

Court Finds SWRCB has Jurisdiction over Pre-1914 Water Rights and Defines Forfeiture Standard

In the decision *Millview County Water District v. State Water Resources Control Board* (September 12, 2014) (“Millview”), the First Appellate District Court found the State Water Resources Control Board (“State Board”) can issue a cease and desist order (“CDO”) preventing the unauthorized diversion of a pre-1914 water right; determining not only the validity of such a right, but also its scope. The Millview case also clarifies California’s forfeiture rule by: 1) finding that forfeiture requires a conflicting claim to the water, and 2) adopting the “resumption of use doctrine.”

Background

Millview County Water District (Millview) diverts water from the Russian River under a pre-1914 appropriative water right, which had passed through several owners and was assigned to Millview in 2002. On the basis of a 2006 citizen complaint, the State Board held an evidentiary hearing and issued a CDO substantially restricting Millview’s diversion of water under the right, finding it had been forfeited by diminished use from 1967 through 1987.

Millview filed a petition for a writ of mandate requiring the State Board to set aside the CDO, contending, among other things, that the State Board lacked jurisdiction to limit appropriation under a pre-1914 water right, and the evidence did not support the State Board’s finding of a forfeiture. The trial court agreed and accepted the writ. On appeal, the First Appellate District Court affirmed the trial court’s issuance of a writ directing the State Board to set aside its decision, although on narrower grounds discussed below.

The State Board Has Jurisdiction to Issue a Cease and Desist Order Precluding Excessive Diversion Under a Pre-1914 Right to Appropriate

Under Water Code section 1831 the State Board has the power to issue a CDO “in response to a violation or threatened violation” of the prohibition against the unauthorized diversion or use of water. The issue here is whether this power extends to pre-1914 appropriative water rights. California subdivides appropriators into those whose water rights established before and after 1914, the date of the Water Commission Act. Post-1914 appropriators may

by *Nathan A. Metcalf*



possess a water right only through a permit or license issued by the State Board. However, pre-1914 appropriators need neither a permit nor other governmental authorization to exercise their water rights and the volume is determined by historical use.

Although acknowledging that the State Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights, the court found that section 1831 allows the State Board to issue an order preventing the unauthorized diversion of water; determining not only the validity of such a rights, but also their scope. Overruling the trial court, the *Millview* court found that unauthorized diversion includes not merely the diversion of water under a claimed but invalid pre-1914 right, but also diversion beyond the proper scope of a valid pre-1914 right, whether because the diversion exceeds the maximum perfected amount of water under the right or because an intervening forfeiture has reduced the proper scope. The court reasoned that any other rule would permit a diverter to place his or her diversion beyond State Board regulation merely by claiming to possess, as opposed to validly possessing, a pre-1914 water right.

Legal Standard for Evaluating Forfeiture of a Water Right

Under Water Code section 1241 a water right may be forfeited if an appropriator fails to beneficially use all or a portion of the appropriated water for a period of five years. The *Millview* Court clarifies California's forfeiture rule by: 1) finding that forfeiture requires a conflicting claim to the water, and 2) adopting the "resumption of use doctrine." The court held that a rights holder whose water use falls below the full appropriation for five years or more may nonetheless resume full use at any time if no conflicting claim has been asserted in the meantime. A conflicting claim has been asserted if another claimant has actually appropriated the water otherwise covered by the original claim and has perfected that appropriation by making beneficial use of the surplus water, or has attempted to appropriate the water by instituting proceedings to establish a right—for example, by seeking a permit from the State Board to appropriate the surplus water or by commencing a legal action for a declaration of rights.

Conclusion

The *Millview* decision comes at a time when pre-1914 and riparian water rights are under increased scrutiny. On July 16, 2014 emergency drought regulations were passed that allow when a water rights complaint is filed with the State Board, or on information of an unlawful diversion, the State Board may issue an order directing riparian and pre-1914 water right holders to provide information regarding proof of ownership and extent of beneficial use of such water rights. (23 CCR §879(c).) Such a complaint under *Millview* could end up in a evidentiary hearing for a determination of whether there is an unauthorized diversion or use of water. Pre-1914 water right holder's should analyze and confirm the basis of their right and claimed volume of water prior to any allegation of unlawful diversion.

Millview's clarification of the forfeiture rule should aid those who are struggling to construct works and perfect a water right, and those who are concerned about periods of non-use of their water rights. *Millview's* adoption of the "resumption of use doctrine" allows resumption of full use of the right so long as there has not been a conflicting claim to the water.

For more information, please contact:

Nathan A. Metcalf, Partner

415-995-5838

nmetcalf@hansonbridgett.com