

1 CARTER, MOMSEN & KNIGHT, LLP  
2 Jared G. Carter, Esq. SBN 36310  
3 Brian C. Carter, Esq. SBN 139456  
4 Matisse M. Knight, Esq. SBN 258039  
5 444 North State Street  
6 Ukiah, CA 95482  
7 Phone: (707) 462-6694  
8 Fax: (707) 462-7839

9 Attorneys for Respondents THOMAS P.  
10 HILL, STEVEN L. GOMES

11 **BEFORE THE CALIFORNIA**  
12 **STATE WATER RESOURCES CONTROL BOARD**

13 In the Matter of Cease  
14 and Desist Order No.  
15 WR 2011-0016 DWR against  
16 Thomas Hill, Steven Gomes and  
17 Millview County Water  
18 District.

19 Ref. No. 363:JO:262.0(23-03-06)  
20 PETITION FOR RECONSIDERATION  
21 (Water Code §1122)

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TABLE OF CONTENTS

**POINTS AND AUTHORITIES** ..... 2

    I. The Board Proceeded Without or in Excess of Jurisdiction ..... 2

    II. Petitioners Did Not Receive a Fair Hearing. ..... 4

    III. The Board Committed a Prejudicial Abuse of Discretion ..... 10

**CONCLUSION** ..... 11

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 Bayside Timber Company v. Board of Forestry (1971) 20 Cal.App.3d 1 . . . . . 5

4 California Farm Bureau Federation v. State Water Resources Control Board  
 (2011) 51 Cal.4th 421 . . . . . 3

5 California Farm Bureau Federation v. State Water Resources Control Board  
 (2011) 51 Cal.4th 421 . . . . . 6

6 Diane E. Young, et al. v. State Water Resources Control Board, et al.  
 San Joaquin County Superior Court Case No. 39-2011-00259191-CU-WM-STK . . 6

7 Gordon v. Justice Court (1974) 12 Cal.3d 323 . . . . . 5

8 North Kern Water Storage Dist. v. Kern Delta Water Dist.  
 (2007) 147 Cal.App.4th 555 . . . . . 10

9 McHugh v. Santa Monica Rent Central Board (1989) 49 Cal.3d 348 . . . . . 4

10 Morango Band of Indians v. SWRCB (2009) 45 Cal.4th 731 . . . . . 6, 7, 9

11 People v. Murrison (2002) 101 Cal.App.4th 349, 359, fn. 6 . . . . . 3

12 People v. Shirokow (1980) 26 Cal.3d 301 . . . . . 3

13 Quintero v. Santa Ana (2003) 114 Cal.App.4th 810 . . . . . 6, 7

14 Rudolph Light, et al. v. California State Water Resources Control Board  
 Mendocino County Superior Court Case SCUK CVG 11 59127 . . . . . 6

15 Russian River Water Users for the Environment, et al. v. State Water Resources  
Control Board Sacramento County Superior Court Case No. 34-2001-80000984 . . 6

16 Thayer v. California Development Co. (1912) 164 Cal. 117, 125 . . . . . 6

17 Wildlife Alive v. Chickering (1976 ) 18 Cal.3d 190 (53 Cal.Jur.3d,  
 Statutes §130, p. 551) . . . . . 4

18 Wood v. Pendola (1934) 1 Cal.2d 435, 442-443 . . . . . 3

23 **Codes**

24 Water Code §103 . . . . . 4, 11

25 Water Code §109 . . . . . 4, 11

26 Water Code §175 . . . . . 5

27 Water Code §1831(e) . . . . . 3

28 Water Code §2 . . . . . 4, 10

1	Water Code §1052 .....	4
2	Water Code §1126(c) .....	10
3	Water Code §§1831 and 1980 .....	3
4	Water Code §§2500, <i>et seq</i> .....	4
5		
6	<b><u>Miscellaneous</u></b>	
7	Article X, Section 2 of the California Constitution .....	2, 3
8	<u>Hutchins</u> <i>the California Law of Water Rights</i> pp 348-363 (1956) .....	3
9	<u>Witkin Constitutional Law</u> §146 (10 <sup>th</sup> Ed.) .....	4

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1           Thomas Hill and Steven Gomes petition the State Water Resources Control  
2 Board for reconsideration of Order #WR2011-0016 pursuant to Water Code §1122,  
3 on the following grounds:

- 4           A. The Board has proceeded without, or in excess of jurisdiction;  
5           B. Petitioners did not receive a fair hearing; and  
6           C. The Board committed a prejudicial abuse of discretion in that, among other  
7 grounds,  
8           1. It did not proceed in a manner required by law;  
9           2. Its order and decision are not supported by the findings; and  
10          3. The findings are not supported by the evidence.

