STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR0 2004 - 0004

In the Matter of
Administrative Civil Liability Complaints for Violations of
Licenses 13444 and 13274 of Lloyd L. Phelps, Jr.;
License 13194 of Joey P. Ratto, Jr.;
License 13315 of Ronald D. Conn and Ron Silva, et al.

SOURCE: Sacramento-San Joaquin Delta Estuary
COUNTY: San Joaquin

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BY THE BOARD:

1.0 INTRODUCTION

This order affirms Administrative Civil Liability Complaints Nos. 262.5-28, 262.5-29 and 262.5-30 issued by the Chief of the Division of Water Rights (Division) on July 2, 2002 to Lloyd L. Phelps, Jr. (Licenses 13444 and 13274), Joey P. Ratto, Jr. (License 13194), and Ronald D. Conn (License 13315), respectively. This order dismisses the part of Complaint No. 262.5-30 pertaining to Ron Silva, et al. This order increases the amounts of liability imposed on Phelps, Ratto, and Conn, as discussed in section 4.4 herein. Each of the respondents farms land on Upper Roberts Island in San Joaquin County, within the Sacramento-San Joaquin Delta (Delta). Each of the complaints alleges that the licensee diverted water during periods when the licensee had been notified to curtail water diversions because no water was available under the license. The complaints proposed imposition of Administrative Civil Liabilities of $3,750 on Mr. Ratto, of $14,250 on Mr. Conn and Mr. Silva et al., and of $22,500 on Mr. Phelps.

This order is the result of an adjudicative hearing conducted by the State Water Resources Control Board (SWRCB) on February 25 and 26, 2003. The respondents requested the hearing by letter from their counsel dated July 22, 2002 after receiving the above complaints. The SWRCB originally issued the notice of the hearing on November 7, 2002. In response to a request by the respondents to postpone the hearing, the SWRCB re-noticed the hearing on

December 13, 2002, setting the February 25 and 26, 2003 dates on which the hearing was conducted. This order is based on the record of the hearing, and the SWRCB has considered all of the evidence and arguments in the hearing record. Because this is an adjudicative proceeding, it is governed by the regulations at California Code of Regulations, title 23, section 648, et seq., and the statutes specified therein.

In the hearing on this matter, the Division was represented by a prosecutorial team who appeared and presented evidence and argument in support of the complaints. The prosecutorial team was separated by an ethical wall from the SWRCB hearing team[1] regarding substantive issues and controversial procedural issues within the scope of the hearing.

2.0 BACKGROUND

2.1 History of Licenses

The SWRCB issued licenses to Lloyd L. Phelps, Jr. (Licenses 13444 and 13274), Joey P. Ratto, Jr. (License 13194), and Ronald D. Conn and Ron Silva, et al. (License 13315) as shown on the following table:

License No.	Licensee	Source	Direct Diversion Rate	Max Amount	Season
13444	Lloyd L. Phelps, Jr.	San Joaquin River	1.43 cfs	335 afa	1/1 – 10/31
13274	Lloyd L. Phelps, Jr.	San Joaquin River	3.16 cfs	534 afa	3/1 – 10/31
13194	Joey P. Ratto, Jr.	Middle River	0.59 cfs	61.5 afa	4/1 – 11/1
13315	Ronald D. Conn and Ron Silva, et al.	Middle River	3.9 cfs	604 afa	3/1 – 12/1

2.2 Term 91

Each of the above licenses includes SWRCB standard term 91 as a condition of the license. Term 91 prohibits diversion of water under the license when the Central Valley Project (CVP) of the U.S. Bureau of Reclamation (USBR) or the State Water Project (SWP) of the Department of

[1] The hearing team consists of the Board members and the staff assisting the Board members.

Water Resources (DWR) is required to release stored or foreign water to satisfy inbasin entitlements, including water quality objectives in the Delta.

Term 91 provides:

> "No diversion is authorized by this permit when satisfaction of inbasin entitlements requires release of supplemental Project water by the Central Valley Project or the State Water Project.
>
> > "a. Inbasin entitlements are defined as all rights to divert water from streams tributary to the Sacramento-San Joaquin Delta or the Delta for use within the respective basins of origin or the Legal Delta, unavoidable natural requirements for riparian habitat and conveyance losses, and flows required by the State Water Resources Control Board for maintenance of water quality and fish and wildlife. Export diversions and Project carriage water are specifically excluded from the definition of inbasin entitlements.
> >
> > "b. Supplemental Project water is defined as that water imported to the basin by the projects plus water released from Project storage which is in excess of export diversions, Project carriage water, and Project inbasin deliveries.
>
> "The State Water Resources Control Board shall notify permittee of curtailment of diversion under this term after it finds that supplemental Project water has been released or will be released. The Board will advise permittee of the probability of imminent curtailment of diversion as far in advance as practicable based on anticipated requirements for supplemental Project water provided by the Project operators."

The purpose of Term 91 is to prohibit the permittee or licensee from diverting water if (1) the water involved was appropriated to upstream storage or imported to the watershed by the SWP or the CVP and (2) the SWP or the CVP is releasing that stored or imported water either to meet inbasin entitlements in streams tributary to or within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary or to export from the basin.[2] The SWRCB adds Term 91 to new permits and to permits and licenses approved in the 1960s or later that contain Term 80[3] when (1) the

[2] Under Term 91 the permittee or licensee has a priority over the exports of the SWP and the CVP to divert natural or abandoned flows.

[3] Term 80 reserves to the SWRCB continuing jurisdiction to change the season of availability in a permit to conform to later findings of the SWRCB concerning water availability and protection of the beneficial uses of the basin.

permit or license authorizes diversion of 1 cfs or more or 100 afa of storage or more within the Sacramento, Cosumnes, Mokelumne, Calaveras, or San Joaquin River Basins or the Sacramento-San Joaquin Delta, and (2) hydraulic continuity with the Delta exists, or is likely to exist, during the diversion season.[4]

Term 91 is a real-world implementation of several statutory criteria that govern the priority under which water right holders with appropriative rights can divert water from a source. It provides a real-time mechanism for telling water right holders when water is available for their priority. The SWRCB added Term 91 to the permits of the respondents when it issued the permits. Term 91 is based on the assumption that the water rights of the DWR and the USBR to appropriate uncontrolled flows for export from the southern Delta are junior to all other water rights in the watershed. The water stored upstream by the DWR and the USBR during periods of excess flow, however, is appropriated at times when its appropriation does not injure any other water right holders. When this water is subsequently released from the reservoirs to flow downstream to the export facilities, it is already appropriated, and is not naturally present in the rivers. Water that is appropriated and is flowing in a channel under the control of its appropriator is not subject to appropriation by others. (*Stevens v. Oakdale Irrigation Dist.* (1939) 13 Cal.2d 343, 352 [90 P.2d 58]; Wat. Code, §§ 7044, 7075.) Accordingly, the stored water transported through the rivers to the export pumps by the projects is not available for others to appropriate. It also is not available to riparian right holders, since it is not natural flow. Water right holders in addition to the DWR and USBR can take natural and abandoned flows as long as there is enough water under these flows to meet the water right holders' needs and meet the water quality objectives in the Delta. However, when the natural flow recedes during the dry season, the DWR and the USBR must release stored water to meet water quality objectives in the Delta. When there is not enough natural flow to meet the water quality objectives, so that the DWR and the USBR are meeting the objectives with stored water, other appropriators with Term 91 in their permits or licenses are notified to cease diverting water under their permits or licenses. In effect, Term 91 requires appropriators with this term in their water right permits or licenses to forego diverting natural flow that is needed to meet the flow-dependent water quality objectives. When there is

[4] Term 91 is not included in permits or licenses to appropriate water from the Putah Creek, Stony Creek, and Cache Creek watersheds.

insufficient flow to meet the water quality objectives, diversions by Term 91 appropriators could contribute to increased concentrations of salts in the Delta channels. If Term 91 appropriators have alternative supplies of water, such as contractual supplies, riparian rights, pre-1914 rights, pre-Term 80 permits or licenses, or groundwater, they can divert under those rights so long as there is unappropriated water available, but they cannot divert under their permits and licenses.

As discussed below, the primary consideration in this proceeding is whether the respondent licensees have alternative supplies of water available to them under either pre-1914 appropriations or under riparian rights.

3.0 ISSUES FOR HEARING AND PARTICIPANTS' POSITIONS

3.1 Key Hearing Issues

The hearing notice contains the following Key Issues (in bold type) and the following explanatory questions regarding the Key Issues:

1. **"Should the SWRCB order liability in response to Administrative Civil Liability Complaint No. 262.5-28 against Lloyd L. Phelps, Jr. (Licenses 13444 and 13274)?**

   Did the licensee divert water during the periods when Term 91 makes water unavailable under the conditions of the license? Does the licensee have any basis of right to divert water during the curtailment periods? Is the proposed administrative civil liability amount appropriate?"

