

LAW OFFICES OF

CARTER, VANNUCCI & MOMSEN, LLP

444 North State Street
POST OFFICE BOX 1709
UKIAH, CALIFORNIA 95482

JARED G. CARTER
BRIAN C. CARTER
BRIAN S. MOMSEN
PHILIP M. VANNUCCI

PHONE: (707) 462-6694
FAX: (707) 462-7839
EMAIL: jaredcarter@pacfic.net

March 6, 2008

Victoria Whitney
State Water Resources Control Board
P.O. Box 2000
1001 "I" Street, 14th Floor
Sacramento, CA 95812-2000

Re: 363:CAR:262.0 - Report of Investigation for Complaint filed by Lee Howard regarding diversion from the east fork of the Russian River.

Dear Ms. Whitney and Members of the Board:

We represent Messrs. Thomas P. Hill and Steven Gomes (represented by Carter, Vannucci & Momsen) and the Millview County Water District (represented by Christopher Neary) regarding the above entitled matter.

Please consider this letter a petition for reconsideration, pursuant to Water Code §1122, by the full Board of the above referenced Report.

We recognize there is some doubt whether the referenced Report is a "decision", much less a "final" decision, within the meaning of Water Code §§1120-1126.2. But, the Report has been broadly distributed; it is having profound negative impacts upon Petitioners by precluding completion of their pending business transactions and posing a threat to Millview if it exercises the water right involved; and Petitioners and the County of Mendocino have, in response to a cover letter accompanying distribution of the Report, provided extensive comments to the author of the Report pointing out its errors, inaccuracies, and the negative impacts it is causing in its present form. But, nothing has been done for over six months by the author of the Report or your agency to finalize, modify or reverse the Report, or to take action to have your Board formally endorse it or hold a hearing on it. We have in just the last couple of days obtained a complete copy of the Record of this investigation. In these circumstances we believe the Report and its recommendations and conclusions have now become "final" and subject to review by a

Ex-R

petition for reconsideration or a petition for writ of mandate. See *Hollon v. Pierce* (1967) 257 CA2d 468, 476; *California Correctional Peace Officers Ass'n v. State Personnel Board* (1995) 10 Cal.4th 1133, 1156; 1 California Administrative Mandamus §3.26 (CEB, 3rd ed.).

We also recognize that a reasonable argument, which we reserve the right to make, can be made that Water Code §§1120-1126.2 don't apply to these proceedings and Report because they are apparently conducted under §1051 (c) of the Water Code and involve a pre-1914 appropriative right, whereas sections 1120-1126.2 are arguably applicable only to water rights granted by the Board under authority of the 1914 Water Commission Act and its successors. Cf. *Meridian, Ltd. v. San Francisco* (1933) 13 C2d 424; *Fleming v. Bennett* (1941) 18 C2d 518. However, proceedings under section 275 are expressly within the actions covered by §1120 et. seq.; and that section's application to any "unreasonable use" of water could arguably reach Petitioners' use of any water in excess of the 15 acre feet per annum that the Report says they are now limited to as a result of "forfeiture" of the great bulk of their pre-1914 appropriative right to divert 2ft³/second. We are not forgoing the right to argue that neither the Board nor its designee can declare a pre-1914 appropriative right "forfeited", particularly under the facts of this case, as pointed out below. We believe that only a court, following a hearing meeting all the requirements of due process, can make such a decision. (See *Fleming v. Bennett, supra*, 18 C2d 518). But, it is imperative that our clients be able to escape the limbo into which they have been placed by this Report; and it is for that reason that this petition is being filed.

Our clients are being significantly harmed by this Report, even in its partially completed condition; and we seek either a prompt order from your Board setting the matter for rehearing or directing that the complaint underlying the Report be dismissed and the Report withdrawn or vacated. Alternatively, please issue an order to us denying this petition for rehearing, and we will then seek court review under CCP §1094.5. As matters now stand our clients can't complete the purchase and sale of the affected water right, and Millview is at risk if it uses the water right to its full extent to serve its customers, as it very much needs to do.

We are very confident we have the right to proceed under CCP §1085 and *Yuba River Power Co. v. Nevada Irr. Dist.* (1929) 207 Cal 521 to seek an order that the Board complete this

Victoria Whitney
State Water Resources Control Board
March 6, 2008
Page 2

investigation and Report and exercise its final discretion. But, we had rather not engage in this effort if we don't have to, because it takes time and money; and our request is that the Board, without implicating a court, take prompt action to help us move this matter to conclusion.

A summary statement of the case and the bases for this petition are as follows:

On June 1, 2007 Mr. Charles A. Rich, Chief, Complaint Unit, Division of Water Rights, published a memorandum Report following his investigation of a complaint filed in February 2006 by Mr. Lee Howard of Ukiah to the effect that the Millview Water District was illegally diverting water from the Russian River because a pre-1914 appropriative water right owned by Messrs. Hill and Gomes, under contract to Millview Water District, had been forfeited or abandoned. Mr. Howard is, and was, not a user of, nor does he claim a right to divert and use, water from the Russian River. Mr. Rich's Report, some 17 pages long, found, among other things, that the original water right was validly obtained and transferred first to Hill and Gomes and then to Millview but that the right had been forfeited from 2ft.³/second to a maximum use of 15 acre feet per year. The Report also indicated that if Millview appropriated water in excess of 15 acre feet per year in reliance upon this water right it would be appropriating water without legal authority and subject to the penalties provided for in the Water Code.