11          This motion is based upon the record before the Board, the points and  
12 authorities below, the transcript of the hearing before the Board on September 20,  
13 2011, in its proceedings to adopt frost protection regulations, and a letter from  
14 Gallery & Barton Law firm submitted to the Board in connection with those  
15 proceedings, which are submitted by separate declaration of the undersigned and  
16 which petitioners request the Board to take notice of pursuant to Evidence Code  
17 §§451, *et seq*, and such evidence as may be submitted at any hearing held by the  
18 Board.

19          These petitioners are aware of and have considered the petition for re-hearing  
20 filed by Millview County Water District; and they endorse those grounds in this  
21 petition. Most of the points asserted in this petition were thoroughly presented and  
22 considered in the Board's proceedings leading up to the adoption of its order and  
23 decision, including at the Board's hearing on October 18, 2011; and, accordingly,  
24 those points will not be belabored in this petition because the exhaustion  
25 requirement for judicial review has been more than adequately met. The materials  
26 presented in those hearings are incorporated and reiterated herein. To avoid any  
27 question of exhaustion of the "jurisdiction" and "fair hearing" issues, this petition  
28 elaborates both those points. /

1 **POINTS AND AUTHORITIES**

2 I. The Board Proceeded Without or in Excess of Jurisdiction.

3  
4 A. Article X, Section 2 of the California Constitution precludes the Board from  
5 being delegated judicial authority to adjudicate the validity of pre-1914 appropriative  
6 rights or riparian rights or to reduce those rights. This "self executing" constitutional  
7 provision provides, among other things, that, "nothing herein contained shall be  
8 construed as depriving any riparian owner of the reasonable use of water of the  
9 stream to which his land is riparian under reasonable methods of diversion and use,  
10 or of depriving any appropriator of water to which he is lawfully entitled." In other  
11 words, so long as the "use" is reasonable and the "method of diversion" is  
12 reasonable, the legislature has no power, on its own or by delegation to the Board, to  
13 "deprive" a pre-1914 appropriator or a riparian of any part of his or her water right.  
14 The extent of petitioners' pre-1914 appropriative rights is determined by the  
15 interpretation and application in judicial proceedings of the Civil Code sections  
16 governing the appropriation of these rights. The rights were acquired prior to the  
17 existence of the State Board or its predecessor and prior to any grant of power to  
18 those agencies in 1914 by the Legislature's adoption of the Water Commission Act,  
19 or by subsequent legislation.

20 Petitioners do not question the power of the Board to prevent waste,  
21 unreasonable use, or unreasonable methods of diversion of their pre-1914 rights.  
22 But, those issues are not presented in this case. This case is about whether  
23 petitioners have pre-1914 rights and, if so, have those rights been lost by forfeiture.<sup>1</sup>  
24 It is these decisions that the Constitution prevents the Board from determining.

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27 <sup>1</sup>The Board has tried to insert an additional issue – what was the extent of the pre-1914 right acquired  
28 by Mr. Waldeufel. Petitioner's position is, and has been, that the Board is precluded by its own orders and  
procedures from raising this issue even if it has the jurisdiction it claims. Petitioners also maintain that, in  
any event, the Board has no jurisdiction to adjudicate this issue and that if it has such jurisdiction it failed  
to proceed in the manner required by law in exercise of that jurisdiction.