2. **"Should the SWRCB order liability in response to Administrative Civil Liability Complaint No. 262.5-29 against Joey P. Ratto, Jr. (License 13194)?**

   Did the licensee divert water during the periods when Term 91 makes water unavailable under the conditions of the license? Does the licensee have any basis of right to divert water during the curtailment periods? Is the proposed administrative civil liability amount appropriate?"

3. "Should the SWRCB order liability in response to Administrative Civil Liability Complaint No. 262.5-30 against Ronald D. Conn and Ron Silva, et al. (License 13315)?

Did the licensee divert water during the periods when Term 91 makes water unavailable under the conditions of the license? Does the licensee have any basis of right to divert water during the curtailment periods? Is the proposed administrative civil liability amount appropriate?"

3.2 Questions for Closing Briefs

After the hearing, the hearing officer sent a letter to the parties posing the following questions to be addressed in their closing briefs. Closing briefs were due on April 18, 2003.

1. "When, based on the hearing record, was each of the subject parcels severed from the current channels of the Delta through a patent or a deed? Is there any specific evidence in the hearing record that demonstrates an intention, at the time when the patent or deed severed the parcel, to retain a riparian water right to the channel?"

2. "If the respondent's land was riparian to a natural surface watercourse at some time in the past, under what circumstances can it remain riparian after the watercourse is no longer present? Have past owners of any of the parcels involved in this hearing preserved riparian rights through actions concurrent with the obliteration of a watercourse to which the parcel was riparian? Is there evidence in the hearing record that owners of the parcels in question were using water from a past watercourse before the watercourse was obliterated?"

3. "If land was reclaimed from swamp and overflow land, is there a legal basis for claiming that a riparian water right attaches to all of the reclaimed land?"

4. "Can pre-patent water uses support a riparian water right?"

5. "Is there evidence in the hearing record to support the establishment of a pre-1914 water right on any of the subject parcels? If such evidence is present, what quantity of water right was established in the right before 1914, how much of the land on the parcel was irrigated, what was the season of diversion, and what was the source of the water?"

6. "Has any established pre-1914 water right on any of the subject parcels been forfeited or abandoned? Is there evidence in the hearing record to show that any part of any of the subject parcels has been continuously irrigated since before 1914?"

7. "If the respondents have current pre-1914 water rights, why did they obtain water right permits and then licenses from the SWRCB?"

3.3 Positions of the Parties

The parties in this proceeding are the three respondents, the prosecutorial team, and the San Joaquin River Group Authority (SJRGA).

The respondents do not dispute that in the two years identified in the complaints they received notices of curtailment and that they continued to irrigate their lands after receiving the notices. They argue, however, that (1) they have other water rights under which they can divert water during the curtailment periods and (2) in any event Term 91 is not applicable to lands within the Delta. Their theories are:

1. Because their lands were reclaimed from swamp and overflowed land, they retain riparian rights regardless of whether their lands have ever been immediately adjacent to or severed from the rivers.
2. Diversion of water by the respondents does not injure the SWP or the CVP, who are the beneficiaries of Term 91.
3. The respondents cause water savings for the SWP and the CVP because they farm in the Delta, and this should offset their diversions and reduce their penalties.
4. The respondents' lands overlie the subterranean part of the river and this makes their lands riparian to the river.
5. There is an assumption in a 1956 study by the DWR and the USBR that the Delta lowlands have riparian rights.
6. The SWRCB excluded evidence that the SWP and the CVP cause Term 91 to be triggered earlier than it should.
7. Riparian use of natural flow is not restricted as to season.
8. Riparian uses must be protected under a physical solution.
9. Filling of the interior channels on Upper Roberts Island does not mean that the riparian right is forfeited or divested.
10. When the respondents' parcels were severed from the main channels of the Delta, the evidence shows that they intended to retain riparian rights.
11. The pre-patent water uses support a riparian right.
12. The evidence supports the application of water to respondents' properties before 1914, resulting in pre-1914 water rights.

13. Changes in points of diversion do not affect pre-1914 water rights.
14. The prosecution staff failed to rebut the respondents' evidence.
15. The state is estopped from seeking liability against the respondents.
16. The Delta Protection Act precludes application of Term 91 to diverters of water to Delta lands.

The prosecution and the SJRGA both argue that the respondents do not have either riparian rights or pre-1914 appropriative water rights to the water in the river channels, and that none of the exceptions apply to the respondents' diversions.

4.0 DISCUSSION OF ISSUES AND ARGUMENTS

4.1 Applicable Law

Water Code section 1052 provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass. Section 1052 further provides that the SWRCB may administratively impose civil liability pursuant to section 1055 in an amount up to $500 for each day a trespass occurs. Water Code section 1055, subdivision (a), authorizes the Executive Director of the SWRCB to issue a complaint to any person on whom administrative civil liability may be imposed under section 1052. This authority is delegated to the Chief of the Division.

When Term 91 is in effect, no water can be diverted under a water right permit or license that contains Term 91. To avoid a trespass under section 1052, any person or entity holding a permit or license that is subject to Term 91 must either cease diverting water or make any water diversions when Term 91 is in effect under another water right. The respondents claim that they have riparian or pre-1914 appropriative water rights that allow them to divert water during the curtailment period under Term 91. They also argue that Term 91 should not be applied to them as a matter of law.

4.1.1 Riparian Rights

A riparian water right is part and parcel of the land. (*Lux* v. *Haggin* (1886) 69 Cal. 255, 391.) A riparian right to take water from a stream and use it on a specific parcel of land generally exists under California law when (1) the land is contiguous to or abuts the stream (*Rancho Santa*

Margarita v. *Vail* (1938) 11 Cal.2d 501, 528; *Joerger* v. *Mt. Shasta Power Corp*. (1932) 214 Cal. 630); (2) the parcel is the smallest parcel held under one title in the chain of title leading to the current owner of the parcel (*Rancho Santa Margarita*, *supra*, 11 Cal.2d at 529; *Boehmer* v. *Big Rock Irrigation District* (1897) 117 Cal. 19, 26-27 [48 Pac. 908])[5]; (3) the parcel is within the watershed of the stream (*Rancho Santa Margarita*, *supra*, 11 Cal.2d at 528-529; see also, *Pleasant Valley Canal Co.* v. *Borror* (1998) 61 Cal.App.4th 742, 774-775 [72 Cal.Rptr.2d 1], summarizing these points). Parcels that are not contiguous to a stream, or do not meet the other elements of this test do not include riparian water rights unless an exception to this test is applicable.

The prosecution and the SJRGA address the potential for exceptions to the test of a riparian right in this case. They acknowledge that a parcel may have retained a riparian right when it was severed from the stream if there is evidence of an intention to maintain a riparian right when the parcel was severed.[6] They maintain, however, that no such evidence is present. The respondents argue that additional exceptions exist that cause them to have riparian rights. They assert that lands reclaimed from swamp and overflowed lands have riparian rights whether or not the lands are severed from the river. They further assert that lands overlying water that is in contact with the stream are riparian to the stream even though the land has no contact with the surface stream. They assert that an assumption in a 1956 technical report creates a riparian water right or an estoppel against the state asserting the lack of a riparian right. They argue that a riparian right is available all year because of a Delta pooling concept. They argue that under a physical solution doctrine upstream reservoirs are obliged to provide them water under their claims of riparian rights in place of flows that they argue would have been present in the river during the irrigation season before the reservoirs were built. The respondents further argue that the evidence shows an intention to retain riparian rights on the parcels in question.

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5 A parcel that is severed from the stream and then reunited with the original parcel does not regain riparian status. (*Anaheim Union Water Co*. v. *Fuller* (1907) 150 Cal. 327, 331 [88 Pac. 978]; see *Rancho Santa Margarita*, *supra*, 11 Cal.2d at 538.)

6 Evidence of intent to retain a riparian right usually consists of language in the deed conveying the parcel. (*Pleasant Valley Canal Co*. v. *Borror* (1998) 61 Cal.App.4th 742, 780.) A grant of a right of way through a riparian parcel for a road or a levee may not, however, result in a severance. *See Borror*, *supra*, 61 Cal.App.4th at 780-781, citing *Murphy Slough Assn*. v. *Avila* (1972) 27 Cal.App.3d 649, 658. Evidence of intent to retain a riparian right can alternatively consist of evidence such as a ditch being present at the time of the conveyance, leading from the stream to the parcel. (*Hudson* v. *Dailey* (1909) 156 Cal. 617, 624-625.)