Each Petitioner, in response to Mr. Rich's cover letter requesting comments, provided comments critical of the Report. The County of Mendocino also submitted comments to Mr. Rich. The essence of our comments were, and the grounds for rehearing are, (i) that Mr. Howard had no standing to make a complaint to justify an investigation pursuant to section 1051(c) of the Water Code, and the Board or its designee, Mr. Rich, otherwise had no jurisdiction to conduct an investigation and issue this Report; (ii) jurisdiction is also lacking because the facts alleged and the facts found do not constitute any ground for finding abandonment or forfeiture within the standards recently articulated in *North Kern Water Storage District v. Kern Delta Water District* (2007) 147 Cal.App.4th 555, and therefore the complaint should be dismissed; (iii) the Report has deprived Petitioners of property without due process of law, as they have received no hearing; (iv) the findings of the Report are not supported by facts in the record and the conclusions are contrary to law - primarily because the

Victoria Whitney
State Water Resources Control Board
March 6, 2008
Page 3

Report places the burden of proof on the holder of a pre-1914 right to establish the continued validity of his/her right and finds forfeiture where no other water user claims the right to use the water in question, whereas *North Kern, supra*, 147 Cal.App.4th 555 makes it clear that the burden of proof is on the person attacking the continued validity of a pre-1914 right or the forfeiture of any part thereof, and that a "clash of rights" to the water in question, in the relevant five year forfeiture period before the complaint is filed, must be involved before there can be a forfeiture. Other deficiencies and inaccuracies were pointed out. Copies of these comment letters are attached and incorporated herein for your easy reference along with a copy of Mr. Rich's Report and cover letter.

We have obtained, pursuant to a Public Record Act request, what we assume to be the complete record in this matter and will forward a copy if you so request. By copy of this letter we request Mr. Rich to forward you a copy if you need it to consider this petition.

As mentioned, Mr. Rich has taken no further action of any kind after June 1, 2007, so far as has been made known to us. Both of our clients are being severely injured; Hill and Gomes because they cannot complete their intended transaction with Millview Water District, and Millview Water District, not only because it cannot complete this transaction, but because it is fearful of being subject to severe penalties from using water pursuant to this pre-1914 right.

As we read Water Code §1126 we cannot bring an action for a writ of administrative mandate until your Board takes "final action" or its designee takes "final action." In the circumstances, it is not clear that "final action" has been taken; though, as indicated above, we think a court would agree that §1095.5 review is available in these circumstances.

This letter seeks your Board's reconsideration of the Report and the granting of a hearing meeting the requirements of due process of law for all of these Petitioners to avoid forcing them to bear the time and expense of litigating to obtain such a hearing. Most importantly, we want to obtain your Board's considered decision on the merits of this matter as not only we, but also a court, if that step is necessary, will benefit from such an opinion.

We are uncertain as to how your Board considers these matters and we seek to cooperate with you to get all the issues appropriately considered. Our clients cannot accept matters as they

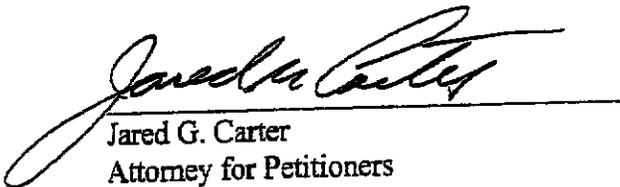
Victoria Whitney
State Water Resources Control Board
March 6, 2008
Page 4

now stand and they must seek an appropriate remedy in court if they don't obtain a remedy from your Board.

Time is of the essence, so we request your prompt response. If we do not obtain any response from you within thirty days, we will consider that a denial of our request for a rehearing and take such actions as appear appropriate in the circumstances.

If there is any further information we can or should provide to you please inform us.

Sincerely,



Jared G. Carter
Attorney for Petitioners
Thomas Hill & Steven Gomes

Christopher J. Neary
(707) 459-5551
Attorney for Petitioner
Millview County Water District

cc Michael Lauffer, Chief Counsel
Office of Chief Counsel
State Water Resources Control Board
1001 "I" Street
Sacramento, CA 95812-2000

Charles A. Rich, Chief
Complaint Unit, Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
1001 "I" Street
Sacramento, CA 95812-2000

Victoria Whitney
State Water Resources Control Board
March 6, 2008
Page 5

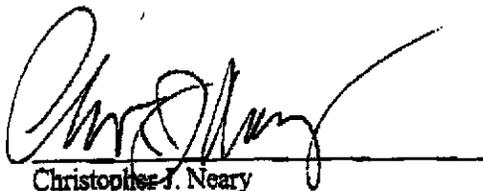
now stand and they must seek an appropriate remedy in court if they don't obtain a remedy from your Board.

Time is of the essence, so we request your prompt response. If we do not obtain any response from you within thirty days, we will consider that a denial of our request for a rehearing and take such actions as appear appropriate in the circumstances.

If there is any further information we can or should provide to you please inform us.

Sincerely,

Jared G. Carter
Attorney for Petitioners
Thomas Hill & Steven Gomes



Christopher J. Neary
Attorney for Petitioner
Millview County Water District

cc Michael Lauffer, Chief Counsel
Office of Chief Counsel
State Water Resources Control Board
1001 "T" Street
Sacramento, CA 95812-2000

Charles A. Rich, Chief
Complaint Unit, Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
1001 "T" Street
Sacramento, CA 95812-2000

Victoria Whitney
State Water Resources Control Board
March 6, 2008
Page 5

Jim Kassel
Chief, Hearings & Special Projects
State Water Resources Control Board
1001 "I" Street
Sacramento, CA 95812-2000

Victoria Whitney
State Water Resources Control Board
March 6, 2008
Page 6