1 B. The Water Code does not delegate to the Board, under section 1831 or any  
2 other section, the authority to adjudicate the validity of or the extent of pre-1914  
3 appropriative water rights or riparian rights, much less the "forfeiture" of a pre-1914  
4 right. (See California Farm Bureau Federation v. State Water Resources Control  
5 Board (2011) 51 Cal.4th 421, 429. See also, People v. Shirokow (1980) 26 Cal.3d  
6 301, 309, Nicoll v. Rudnick (2008) 160 Cal.App.4th 550, 557; People v. Murrison  
7 (2002) 101 Cal.App.4th 349, 359, fn. 6. These and other cases, and the structure of  
8 the Water Code itself as a whole, compel the conclusion that, "judicial" power to  
9 adjudicate these fundamental property right issues has never been delegated to the  
10 Board.

11 Prior to adoption of Water Code §§1831 and 1980, apparently the Board never  
12 considered that it had any power to adjudicate any water right though it did have  
13 power to assist in adjudication upon reference by, or under supervision of, a court.  
14 (See Wood v. Pendola (1934) 1 Cal.2d 435, 442-443, "It has long been settled that  
15 the Water Commission exercises only administrative functions."; Hutchins the  
16 California Law of Water Rights pp 348-363 (1956).

17 Section 1831, upon which the Board relies in this case, does not change this  
18 situation with respect to pre-1914 and riparian rights. Section 1831(e) exempts from  
19 the article authorizing cease and desist adjudications "water not otherwise subject to  
20 regulation of the Board under this part." The Board is not authorized "to regulate in  
21 any manner the diversion or use" of such water. Obviously, the Legislature did not  
22 intend to give the Board adjudicatory power over pre-1914 and riparian rights that it  
23 did not previously have. Yet, the Board, in its recent decision, never considers what  
24 "water" is being referred to in subsection (e) if it is not water subject to pre-1914 or  
25 riparian rights protected by Article X, Section 2 of the Constitution.

26 Other Water Code provisions compel the conclusion that the Legislature has  
27 considered the necessity of decisions being made on critical property right questions  
28 affecting pre-1914 and riparian rights and has authorized the Board to become

1 involved in making these decisions only under the reference from and control of a  
2 court. See Water Code §§2500, *et seq.* Under Water Code §1052 the Board can  
3 request the Attorney General to commence appropriate court proceedings.

4 Moreover, the Water Code is quite clear that it is not intended to “evolve” the  
5 Board’s jurisdiction to meet new circumstances. See Water Code §§2, 103, and  
6 109. The doctrine of *expressio unius est exclusio alterius* (Wildlife Alive v.  
7 Chickering (1976 ) 18 Cal.3d 190), dictates that where one or more methods of  
8 solving a vital question has been considered and dictated by the legislature, other  
9 methods cannot be implied. (See also, 53 Cal.Jur.3d, Statutes §130, p. 551).

10 C. Lastly, even if the Legislature could, and has tried to, delegate judicial  
11 power to the Board to adjudicate the validity and extent, including forfeiture of, pre-  
12 1914 appropriative rights and riparian rights, such power could not validly be  
13 delegated. See generally, Witkin Constitutional Law §146 (10<sup>th</sup> Ed.). In McHugh v.  
14 Santa Monica Rent Central Board (1989) 49 Cal.3d 348 the Supreme Court explains  
15 the circumstances and standards under which administrative agencies can be  
16 delegated judicial authority. The court held that an administrative agency can’t be  
17 authorized to impose damages in a rent control case beyond restitutionary  
18 damages, even if a required judicial “check” is provided for. The authorization given  
19 the rent control Board to impose treble damages was unconstitutional. Here, the  
20 Board asserts the right to deprive litigants of fundamental property rights expressly  
21 protected by the Constitution – a pre-1914 water right – by finding a forfeiture, and it  
22 is petitioners’ position that a legislative grant of such authority would be  
23 unconstitutional in violation of the separation of powers doctrine.

#### 24 II. Petitioners Did Not Receive a Fair Hearing.

25 In the proceedings before the Board these petitioners argued that they were  
26 denied due process because of the operations and activities of the prosecuting staff  
27 and that staff’s relationship to the Board itself. Petitioners adopt and reiterate those  
28 arguments but expand on them herein.