4.1.1.1 Riparian Status of Swamp and Overflowed Lands

Respondents argue that their lands, which are reclaimed from swamp and overflowed land, have riparian rights to the channels of the Delta even if they are severed from the channels, because their lands before reclamation were covered with water. These arguments fail. A riparian right to use water attaches to a stream or a watercourse and allows the riparian owner to divert and use water of the stream to which the land is riparian. (Wat. Code, § 101.) If a parcel of land is reclaimed from swamp and overflowed land and is not severed from the adjacent watercourse, it will include a riparian right because it is adjacent to the watercourse. If the parcel has been severed from the watercourse, however, its history of having been flooded does not make it riparian, because it could not have exercised riparian water rights when it was under water. (*See* Hutchins, The California Law of Water Rights (1956) p. 210.) Further, the California Supreme Court reasoned that an owner of swamp and overflow land would not have a riparian right if either there was no watercourse (i.e., no channel) to which a riparian right could attach, or the land was on the bottom of, not adjacent to, the stream. (*Lux* v. *Haggin* (1886) 69 Cal. 255, 413 [10 P. 674].) If the land was on the bottom of the stream, the court indicated that by definition the owner would not be a riparian proprietor.

Assuming for sake of argument that a riparian right could attach to swamp and overflowed land, the land could nevertheless be severed from the adjacent watercourse. If the owner of a riparian tract conveys a noncontiguous portion of the tract by a deed that is silent as to riparian rights, the conveyed parcel is permanently deprived of riparian status unless there is evidence, such as a ditch leading from the stream at the time of conveyance, that is adequate to show that the parties intended to preserve the riparian right on the severed parcel. (*Hudson* v. *Dailey* (1909) 156 Cal. 617, 624-625 [105 Pac. 748]; see also, *Anaheim Union Water Co*., *supra*, 150 Cal. 327, 331; *Rancho Santa Margarita, supra*, 11 Cal.2d 501, 538.)

Riparian rights also can be severed from the watercourse by avulsion (i.e., changes in the stream course). (*McKissick Cattle Co*. v. *Alsaga* (1919) 41 Cal.App. 380, 388-390.) Avulsion can be the result of either natural or man-caused changes in the course of a stream. (*McKissick, supra*; *State of Calif. ex rel. State Lands Comm.* v. *Superior Court* (1995) 11 Cal.4th 50, 79.) A former riparian right holder whose right was severed due to avulsion can regain the riparian right by ditching the water back to its original channel, if the former riparian right holder restores the original course of the stream within a reasonable period of time, and does so without disturbing the rights of others. (*McKissick, supra,* 41 Cal.App. at 388-389.) Past configurations of the land are not the basis of riparian rights; instead, riparian rights are determined from the current topography. (*Rancho Santa Margarita, supra,* 11 Cal.2d 548-549.)

4.1.1.2 Riparian Status of Severed Lands Overlying Underflow of the Stream

The respondents assert that to the extent that they are on lands severed from the stream but overlying the subterranean flow of the stream, they have riparian rights to the stream. This is not the rule. The California Supreme Court has specifically rejected this argument. (*Anaheim Union Water Co., et al*. v. *Fuller, et al*. (1907) 150 Cal. 327 [88 P. 978].) Lands that are severed from the surface stream or do not abut the surface stream do not have riparian rights to the surface flow even though they are overlying the underground flow of the stream.

The respondents argue that two subsequent cases, *Hudson* v. *Dailey*, *supra*, at 156 Cal. 617, 628, and *Turner* v. *James Canal* (1909) 155 Cal. 82, 92, support their position. Neither case holds, however, that a parcel overlying the subterranean flow of a stream includes a riparian right if the parcel does not abut the surface stream or has been separated from the surface stream without action to preserve the riparian right. *Hudson* establishes an exception to the severance rule in the Anaheim case if there are physical circumstances, such as the existence of a ditch leading from the stream to the severed parcel at the time of the parcel's conveyance, that indicate an intent to preserve the riparian right. In the absence of either explicit language in the conveyance document or other circumstances demonstrating an intention to preserve the riparian right, however, *Hudson* does not support preservation of a riparian right on a parcel not contiguous to the surface stream. Although *Hudson* recognizes that an overlying user and a riparian user from the same stream share a common supply, it does not recognize any right of the overlying user to take water directly from the surface stream. *Turner* does not address subterranean flow; instead it recognizes that a riparian right holder with land abutting a slough that is part of a river may take its share of water from the main stem of the river. In *Turner,* the land of the riparian right holder was in contact with the surface water body, making it inapposite to the respondents' circumstances.

Even if the respondents' legal position were correct that riparian rights can attach to a stream if the parcel involved overlies the underground flow of the stream, the respondents would not be able to establish a riparian right based on the evidence they presented in this proceeding. On redirect examination, the respondents' engineering expert testified that the groundwater has a high salt content that makes the groundwater unusable for irrigation. The difference in quality of the groundwater and the surface water does not support, and actually tends to contradict, the assertion that the groundwater is the underground flow of the Middle River or the San Joaquin River. In the absence of other evidence, the respondents' factual contention is unfounded and provides no support to the legal contention.

4.1.1.3 Estoppel Argument

Based on the Report on the 1956 Cooperative Study Program issued in March 1957 by the DWR and the USBR (WR 2-10), the respondents argue that the SWRCB should be estopped from imposing liability on them. The report includes an assumption that the Delta lowlands discussed in the report have riparian status. The report emphasizes, regarding the water right assumptions in the report, that these assumptions may differ substantially from the actual water rights, and points out that the purpose of the assumptions was to develop information on water use for negotiations between the DWR and the USBR and existing water users along the Sacramento River and in the Delta. This assumption was discussed in a 1964 report issued by the USBR, which stated that the assumption had been questioned, and which stated that, "It is not the purpose of this report to substantiate or repudiate the riparian assumption, but rather to present information that will aid in analyzing the various problems and help in understanding the physical characteristics involved." (WR 2-11, p. 2.) Agencies other than the SWRCB made the assumptions in the reports, and they did not make the assumptions for the purpose of determining actual water rights, but instead for estimating water use. Accordingly, these reports do not provide evidentiary support for an estoppel argument.

Respondents also point out instances in 1984, 1986, and 1997 when the staff of the SWRCB filled out reports that indicated the staff was not contesting a claim that the water users in the Delta Lowlands had riparian rights. None of these notations represents a decision by the SWRCB regarding whether water users in that area have riparian rights. These notations show only that the SWRCB did not either exercise its prosecutorial discretion to take action against the water users or further investigate the water users' claims at that time. In the absence of a formal determination such as the one herein, there is no determination by the SWRCB on that issue.

On the basis that SWRCB staff members have seemed to accept their claims in the past, however, respondents seek to establish riparian water rights by arguing that the SWRCB is estopped to deny that they have riparian water rights. This argument fails. The SWRCB does not issue riparian rights, and cannot make them exist by failing to take enforcement action on the first occasion that its staff finds out that the party is diverting water under a claim of riparian right. Riparian rights either exist by operation of law, or they do not exist. Accordingly, the SWRCB's determination herein is limited to deciding whether and to what extent such rights exist, not granting them if they do not exist. This determination is within the authority of the SWRCB under Water Code section 1052(a). If the SWRCB determines that no riparian right is associated with a particular diversion of water, and that the respondent has no other water right that authorizes the diversion, the SWRCB is authorized by statute to impose administrative civil liability against the respondent.

Further, after the enactment of the 1913 Water Commission Act, a water user cannot establish a new water right simply by using water; the water user either must have an existing water right under some theory or must acquire an appropriative right by complying with Division 2 of the Water Code. The exclusive means of obtaining an appropriative right to divert and use water from a surface stream is by complying with the provisions of Division 2 of the Water Code. (Wat. Code, § 1225.) Equitable estoppel is not available. The SWRCB cannot give the respondents, through equitable estoppel, a water right that it could not give them in the absence of following the statutorily prescribed procedures. (*American Federation of Labor v. Unemployment Insurance Appeals Board* (1996) 13 Cal.4th 1017, 1039 [56 Cal.Rptr.2d 109, 122].)

Also, the California Supreme Court has made it clear that a water user cannot prescriptively acquire a water right against the state. (*People* v. *Shirokow* (1980) 26 Cal.3d 301 [162 Cal.Rptr. 30].) Based on the *Shirokow* decision, a water user cannot obtain equitable relief such as estoppel against the SWRCB's enforcing the requirement that water users must obtain appropriative water rights under the Water Code if they do not have other water rights.

