent upon the Record, but the Order itself is internally  
4 inconsistent in this regard.

5 At the very least, due process requires notice of the matter in issue. Millview was not  
6 provided notice that perfection was to be in issue.

7 **B. The Order assumes facts inconsistent with the hearing officer's ruling.**

8 The Order states at p.14 that is prosecution team and Millview "appear to have  
9 assumed" that J.A. Waldteufel owned all of Lot 103, and therefore the entire intended place of  
10 use for the Waldteufel Right. Prior to the hearing the Hearing Officer ruled that the "legal  
11 and factual basis" for the hearing was stated in the proposed order that had been issued to  
12 Millview prior to the hearing.

13 The pre-hearing Order stated that "the Waldteufel Property consisted of about 165  
14 acres circa 1914." A central premise of the Order is that Mr. Waldteufel owned only 32  
15 acres. The reason why there was no evidence presented by Millview as to the extent of Mr.  
16 Waldteufel's interest in Lot 103 is that the Board's Hearing Officer ruled that facts recited  
17 in the Draft CDO were to be the factual basis of the hearing.

18 Therefore, it was not an "assumption," but rather a stated factual basis for the Draft  
19 Order being considered by the Board, upon which the parties relied. As the Board is aware,  
20 Judge Schafer ruled that the Board should as it relates to the Board's interest in expanding its  
21 jurisdiction "pursue a course of due process to reviewable finality."

22 It is inconsistent with due process to provide that a hearing will be conducted upon a  
23 stated "factual basis," and to then rest the Order upon a fact inferred from the record to be  
24 inconsistent with such factual basis, partially upon the absence of evidence to rebut the  
25 inferred inconsistency. The Board in adopting its Order has failed in its obligation to extend  
26 due process.  
27  
28



Cease and Desist Order No. WE 2011-0016

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

**PROOF OF SERVICE**

I, JENNIFER M. O'BRIEN, declare that:

I am employed in the County of Mendocino, State of California. I am over the age of eighteen and not a party to the within entitled action; my business address is 110 South Main Street, Suite C, Willits, California 95490. On this date I served the attached

PETITION FOR RECONSIDERATION  
(Of Millview County Water District)

on the parties in said cause via e-mail as follows:

David Rose, Esq.  
Staff Counsel  
State Water Resources Control Board  
1001 I Street, 22<sup>nd</sup> Fl  
Sacramento, CA 95814  
E-mail: [Drose@waterboards.ca.gov](mailto:Drose@waterboards.ca.gov)

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Sonoma County Water Agency  
c/o Alan B. Lilly, Esq.  
Bartkiewicz, Kronick & Shanahan  
1011 22<sup>nd</sup> Street  
Sacramento, CA 95816-4907  
E-mail: [abl@bkslawfirm.com](mailto:abl@bkslawfirm.com)

and via e-mail and by mailing the foregoing by Federal Express, overnight delivery, postage prepaid at the Willits, California Federal Express drop off, addressed as follows:

*(five hard copies)*

Attention: Ernest Mona  
State Water Resources Control Board  
Division of Water Rights  
1001 I Street, 2<sup>nd</sup> Floor  
Sacramento, CA 95814  
E-mail: [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)

Fed Ex Tracking:  
8715-0671-6050

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15<sup>th</sup> day of November, 2011 at Willits, California.

JENNIFER M. O'BRIEN