1           A. This Board as constituted could not validly exercise judicial power in this  
2 case, even if such power were granted, and lawfully granted, by the Water Code.  
3 Section 175 of the Water Code creates the Board and says it shall consist of “five  
4 members”, one of whom shall be an attorney “who is qualified in the fields of water  
5 supply and water rights”, and one of whom shall be “a registered civil engineer ...  
6 who is qualified in the fields of water supply and water rights”. The Board that heard  
7 and determined this case consisted of three persons and did not contain either an  
8 attorney or a registered civil engineer meeting the above qualification. Under the  
9 case of Gordon v. Justice Court (1974) 12 Cal.3d 323, which held that non-attorney  
10 justice court judges could not perform certain judicial functions because they were  
11 not legally trained, it is clear that the fundamental judicial power exercised by the  
12 Board in this case could not be exercised by a Board containing no lawyer with the  
13 required expertise. Gordon held that the 14<sup>th</sup> Amendment prohibition of deprivation  
14 of “liberty” without due process of law precluded a non-attorney judge from putting a  
15 defendant in jail. The same clause of the 14<sup>th</sup> Amendment precludes deprivation of  
16 “property” without due process of law. Petitioners argue this clause is violated – as is  
17 Section 175 of the Water Code – by this 3 person non-attorney Board’s depriving  
18 them of their pre-1914 water right.

19           This issue is intertwined with the issue raised under B, below, concerning  
20 relationships between the Board and its staff when considering whether petitioners  
21 have received a fair hearing. The two points, together if not separately as  
22 petitioners argue, combine to constitute a denial of due process.

23           The case of Bayside Timber Company v. Board of Forestry (1971) 20  
24 Cal.App.3d 1, holds that even when the delegation of legislative authority is involved,  
25 and judicial review is more lenient, the courts will scrutinize the qualifications and  
26 potential biases of board members to determine whether they can constitutionally be  
27 granted the authority they seek to exercise. Here, in this case, this Board has  
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1 exercised the most basic of judicial functions – depriving a person of property <sup>2</sup> –  
2 and, even if the Legislature intended to allow this three person Board to exercise  
3 judicial power to deprive petitioners and Millview of their property rights, it violates  
4 due process to allow them to do so. Consequently, the hearing conducted by this  
5 unqualified Board did not constitute a fair hearing.

6  
7 B. The Board's practices do not meet the requirements of (Morango Band of  
8 Indians v. SWRCB (2009) 45 Cal.4th 731, and Quintero v. Santa Ana (2003) 114  
9 Cal.App.4th 810). For at least several years, this Board has been seeking to  
10 expand its regulatory and adjudicatory authority over pre-1914 water rights and  
11 riparian water rights. This case is one of several and an example of that effort.  
12 Another example is the Board's proceedings to adopt frost protection regulations in  
13 the Russian River watershed in Mendocino and Sonoma Counties concerning which  
14 the undersigned law firm has filed an action in the Superior Court of Mendocino  
15 County to invalidate recently adopted regulations to this end (Rudolph Light, et al. v.  
16 California State Water Resources Control Board Mendocino County Superior Court  
17 Case SCUK CVG 11 59127; See also Russian River Water Users for the  
18 Environment, et al. v. State Water Resources Control Board Sacramento County  
19 Superior Court Case No. 34-2001-80000984). Another example is portrayed in a  
20 San Joaquin County Case, Diane E. Young, et al. v. State Water Resources Control  
21 Board, et al. San Joaquin County Superior Court Case No. 39-2011-00259191-CU-  
22 WM-STK, where the trial court held that the Board has no jurisdiction over these  
23 rights, and the Board is now appealing that decision. Moreover, the California  
24 Supreme Court, in California Farm Bureau Federation v. State Water Resources  
25 Control Board (2011) 51 Cal.4th 421, has recently dealt with another related effort of

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<sup>2</sup>Pre-1914 water rights and riparian water rights are real property under California law (Thayer v. California  
Development Co. (1912) 164 Cal. 117, 125).

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the Board to regulate such rights and declared:

“The Water Rights Division has no permitting or licensing authority over riparian, or pueblo rights, or over appropriative rights acquired before 1914.”