4.1.1.4 Implied Physical Solution Argument

Respondents argue that they should be treated as if there is natural flow available even during seasons when there is inadequate natural flow entering the Delta to meet their current water uses. In effect, they are arguing that there is no requirement that there be natural flow available for their riparian rights. The respondents hypothesize that before upstream development occurred, natural flow would collect in the Delta and be available for irrigation during the entire irrigation season.[7] They contend that under Article X, section 2 of the California Constitution, there is an implied physical solution to upstream development that gives them a legal right to water captured and stored upstream by other entities during seasons when the respondents would have excessive water for any irrigation use. In effect, the respondents are saying that if an upstream water storage facility releases water stored during an earlier season for a customer, the respondents can take it in preference to the customer, even though the respondents have no contract with the facility operator and no judicial determination establishing the claimed right. The respondents make this claim even though the water the respondents want from the upstream storage facilities was diverted at a time when surplus water was available, the upstream diverters did not take water needed at the time of diversion for the respondents' claimed senior downstream direct diversion uses, and the upstream diverters did not prevent flood flows of fresh water adequate to freshen the Delta.

The physical solution doctrine is founded on the 1928 constitutional amendment that became the current article X, section 2 of the California Constitution. The constitutional amendment requires that in making a decision in a dispute regarding rights to water, if protecting a prior right would entail a waste of water, the decision maker must fashion a decision that will avoid wasting water and simultaneously protect the prior water right. (*Lodi* v. *East Bay Municipal Utility District* (1936) 7 Cal.2d 316, 339-341 [60 P.2d 439]; *Rancho Santa Margarita*, *supra*, 11 Cal.2d at 558-562.) The physical solution doctrine does not, however, change the water right priorities or materially alter a prior right holder's water right. (See *City of Barstow v. Mojave Water*

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[7] If the Delta stored quantities of fresh water during the irrigation season prior to development of the Delta, the Delta was a marsh at that time, and could not be used for irrigated agriculture. Under the current configuration with channels created by building islands from former marshlands, excess winter flows rush out to sea. The respondents cannot, consistently with their farming use, which depends on the current channel, levee, and island configuration of the Delta, reasonably claim a right to the water that would be present in the Delta under natural marsh conditions.

Agency (2000) 23 Cal.4th 1224, 1250 [99 Cal.Rptr.2d 294, 312.) The appropriative rights to divert water at the upstream reservoirs do, however, protect the rights of downstream prior right holders at the times when water is being diverted into the reservoirs. Because the permits and subsequent licenses issued to the upstream appropriators were issued subject to prior rights, they require that inflow be bypassed to meet the needs of senior downstream water right holders at the time when the inflow occurs. The permits and licenses do not, however, require the release of previously stored water for use by downstream water right holders in a later season. Further, riparian right holders could not take previously stored water under their riparian rights, because it is not natural flow. The respondents assert, however, that as riparian right holders they are entitled to any flow in the river, not only the natural flow. This argument is contrary to the riparian doctrine. Riparian rights attach only to natural flow of a stream, and do not attach to water that is present due to artificial causes, such as storage releases, imports from another watershed, or return flows from groundwater pumping. (*Lux* v. *Haggin* (1884) 69 Cal. 255, 390-391 [10 P. 674]; *Stevinson Water District* v. *Roduner* (1950) 36 Cal.2d 264 [223 P.2d 209]; *Bloss* v. *Rahilly* (1940) 16 Cal.2d 70, 75-76 [104 P.2d 1049].)

Further, if the respondents had believed that they had rights to water that would be stored by the upstream reservoirs, the appropriate time to seek a physical solution to protect their rights, if a physical solution was needed, was when the upstream reservoirs from which they now claim to have a right to take water received their water right permits. In the absence of terms and conditions on the permits or licenses for the upstream rights, no basis now exists for the respondents to assert, as a defense to this enforcement proceeding, that they are exercising a right under a physical solution.

4.1.1.5 Relevance of Evidence Regarding Effects of DWR and USBR Operations on Term 91 Date

In response to a motion by the SJRGA, the hearing officer excluded part of SDWA Exhibit 2, including Exhibit 2-B. Respondents request that the SWRCB reconsider the exclusion. Respondents claim that the excluded evidence shows that the SWP and the CVP cause Term 91 to be triggered earlier in years when it is triggered, and that the projects cause Term 91 to be triggered in years when it would not otherwise be triggered. Respondents argue that this unfairly deprives them of permission to appropriate water under their licenses, by favoring the projects that are protected by Term 91.

The hearing officer excluded several paragraphs of the respondents' SDWA Exhibit 2 and excluded attachment B (Exhibit 2-B) of SDWA Exhibit 2. SDWA Exhibit 2 is the written testimony, plus attachments, of a witness for the respondents. The excluded material is irrelevant to the issues in the hearing, which addressed whether the respondents had violated Term 91 by diverting water from the channels of the Delta during the periods in 2000 and in 2001 when Term 91 prohibited diversions under the respondents' licenses. The excluded material is intended to challenge the applicability of Term 91 to in-Delta diverters. The excluded written testimony would challenge the method of calculating when Term 91 goes into effect. The SWRCB decided the language, policy objectives, and method of calculation of Term 91 in SWRCB Decision 1594 (D-1594) and in SWRCB Order WR 81-15 after a lengthy adjudicative hearing process in which the respondents were parties. Pursuant to the policy direction in D-1594, the SWRCB added Term 91 to the respondents' permits when it issued the permits.[8] Respondents did not, however, file timely challenges to either D-1594 or their permits. (See Wat. Code §§ 1122 and 1126(b), derived from Wat. Code §§ 1055.1, 1357, 1360, 1412, 1413, 1615, 1616, 1677, 1705.5, 1730, 1739, 1740, and 10507.) Having accepted Term 91 without bringing a timely challenge to the inclusion of this condition in their water right permits, the respondents cannot now collaterally attack Term 91 as a defense to this enforcement action.[9] Exhibit 2-B is Table V-21 excerpted from a report published in 1980 jointly by the predecessor of the USBR and by South Delta Water Agency (SDWA). It summarizes the reduction in runoff

[8] The permits subsequently ripened into licenses, and Term 91 remained a condition of the licenses.

[9] The respondents argued at a workshop on this order that the policy direction in D-1594 did not apply to unapproved applications that had been filed before D-1594 was adopted and were approved after D-1594 was adopted. Under this argument, Term 91 would be included in permits on applications filed in 1984 or later and in permits approved between the 1960's and February 1984, but would leave a loophole for the applications that were being processed when D-1594 was adopted. This argument is based on the introductory language in D-1594 for a list of policies regarding the use of Term 91. The policies are in the findings preceding the order, not in the ordering part of the decision. The introduction to the list of policies refers to "policies for use in acting upon future applications to appropriate water...." This language is not contained, however, in the individual policies. The policy relevant to the respondents' water rights provides that "Standard Permit Tem 91 shall be included in new permits for diversion from the Sacramento-San Joaquin Delta watershed except when:..." The SWRCB's long-standing interpretation of this policy, evidenced by its repeated inclusion of the term in the permits of the respondents and others, is that Term 91 is to be added to <u>all</u> new permits for diversion from the Delta watershed unless an exception specified in the policy applies. Accordingly, the respondents' argument is wrong.

of the San Joaquin River at Vernalis after 1944 due to CVP diversions and due to water diversions by other San Joaquin watershed diverters who initiated diversions after the CVP diversions commenced.[10] The table shows average reductions in runoff by year type during the April through September period and during the full year. Reductions are expressed as the total number of acre-feet reduction and expressed as a percentage of pre-1944 flow or runoff.[11] Based on the table, it appears that non-CVP diversions have substantially more impact on total runoff at Vernalis than CVP diversions. It is impossible to determine from the table, however, the specific months when the reductions in runoff occurred and whether adequate runoff remained during these months to supply the needs of southern Delta diverters. The timing of the flows month-by-month is essential to determining when Term 91 is triggered. Accordingly, even if it were appropriate for the respondents to collaterally attack Term 91, and even if the evidence were admitted, the evidence respondents sought to present would not support such an attack.

Further, to the extent that the excluded written testimony challenges the operations of upstream water right holders and questions whether they are violating their water rights, it should be excluded. This is not the appropriate proceeding to determine whether senior upstream water right holders are acting within their water rights. The purpose of this proceeding is to decide whether the respondents have water rights other than their water right licenses that would validate their diversion of water from the Delta during the periods of alleged violation of Term 91.

4.1.2 Pre-1914 Rights

Prior to the enactment of the Water Commission Act in 1914, there were three elements to an appropriation of water. First, the appropriator must have intended to put water to beneficial use. Second, there must have been an actual diversion from the natural watercourse using a means sufficient to put the water to beneficial use. Third, the appropriator must have applied the water to beneficial use within a reasonable period. The best way to have established a pre-1914 water right was to have done the things that were at that time specified in the Civil Code. (Civ. Code,

[10] Because the report was published in 1980, it obviously does not show the effects of any increases in diversions after 1980.

[11] The table does not implicate the SWP, which does not divert water from the watershed of the San Joaquin River above Vernalis.

§§ 1410-1422.) Compliance with the notice and recordation procedures in these sections provided evidence that could be used to establish a priority of right. The courts, however, held that in the absence of such compliance, a person could legally appropriate water, but would need another form of proof if there were a dispute. (*Duckworth* v. *Watsonville Water & Light Co*. (1915) 158 Cal. 206, 211; *Lower Tule etc. Co*. v. *Angiola etc. Co*. (1906) 149 Cal. 496, 499; *Borror*, *supra*, 61 Cal.App.4th at 752.) There is no evidence in the hearing record that any of the predecessors of the respondents complied with the Civil Code procedures in sections 1410-1422 to appropriate water for the parcels discussed herein. Accordingly, they must establish the existence of the above three elements by direct evidence.

Additionally, a pre-1914 water right can be abandoned, or can be forfeited due to a period of five consecutive years of nonuse. (Wat. Code, § 1240; *Smith v. Hawkins* (1895) 110 Cal. 122 [42 P. 453]; *Erickson v. Queen Valley Ranch Co*. (1971) 22 Cal.App.3d 578 [99 Cal.Rptr. 446].) Subsequent resumption of use cannot revive a forfeited pre-1914 water right. (*Smith v. Hawkins, supra*, at 110 Cal. 122, 127; *Kirman v. Hunnewill* (1892) 93 Cal. 519, 529 [29 P. 124].)

4.1.3 Application of Term 91 to in-Delta Diverters

The respondents argue that the application of Term 91 to them is contrary to the Delta Protection Act (Wat. Code §§ 12200-12205), because the respondents divert from the channels of the Delta.[12] The respondents point to the language in sections 12202 and 12205 to support their position. Section 12202[13] provides that a function of the SWP is to provide salinity control and an adequate water supply for the users of water in the Delta. Section 12205[14] establishes state

[12] Respondents' argument could be read as a collateral attack on the terms of their licenses. As discussed above, the respondents cannot collaterally attack the terms of their licenses as a defense to this enforcement proceeding.

[13] Section 12202 provides: "Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery of said substitute water supply shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code."

[14] Section 12205 provides: "It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part."

policy to the effect that releases of stored water into the Delta for export shall be "integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part."

In addition to providing that a function of the SWP is to provide salinity control and an adequate water supply for Delta water users, section 12202 provides that if a substitute water supply is provided in lieu of salinity control, "no <u>added</u> financial burden shall be placed upon said Delta water users <u>solely by virtue of the substitution</u>." (Emphasis added.) No substitution currently is in effect, so any current financial burden on the Delta water users would be the same burden they would have to bear in the absence of a substitution. This language clearly recognizes, however, that the Delta water users may have a financial burden in connection with receiving water from the SWP. Most likely, the financial burden would arise due to the use by Delta water users of water that is made available by the construction of water works, such as upstream storage reservoirs, by DWR. As discussed below, section 11462 specifically does not require the DWR to provide its stored water free of charge.

No provision in the Delta Protection Act accords a water right to users of water in the Delta. Accordingly, they must have adequate existing water rights, acquired under the laws that govern acquisition of water rights, before they can divert and use water from the channels of the Delta. If existing water rights are not adequate to supply the needs of in-Delta water users, the Delta Protection Act does not ensure the Delta water users an adequate supply. The in-Delta water users can, however, make arrangements with DWR and pay adequate compensation to the DWR for the water, pursuant to Water Code section 11462.[15] At the hearing, the DWR stated, in a policy statement to the SWRCB, that the DWR is willing to contract for a water supply with agencies such as SDWA, and that the DWR had met with the attorney for SDWA on September 5, 2002, to discuss the option of a contract with the DWR for a supplemental water supply. DWR pointed out that Article 18 of DWR's standard long-term water supply contract provides for shortages of exported water that would result from demands due to area of origin claims.

[15] Section 11462 provides: "The provisions of this article shall not be so construed as to create any new property rights other than against the department as provided in this part or to require the department to furnish to any person without adequate compensation therefor any water made available by the construction of any works by the department."

By giving new appropriators in the watershed or area of origin the opportunity to obtain water right permits that have seniority over water that is appropriated for export by the SWP and the CVP, Water Code sections 11460-11465 protect the ability of new water users in the area or watershed of origin to appropriate water from the natural and uncontrolled flows that otherwise would be exported by the SWP and CVP under their appropriations.[16] Section 11462 also provides a way for water users in the area or watershed of origin to obtain a water supply contract from the DWR to supplement their water rights. Section 11462 provides that (1) sections 11460-11465 do not create any new property rights other than against the DWR, and (2) these sections do not require DWR to furnish water from any works constructed by DWR to any person <u>without adequate compensation</u> for the water.[17] (Emphasis added.) Stated another way, if the Delta water users adequately compensate DWR for water that is made available by the construction of its storage facilities, DWR must provide water to the Delta water users because they are within, or immediately adjacent to, the watershed where the water originates. Stored water that DWR releases into the Delta when Term 91 is in effect is water made available by the construction of DWR's Oroville Reservoir. Accordingly, if the Delta water users adequately compensate DWR, they can take water attributable to DWR's storage releases from the Delta when Term 91 is in effect.[18] In the absence of contracts between the respondents and the DWR, Ratto, Conn, and Phelps have no valid basis to divert water from the Delta when Term 91 is in effect.

4.2 <u>Diversions During Periods When Water is Unavailable under Term 91</u>

4.2.1 Phelps Diversions

On July 2, 2002, the Chief of the Division of Water Rights issued Administrative Civil Liability Complaint No. 262.5-28 against Lloyd L. Phelps & Thelma B. Phelps Family Trust (Phelps) for noncompliance with the terms and conditions of water right licenses 13444 and 13274 (issued on

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[16] Water Code sections 11460, et seq., apply only to the SWP and, to the extent specified in section 11128, to the CVP. Section 11128 provides that the limitations in sections 11460 <u>and</u> 11463 apply to the USBR.

[17] By the terms of Water Code section 11128, section 11462 does not apply to the USBR; consequently the USBR is not required to deliver water made available by the works it has constructed to Delta water users in exchange for compensation.

[18] Any water provided by DWR when Term 91 is in effect would be provided under DWR's water right permits, not under the respondents' licenses.

applications 21162 and 20957, respectively). SDWA, on behalf of Phelps, filed a timely request for a hearing.

License 13444 authorizes the diversion from the San Joaquin River of 1.43 cubic feet per second (cfs) from January 1 to October 31 of each year. License 13274 authorizes the diversion from the San Joaquin River of 3.16 cfs from March 1 to October 31 of each year. Both licenses contain Term 91. The curtailment periods were initiated by letters dated June 28, 2000 and June 4, 2001, and ended on August 17, 2000 and August 31, 2001.

On August 15, 2000, and on August 14, 2001, the Division's staff inspected Phelps' diversions under the two licenses and found that Phelps had been diverting water for irrigation during the Term 91 curtailment period. The evidence in the hearing record supports the allegation of the prosecution that Phelps diverted water from the San Joaquin River for irrigation during the Term 91 curtailment period.

4.2.2 Ratto

On July 2, 2002, the Chief of the Division of Water Rights issued Administrative Civil Liability Complaint No. 262.5-29 against Joey P. Ratto, Jr., and Linda A Ratto (Ratto) for noncompliance with the terms and conditions of water right license 13194 (issued on application 29598). SDWA, on behalf of Ratto, filed a timely request for a hearing.

License 13194 authorizes the diversion from the Middle River of 0.59 cfs and 61.5 acre-feet per annum (afa) from April 1 to November 1 of each year. The license contains Term 91. The curtailment periods were initiated by letters dated June 28, 2000 and June 4, 2001, and ended on August 17, 2000 and August 31, 2001.

On August 15, 2000, and on August 14, 2001, the Division's staff inspected Ratto's diversions under License 13194 and found that Ratto had planted and irrigated tomatoes within the place of use of License 13194 during each of the Term 91 curtailment periods. At the time of the second inspection, on August 14, 2001, although there was no sign of recent irrigation from the river, and the conveyance ditch was dry, the crop was growing. The evidence in the hearing record supports the allegation of the prosecution that Ratto diverted water from Middle River for irrigation during the Term 91 curtailment period.

4.2.3 Silva & Conn

On July 2, 2002, the Chief of the Division of Water Rights issued Administrative Civil Liability Complaint No. 262.5-30 against Ron Silva, Ronald D. Conn, Patricia A. Conn, John E. Conn, Mark W. Conn, Bill J. Conn, and Cathleen Conn (Silva and Conn) for noncompliance with the terms and conditions of water right license 13315 (issued on application 22638). SDWA, on behalf of Silva and Conn, filed a timely request for a hearing.