In the course of these efforts to expand its regulatory and adjudicatory authority, the Board makes only perfunctory efforts to meet the underlying, substantive objective of the Morongo and Quintero cases, which is that an administrative Board must give an affected party a fair and unbiased adjudicatory hearing when that party’s water rights are at risk. In order to meet this objective, the Board must not only be properly composed, it must receive unbiased, competent legal advice from some source when conducting adjudicatory proceedings. It can receive that advice from its staff only if adequate protective measures are adopted and applied. That requirement has not been met in this case for the reasons petitioners have previously argued and for the reasons argued in the next few paragraphs.

The new concern petitioners want the Board to consider, in addition to the points they previously argued and this Board has rejected, involves the role of the General Counsel’s office and specifically Mssrs. John O’Hagan and David Rose. In the instant case Mr. Rose acted as the prosecuting attorney under the direct supervision of Mr. O’Hagan. In the case of the Board’s adoption of frost protection regulations only a month earlier (on September 20, 2011), but which has been ongoing for 3 years, Mr. O’Hagan and Mr. Rose acted as close confidential, technical and legal advisors to the Board.

In fact, Mr. O’Hagan and Mr. Rose specifically advised the Board regarding how the new frost protection regulation would be implemented, and the effects thereof, on not only regulatory, but enforcement issues:

//

1 "MR. ROSE: Shall I begin?

2 CHAIRPERSON HOPPIN: If you would.

3 MR. ROSE: First thing I'd like to make sure is completely clear -- Tam  
4 [DODUC, one of the Board members], a question you had asked I'm not  
sure I fully responded to.

5 BOARD MEMBER DODUC: You did not. So please do so now.

6 MR. ROSE: I wasn't sure. So let's make that clear for your satisfaction. As  
7 to the real time data being available for potential violations, if there is an  
8 incident would a data be the available to the public or the Board before  
September 1st, I think that was part of your question.

9 BOARD MEMBER DODUC: To clarify. It's not necessarily for determining  
10 a violation purpose, but also just to understand what happens and to  
make corrections where appropriate.

11 MR. ROSE: Absolutely. And I think that while it may not be clear under the  
12 regulation that that is something that the regulation provides for, people to  
13 give the data on a real time basis or to us to get it immediately as we  
14 need. We do have a number of other tools that we can use, subpoenas,  
Public Records Act request, if appropriate, or we can simply modify the  
WDMPs or just ask for the data. There are a number of tools available to  
get the data if we think we want it before September 1<sup>st</sup>.  
(Reporter's Transcript of September 20, 2011 Hearing 104:18-105:19.)

15 The frost protection regulation adoption "process" was even tainted by clear  
16 improprieties when the Board's staff - spearheaded by Mssrs. Rose and O'Hagan -  
17 manipulated federal agencies into providing support for that unauthorized foray  
18 beyond the Board's authority and jurisdiction. (See Gallery & Barton Comment  
19 Letter – Proposed Russian River Frost Protection Regulation of July 5, 2011.)

20 In addition, at the hearing on the frost protection regulation, the Board and Mr.  
21 O'Hagan engaged in improper *ex parte* communications related to pending water  
22 right enforcement actions. (Reporter's Transcript of September 20, 2011 Hearing  
23 103:7-21.) When Ms. Spivy Weber asked, "so how is the water rights issue being  
24 handled by your division?" Mr. O'Hagan responded with: "we still have our own -- the  
25 Board has its own enforcement authority and to take actions for unauthorized  
26 diversions. And we are continuing that effort in all these areas, including the Russian  
27 River watershed." (*Id.*)

28 In the end, Mssrs. Rose's and O'Hagan's close counsel and interaction

1 regarding the frost protection regulation persuaded the Board to assert authority and  
2 jurisdiction that the Board - particularly Chairman Hoppin - believed, from the  
3 inception of discussions related to this regulation, it did not have. (Id. at 115:20-  
4 117:1.) As Mr. Hoppin explained, similar to statements he made in other  
5 proceedings,

6 "It's taken a lot of repetitive answers to me from staff and from Michael  
7 Lauffer and Tom Howard as it related to this unreasonable use  
8 component of  
9 it. And the fact is the language there is something that's required for us to  
10 have enforceability over 314 riparian and groundwater pumpers or it  
11 probably wouldn't  
12 be there in the way it is.... So I don't know how many times you all had to  
13 go  
14 through that. David [Rose], you are very patient as you, John [O'Hagan]."  
15 (Id.)