License 13315 authorizes the diversion from the Middle River of 3.9 cfs from March 1 to December 1 of each year. The license contains Term 91. The curtailment periods were initiated by letters dated June 28, 2000 and June 4, 2001, and ended on August 17, 2000 and August 31, 2001.

On August 15, 2000, and on August 14, 2001, the Division's staff inspected the Silva and Conn diversions under License 13315 and found that Silva had irrigated 170 acres of alfalfa in 2000 during the curtailment period. In 2001, Silva irrigated about 170 acres of corn during the curtailment period. In 2000, Conn dry farmed, but in 2001, Conn irrigated about 120 acres of tomatoes and 28.3 acres of corn during the Term 91 curtailment period. At the time of the second inspection, on August 14, 2001, the pump at the point of diversion was running, the conveyance ditches contained water, and the fields recently had been irrigated. The evidence in the hearing record supports a finding that Silva diverted water from Middle River for irrigation during both of the Term 91 curtailment periods and Conn diverted water from Middle River during the 2001 curtailment period.

4.3 <u>Claims of Rights during Term 91 Curtailments</u>

None of the properties served by the above licenses of the respondents currently is contiguous to either Middle River or the San Joaquin River. There is no evidence that any of the respondents has a groundwater well to irrigate their parcels. Based on the evidence and the following discussion, the SWRCB finds that Silva's property has a preserved riparian right. There is no evidence that a riparian right has been preserved on the other properties.

There also is no direct, non-hearsay, evidence in the hearing record that any of the properties actually were irrigated from the channels of the Delta before 1914. While SDWA provided general evidence of farming on Upper Roberts Island, SDWA provided no specific evidence to show that irrigation occurred on the respondents' properties or even near their properties before 1914. Most of SDWA's evidence consists of hearsay, upon which the SWRCB cannot base a finding unless it corroborates non-hearsay evidence. (Gov. Code, § 11513(d).) Further, to the extent that SDWA presented evidence that may be considered non-hearsay evidence, it is not the sort of evidence that is either persuasive or can be relied upon in the conduct of serious affairs. (See Gov. Code, § 11513(c).) While there is some indication that there were once internal sloughs on the island, the only evidence SDWA provided as to the location of the sloughs was a 1912 map and a copy of the map with hand-drawn channels added by SDWA's witness. (SDWA 3 D.) The underlying 1912 topographic map shows only one slough extending into a parcel of Phelps, one of the respondents, and that slough is marked as being intermittent and does not extend to a channel of the Delta. The locations of the channel extensions hand-drawn by the witness are uncorroborated by any evidence in the record other than the witness' speculation. Further, there is no evidence in the record that the sloughs were connected to the channels of the Delta, and the 1912 topographic map shows several sloughs that clearly do not connect to a channel. While SDWA presented some old newspaper accounts to show that some floodgates existed on Upper Roberts Island, these documents are not specific as to where the sloughs were, and cannot be relied upon as a basis for finding either that the sloughs actually reached the respondents' parcels or that they were in fact connected to a channel of the Delta through a floodgate. Likewise, SDWA's witness, while claiming that he had removed six old floodgates, did not claim that any one of the floodgates connected to a specific slough that actually reached a parcel of one of the respondents. To the extent that SDWA presented evidence that irrigation occurred on the island before 1914, it is impossible to determine a linkage between a location of irrigation, irrigation during the late summer when Term 91 now requires curtailment, and a point of diversion of the water from the channel.

SDWA presented general evidence of farming activity in the Delta before 1914, and presented more specific evidence of farming on the Ratto property, but the evidence does not establish that the farming involved irrigation. Contrary to SDWA's allegations, the available reliable evidence indicates that during the period between 1873 and 1910, the primary crop in the Delta was wheat. The season when wheat uses water is from September 1 through March 1, not during the dry summer period when Term 91 requires curtailment. (WR 2-24, R.T., pp. 340-348.) A map drawn in 1886 by the California State Engineering Department shows all of Roberts Island as Swamp Lands, Irrigable, but does not show any irrigation. (WR 2-16.) A PhD dissertation written in 1957 describes strips of irrigated land along the eastern and western banks of the island in 1875, but characterizes the interior of the island, where the respondents' parcels are located, as grain crops. (SDWA 3C, pp. 311-312.) Grain crops usually are dry farmed. (WR 2-23.)

Despite SDWA's claim that the interiors of the islands received water through sloughs running between the interior parcels and the river channels, the quad maps based on a survey in 1911-1912 show that none of the sloughs actually intersected the levees around the islands. (WR 2-14; 2-15; R.T., pp. 357-359.) Additionally, a map on page 25 of the California Water Atlas published by the Department of Water Resources in 1979 shows that very little of the Delta was irrigated before 1912. (WR 2-18.)

4.3.1 Phelps

By letter dated August 23, 2000, the Division asked Phelps for proof of an alternate water supply under which Phelps could divert water during the Term 91 curtailment period. On Phelps' behalf, the SDWA claimed in a letter dated October 20, 2000, that the alternate source of water was a claim of riparian right, and SDWA requested time to do a title search. SDWA submitted some information on May 21, 2001 after several time extensions, but the Division advised SDWA by letter dated January 31, 2002, that the information was inadequate to establish the existence of an alternate water right.

Phelps has two licenses encompassing places of use in three sections. (SJRGA 10 and 11; SDWA 3CC.) The place of use in Section 8, T1S, R6E, MDB&M, and in Section 17, T1S, R6E, MDB&M, totaling 232 acres, is under License 13274 (Application 20957). (SDWA 3; WR 3-09.) The place of use in Section 18, T1S, R6E, MDB&M, totaling 156.65 acres, is under License 13444 (Application 21162). The land in the place of use of License 13274 (Application 20957) was not riparian as of the date of patent, and there is no evidence in the hearing record of a pre-patent conveyance. This land was patented to George W. Kidd on August 26, 1874. (SJRGA 6; SDWA 3CC, p. 2.) The land in the place of use of License 13444 (Application 21162) was riparian at the time of patenting, but it lost its riparian connection to the San Joaquin River due to a transfer on September 17, 1878 (Deed 37-D-529). (SDWA Exhibit 3D.) The deed does not address access to the San Joaquin River.

4.3.2 Ratto

By letter dated August 23, 2000, the Division asked Ratto for proof of an alternate water supply under which Ratto could divert water during the Term 91 curtailment period. On Ratto's behalf, the SDWA claimed in a letter dated October 20, 2000, that the alternate source of water was a claim of riparian right, and SDWA requested time to do a title search. SDWA submitted some information on May 21, 2001 after several time extensions, but the Division advised SDWA by letter dated January 31, 2002, that the information was inadequate to establish the existence of an alternate water right.

At the time of patent, on November 24, 1876, the Ratto property in the place of use of License 13194 (Application 22598) was riparian to the San Joaquin River, Whiskey Slough and the Middle River. (SDWA 3C.) The place of use of License 13194 is 55 acres in Section 18, T1S, R6E, MDB&M. (WR 3-11.) The Ratto property lost its connection to any channel due to a transfer dated June 15, 1891 from Stuart to Small. (SDWA 3C.) The deed does not address access to any of the channels.

SDWA presented testimony that the parcels retained riparian status due to being contiguous with a slough. A map contained in the History of San Joaquin County dated 1879 does show a slough off of the Middle River in Section 30, Township 1S, Range 6E and heading north and ending in Section 18 near the Ratto property. (SDWA 3Q.) However, no evidence shows that the slough was used for irrigation. Further, the map does not actually show the slough contacting the Ratto property. (WR 2-16; 2-17; R.T., pp. 356-357.) Even if the slough did contact the property at the time, however, the current topography does not support the existence of a riparian right, because it does not include an existing slough to which the right could attach. (*See Rancho Santa Margarita*, *supra*, 11 Cal.2d 548-549.)

4.3.3 Silva & Conn

Silva and Conn both appropriate water under License 13315 (Application 22638). By letter dated August 23, 2000, the Division asked Silva and Conn for proof of an alternate water supply under which Silva and Conn could divert water during the Term 91 curtailment period. On Silva's and Conn's behalf, the SDWA claimed in a letter dated October 20, 2000, that the alternate source of water was a claim of riparian right, and SDWA requested time to do a title search. SDWA submitted some information on May 21, 2001 after several time extensions, but the Division advised SDWA by letter dated January 31, 2002, that the information was inadequate to establish the existence of an alternate water right.

The Silva property, which includes approximately 170 acres in the place of use of License 13315, was riparian to the Middle River at the time of patent on January 17, 1876 (Swamp and Overflow Lands Patent 2182). The Silva property was separated from the channel of the Middle River due to a transfer dated December 28, 1911. (SDWA 3B.) The deed does not address access to the Middle River, but the deed is subject to two September 29, 1911 agreements, to provide canals and to furnish water, discussed below.

A single landowner at one time owned the lands served by the Woods Irrigation District and during that time, the lands were connected to the Middle River. Although these lands were severed from the main channels by conveyances, they continued to have access to the Middle River through the Woods Irrigation District facilities, as evidenced by the agreements dated September 29, 1911. (SDWA 3B; 3L.) Both agreements predate the transfer that separated the Silva property from the Middle River, and demonstrate that there was an intention at the time of the severance to maintain a connection to the Middle River for irrigation. The deed, since it is conditioned upon the agreements to construct canals and to furnish water, is evidence of preservation of the riparian right. Additionally, the agreement shows that Woods Irrigation District had agreed before 1914 to serve water to the Silva property lands, raising the possibility that Woods Irrigation District may have been appropriating water under its own claim of right to deliver to others. The agreement does not, however, establish the amount of water appropriated or the season of diversion of any claim of a pre-1914 appropriative right; nor does it provide direct evidence of actual appropriation of water before 1914.

SJRGA argues that the agreements do not evidence a riparian right because the agreement to furnish water provides that “this contract is not intended to and does not create or convey any lien, estate, easement or servitude, legal or equitable, in any manner upon or in the canal or ditch of [Woods Irrigation Company], or in or to any water flowing therein or which may hereafter flow therein...” This language does not, however, preclude the preservation of a riparian right. In fact, it is silent as to the basis or ownership of any water right to the water. While it expressly does not “create or convey” (emphasis added) any right in the canal or in the water flowing in it, this language simply means that the agreement itself did not create a water right. Since water rights arise under the laws of California, the agreement could not have created a water right in any event, but that does not preclude the maintenance of an existing water right or its creation by other means. SJRGA also argues that since the agreement limits the water to be supplied to 32.86 cubic feet per second, this is inconsistent with a riparian right. This limit, however, is not expressed as a limit on any water right, but rather as a limit on the amount of water that would be delivered from the river. With the exception of the physical limits on the canal, there is nothing in the agreement that would prevent the use of more water.[19]

Conn has two separate parcels totaling 160.2 acres in the place of use of License 13315. (SDWA 1E.) One parcel is located in Sections 5 and 6, T1S, R6E, MDB&M, and the other parcel is located in Section 6 of T1S, R6E, MDB&M. The parcel in Sections 5 and 6 was not riparian to a stream channel at the date of patenting, August 10, 1874 (Patent 1558; Survey 1325). (SJRGA 6.) The parcel in Section 6 was riparian to the Middle River and the San Joaquin River as of the date of patenting, November 24, 1876 (Patent 2182; Survey 1321). (SJRGA 7.) The parcel in Section 6 continued to retain its riparian status until August 10, 1889 when a transfer between Stuart and Krenz separated it from all stream channels. (SDWA 3A.) This transfer preceded by twelve years the Woods Irrigation District agreement to deliver water, effectively precluding any possibility that a riparian right was preserved during this transfer.

SDWA presented a declaration signed by Peter Ohm alleging that a terra cotta pipe from the San Joaquin River served the Conn place of use prior to its severance. The Conn parcel was severed

[19] Of course, an excessive use of the water would be subject to the limitation on all water rights to the amount that reasonably can be used, pursuant to California Constitution, article X, section 2.

no later than 1889. Mr. Ohm passed away before the hearing. He was 83 years old when he signed the declaration, making it clear that any irrigation prior to severance of the Conn parcel would have been prior to his birth. Considering that he could not have had any personal knowledge of such irrigation, and that he did not testify at the hearing, his declaration is hearsay evidence.

4.4 Amounts of Proposed Civil Liability

The three administrative civil liability complaints addressed in this order all are based on alleged violations of Water Code section 1052, subdivision (a), which provides: "The diversion or use of water subject to this division other than as authorized in this division is a trespass." Subdivision (b) of section 1052 authorizes the SWRCB to administratively impose civil liability in an amount not to exceed five hundred dollars ($500) for each day that a trespass occurs. Under Water Code section 1055, the Executive Director of the SWRCB may issue a complaint to any person or entity on which administrative civil liability may be imposed. On May 17, 1999, the Executive Director of the SWRCB delegated this authority to the Chief of the Division.

The prosecution calculated the amounts of proposed civil liabilities for each of the complaints by making a conservative estimate of the number of days that each licensee actually diverted water during the 2000 and 2001 periods when Term 91 was in effect and multiplying that number of days times $500. The estimated number of 24-hour days of violation was based on the water demand of the crop or crops being irrigated[20] and the capacity of each diversion pump. The prosecution then checked the results against alternative means of estimating a liability for the illegal diversions, including the cost of the water diverted, at $25 per acre-foot (see WR 3-18), plus a 20% penalty.

As provided above, a trespass occurs when there is either a diversion or a use of water that is not authorized in Division 2 of the Water Code. (Wat. Code, § 1052, subd. (a).) Although the respondents may not have diverted water continuously during the curtailment period, the evidence is that the respondents' crops used water continuously during the curtailment period.

[20] The prosecution calculated the water demand of the crop or crops being grown in each place of use using crop evapotranspiration date for June through August. (WR 3-13, p. 38, Table 28.)

Each day of unauthorized water use during the curtailment period is subject to a liability of up to $500.

The SWRCB can consider all relevant factors in the hearing record in setting the amount of liability. Among the factors that the SWRCB may consider, depending on the evidence, are the number of days of trespass, the extent of harm caused by the trespass, the nature and persistence of the trespass, the cost to the SWRCB of enforcing the requirements of the Water Code, the economic value of the trespass, and any corrective action taken by the respondent. In this order, the SWRCB has considered all of the relevant factors contained in the hearing record before setting the amount of liability.

4.4.1 Phelps

Phelps is authorized to divert water under Licenses 13274 and 13444 as specified in section 2.1 of this order. Both licenses contain Standard Term 91. During both 2000 and 2001, Phelps diverted water during the Term 91 curtailment periods without having an alternative source of water. The SWRCB finds that Phelps diverted water during the curtailment periods without a basis of right, thereby committing a trespass under Water Code section 1052, subdivision (a). Complaint 262.5-28 estimates the maximum administrative liability at $138,000, based on an assumed 40 days of curtailment in 2000, 78 days[21] of curtailment in 2001, and the use of two points of diversion. A prosecution witness testified, however, that it is reasonable to calculate the number of days of curtailment starting with the date when the respondent received the curtailment notice. This shortens the combined number of days of trespass to 104 days in 2000 and 2001. Phelps has two separate licenses, each with separate places of use and points of diversion. Accordingly, the maximum liability at $500 per day for each of the two separate water rights would be at least $104,000.

Pursuant to Water Code section 1055.3, the SWRCB takes into account, in determining the amount of liability, all relevant circumstances, including the extent of harm, the nature and persistence of the violation, the length of time over which the violation occurred, and any

[21] The actual number of days of curtailment was 50 in 2000 and 88 in 2001, but for purposes of enforcement, the prosecutorial staff assumed that the respondents did not receive notice to curtail until ten days after the curtailment period began.

corrective action taken by the violator. Phelps violated Term 91 in two consecutive years after having been notified to curtail diversions, and continued to divert after having been warned specifically to stop. The prosecution recommended liability in the amount of $22,500, which is based on 45 24-hour days of violation. In the judgment of the SWRCB, the liability recommended by the prosecution is overly lenient; the liability should be a penalty high enough to take into consideration the market value of the water used by the crop, the costs to the SWRCB, and the effects on other water users and instream uses of water of diverting and using water without authorization. An equivalent cost of the water used would be approximately $20,000. (WR 3-18.) The SWRCB intends that the liability imposed in this order will serve as a deterrent to future unauthorized diversions by the respondent. To that end, the liability imposed on Phelps in this order must cover the value of the water taken, plus a sufficient additional penalty to make it clear that unauthorized diversion or use of water is more expensive than authorized diversions. It also takes into consideration the substantial investment of staff time and effort by the SWRCB to conduct an investigation and proceedings in this matter. The total liability imposed on Phelps is $45,000. This determination takes into consideration all of the circumstances, including the failure of the respondent to curtail diversions after repeated warnings, but it is a fraction of the potential liability of at least $104,000, thereby accounting for the fact that this is the first imposition of liability against Phelps for a trespass under section 1052.