16 These closely related cases, directly involving the Board's authority and  
17 jurisdiction to regulate and adjudicate pre-1914 and riparian water rights,  
18 demonstrate that, when it comes to such questions, Mssrs. Rose and O'Hagan first  
19 develop - by any means necessary - what authority and jurisdiction the Board has  
20 and then subsequently turn around and prosecute the enforcement of the authority  
21 they've advocated. Such clear commingling is in direct violation of the required  
22 "internal separation between advocates and decision makers to preserve neutrality."  
23 Morongo, 45 Cal.4th at 737. As such, the Board and its staff are not entitled to an  
24 assumption of the "more practical and less pessimistic view of human nature"  
25 articulated in Morongo. Id. at 741. Mssrs. Rose and O'Hagan are clearly  
26 establishing the Board's policy regarding its authority and jurisdiction over pre-1914  
27 and riparian water rights and subsequently enforcing and prosecuting that policy.

28 Mssrs. Rose and O'Hagan's roles as the prosecutors in this case, advocating  
for policies they've put in place, creates an ineffective "firewall" standing in name  
only. Petitioners herein were denied a fair hearing when such demonstrably trusted  
agents were the prosecuting team in their case. Furthermore, this case, resulting in  
the deprivation of Petitioners' property, was improperly heard and decided by non-

1 attorneys.

2  
3 III. The Board Committed a Prejudicial Abuse of Discretion.

4 It is petitioners' position that judicial review of the Board's order and decision  
5 will be under the "de novo" standard wherein the court will exercise its independent  
6 judgment on the evidence both because such a result is required by Water Code  
7 §1126(c) and because petitioners have been deprived of property and are  
8 constitutionally entitled to such a review. Petitioners are further of the view that,  
9 except as supplemented and elaborated by petitioner Millview, the questions whether  
10 the Board's order is supported by the findings and whether the findings are  
11 supported by the evidence have been sufficiently exhausted to allow a  
12 comprehensive and adequate judicial review of these questions. The Board has  
13 obviously spent a great deal of time on these issues and petitioners believe that  
14 further elaboration in this petition is not likely to elicit a change of attitude.

15 One matter the Board should specifically reconsider, however, is its own  
16 arrogant assumption that it can establish its own judicial standards for finding a  
17 forfeiture. The Board's opinion rejects out of hand the North Kern Water Storage  
18 Dist. v. Kern Delta Water Dist. (2007) 147 Cal.App.4th 555 case, seemingly agreeing  
19 that under the standards governing forfeiture articulated in the North Kern Water  
20 Storage case no forfeiture could be found in this proceeding. It is petitioners'  
21 position that if there is any area of law in California where "old law is good law" it is in  
22 the field of water rights. The Supreme Court has said so in so many cases it is  
23 unnecessary to even cite one, but the legislature has said the same thing. Section 2  
24 of the Water Code says:

25 "The provisions of this Code, in so far as they are  
26 substantially the same as existing statutory provisions  
27 relating to the same subject matter, shall be construed as  
28 restatements and continuations thereof, and not as new

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enactment.”

Section 103 says:

“In the enactment of this Code the legislature does not intend thereby to effect any change in the law relating to water rights.”

Section 109 says, in part:

“The legislature hereby finds and declares that the growing water needs of the State require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water ...”

The Board’s cavalier assumption that it can articulate whatever standards to govern forfeiture it chooses flies in the face of these principles.

**CONCLUSION**

For the reasons stated, the Board should grant this petition for reconsideration and reverse order WR 2011-0016 and dismiss the petition for a cease and desist order.

Dated: November 14, 2011

Respectfully submitted,

  
CARTER, MOMSEN & KNIGHT, LLP  
By: JARED G. CARTER, ESQ.

Attorneys for Petitioners Thomas Hill and Steven L. Gomes