4.4.2 Ratto

Ratto is authorized to divert water under License 13194 as specified in section 2.1 of this order. The license contains Standard Term 91. During both 2000 and 2001, Ratto diverted water during the Term 91 curtailment periods without having an alternative source of water. The SWRCB finds that Ratto diverted water during the curtailment periods without a basis of right, thereby committing a trespass under Water Code section 1052, subdivision (a). Complaint 262.5-29 estimates the maximum administrative liability at $69,000, based on an assumed 40 days of curtailment in 2000 and 78 days of curtailment in 2001 at one point of diversion.[22] A witness for the prosecution corrected the maximum liability amount in his testimony; it is at least $59,000.

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[22] The Division sent Ratto curtailment notices in 2000 by both certified mail and regular mail, and in 2001 by certified mail. The notices sent by certified mail were returned to the Division unclaimed, but the 2000 notice sent
(footnote continued)

Pursuant to Water Code section 1055.3, the SWRCB takes into account, in determining the amount of liability, all relevant circumstances, including the extent of harm, the nature and persistence of the violation, the length of time over which the violation occurred, and any corrective action taken by the violator. Ratto violated Term 91 in two consecutive years after having been notified to curtail diversions, and continued to divert after having been warned specifically to stop. The prosecution recommended liability in the amount of $3,750, which is based on 7½ 24-hour days of violation. In the judgment of the SWRCB, the liability recommended by the prosecution is overly lenient; the liability should be high enough to take into consideration the market value of the water used by the crop, the costs to the SWRCB, and the effects on other water users and instream uses of water of diverting and using water without authorization. An equivalent cost of the water used would be approximately $2,600. (WR 3-18.) The SWRCB intends that the liability imposed in this order will serve as a deterrent to future unauthorized diversions by the respondent. To that end, the liability imposed on Ratto in this order must cover the value of the water taken, plus a sufficient additional penalty to make it clear that unauthorized diversion or use of water is more expensive than authorized diversions. It also takes into consideration the substantial investment of staff time and effort by the SWRCB to conduct an investigation and proceedings in this matter. The total liability imposed on Ratto is $7,000. This determination takes into consideration all of the circumstances, including the failure of the respondent to curtail diversions after repeated warnings, but it is a fraction of the potential liability of at least $59,000, thereby accounting for the fact that this is the first imposition of liability against Ratto for a trespass under section 1052.

4.4.3 Silva & Conn

Silva and Conn are authorized to divert water under License 13315 as specified in section 2.1 of this order. The license contains Standard Term 91. During 2001, Silva and Conn diverted water during the Term 91 curtailment period. The SWRCB finds that Conn diverted water during the 2001 curtailment period without a basis of right, thereby committing a trespass under Water Code section 1052, subdivision (a). As discussed above, however, Silva has a riparian right, and

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by regular mail was not returned. The prosecution assumed, for purposes of enforcement, that Ratto received the notices no later than 10 days after they were mailed.

since there was no allegation in the complaint that there was no water available for riparian right holders, there is no basis to consider herein whether Silva has committed a trespass under Water Code section 1052, subdivision (a). Complaint 262.5-30 estimates the maximum administrative liability for both Silva and Conn at $69,000, based on an assumed 40 days of curtailment in 2000 and 78 days of curtailment in 2001 at one point of diversion.[23] A witness for the prosecution corrected the dollar amount; the correct maximum liability under the complaint would be at least $59,000.

Pursuant to Water Code section 1055.3, the SWRCB takes into account, in determining the amount of liability, all relevant circumstances, including the extent of harm, the nature and persistence of the violation, the length of time over which the violation occurred, and any corrective action taken by the violator. Conn violated Term 91 in 2001 after having been notified in 2000 and again in 2001 not to divert under License 13315 without having an alternative source of water. Conn continued to divert after having been warned specifically to stop. The Chief of the Division recommended liability for Silva and Conn together in the amount of $14,250, which is based on 28.5 days of violation. As discussed above, however, the SWRCB is not imposing any liability on Silva. Of the approximately 330.2 acres irrigated, Conn owns approximately 160.2 acres, or approximately 48.5 percent of the irrigable land. The equivalent cost of the water used by both Silva and Conn would be approximately $15,850. (WR 3-02; WR 3-18.) Conn used water during 78 days of the assumed 118 days of curtailment addressed herein, making the maximum liability for Conn $39,000 at $500 per day. Based on the proportion of the irrigated land that Conn owns (48.5%), and assuming that Conn used water only during the 78 days in 2001, the equivalent cost of the water Conn used is approximately $5,100. Using the same proportions, the number of 24-hour days of diversion attributable to Conn is 9.1 days. At $500 per assumed 24-hour day, the liability would be $4,550.

In the judgment of the SWRCB, the liability recommended by the prosecution is overly lenient; the liability should be high enough to take into consideration the market value of the water used

[23] The Division sent Conn, as the agent for both Silva and Conn, curtailment notices in 2000 by both certified mail and regular mail, and in 2001 by certified mail. The notices sent by certified mail in 2000 was returned to the Division unclaimed, but the 2000 notice sent by regular mail was not returned. The prosecution assumed, for purposes of enforcement, that Conn received the notices no later than 10 days after they were mailed.

by the crop, the costs to the SWRCB, and the effects on other water users and instream uses of water of diverting and using water without authorization. The SWRCB intends that the liability imposed in this order will serve as a deterrent to future unauthorized diversions by the respondent. To that end, the liability imposed on Conn in this order must cover the value of the water taken, plus a sufficient additional penalty to make it clear that unauthorized diversion or use of water is more expensive than authorized diversions. It also takes into consideration the substantial investment of staff time and effort by the SWRCB to conduct an investigation and proceedings in this matter. The total liability imposed on Conn is $10,000. This determination takes into consideration all of the circumstances, including the failure of the respondent to curtail diversions after repeated warnings, but it is a fraction of the potential liability of at least $39,000, thereby accounting for the fact that this is the first imposition of liability against Conn for a trespass under section 1052.

5.0 CONCLUSIONS

1. Each of the water right licenses considered in this order includes SWRCB standard permit Term 91. When Term 91 is included in a permit or license, the water right holder must curtail water diversions under the permit or license at times when the SWRCB issues notice that there is no water available for diversion under the permit or license. The water right holder can, however, continue to divert water during a curtailment period if the water right holder has an alternative supply of water under, for example, a contract, a riparian right, or a pre-1914 water right.

2. Water was diverted for irrigation to the place of use of each of the licenses considered herein during both 2000 and 2001 after the SWRCB notified the licensees to curtail their diversions of water.

3. One of the co-licensees of License 13315, Mr. Silva, has an alternative supply of water that allows continued diversion of water during the Term 91 curtailment period, and consequently did not violate Term 91. The other co-licensee of License 13315 (Conn) and the licensees of Licenses 13444 (Phelps), 13274 (Phelps), and 13194 (Ratto) do not have alternative supplies of water, and their diversions during the curtailment period constitute violations of Term 91.

ORDER

IT IS HEREBY ORDERED THAT:

1. Under Administrative Civil Liability Complaint No. 262.5-28 regarding diversions under water right Licenses 13274 and 13444, Lloyd L. Phelps, Jr., shall pay to the SWRCB liability in the amount of $45,000, within thirty days of the date of this order.

2. Under Administrative Civil Liability Complaint No. 262.5-29 regarding diversions under water right License 13194, Joey P. Ratto, Jr., shall pay to the SWRCB liability in the amount of $7,000, within thirty days of the date of this order.

3. Under Administrative Civil Liability Complaint No. 262.5-30 regarding diversions under water right License 13315, Ronald D. Conn shall pay to the SWRCB liability in the amount of $10,000, within thirty days of the date of this order.

4. If Lloyd L. Phelps, Jr., Joey P. Ratto, Jr., or Ronald D. Conn diverts water from the San Joaquin River or the Middle River, as the case may be, during a curtailment period under Term 91 after the date of this order, the SWRCB or the Division may impose additional administrative civil liabilities, and may impose such liabilities at a rate higher than the liabilities assessed herein.

5. Nothing in this order limits the authority of the SWRCB or the Division to impose future penalties for violation of the terms and conditions of Licenses 13274, 13444, 13194, or 13315 or to impose penalties for violation of any provisions of the Water Code, including but not limited to violations of section 1052.

6. Administrative Civil Liability Complaint No. 262.5-30, insofar as it applies to diversions to property owned by Ron Silva, et al. or to liability against Ron Silva, et al., is dismissed.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on February 19, 2004.

AYE: Arthur G. Baggett, Jr.
Gary M. Carlton
Nancy H. Sutley

NO: None.

ABSENT: Peter S. Silva
Richard Katz

ABSTAIN: None.

Debbie Irvin
Debbie Irvin
Clerk to the Board