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October 3, 2011

VIA EMAIL AND U.S. MAIL

Chair Charlie Hoppin and Members of the State Water R
Control Board
c/o Jeanine Townsend
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100

Re: COMMENT LETTER - 10/18/11 BOARD MEETING: Millview CDO

Dear Chair Hoppin and Members of the State Water Board:

This firm represents Thomas Hill and Steve Gomes ("**Hill and Gomes**") in the above referenced matter. The Draft Order Issuing a Cease and Desist Order Against Millview County Water District ("**Draft Order**") is a disingenuous attempt by the State Water Resources Board ("**Board**") to avoid the clear law and facts in this matter and attempt to usurp authority it does not have. For the reasons stated below - and in Hill and Gomes' prior submissions to the Board in this matter, which are incorporated herein by this reference - the Draft Order is unacceptable and the Board should not adopt it.

At a time when the State is broke and ranks at or near the bottom of every list of desirable places to invest, it is incomprehensible that this Board should try to bend its discretionary powers beyond the breakpoint to increase its and its staff's power to micromanage property rights that for about 100 years have been considered essential to a viable State economy and beyond this Board's regulatory powers.

The Board Does Not Have Authority To Issue A Cease and Desist Order Related to A Pre-1914 Right

By this and other recent Draft Orders, the Board is clearly on a campaign to expand its authority. Pre-1914 water rights do not fall under the Board's regulatory authority. In a thinly

veiled power grab to usurp authority over pre-1914 water rights, the Board asserts that the power given to it by the Legislature in WC §1831 to issue cease and desist orders includes the "inherent" power to regulate and issue a cease and desist order on a pre-1914 water right. WC §1831 does not provide the Board with authority, inherent, evolving or otherwise, to respond to what the Board thinks are new situations requiring its input and control. When it was adopted, WC §1831 was understood to apply only to post-1914 appropriated water, and WC §§ 103 and 109(a)[1] enunciated the basic concept of California water law, since articulated in scores of cases: namely, that the water law of this State is designed to assure "certainty in the definition of property rights to the use of water..." so that economic development can be facilitated.

The Board has recently attempted this same coup in the Woods Irrigation Company matter. The Board's actions therein were clearly and succinctly struck down by the Superior Court of San Joaquin County. A copy of that ruling is enclosed herewith[2].

Assertion of WC §1831 as the basis of the Board's authority in the Draft Order blatantly disregards paragraph (e) of WC §1831: "This article [cease and desist orders] shall not authorize the board to regulate <u>in any manner</u>, the diversion or use of water not otherwise subject to regulation of the board under this part" [emphasis added]. The applicable "part" is Part 2 of Division 2 of the Water Code which pertains <u>only</u> to "Appropriation of Water" after December 1914. In other words, the Board's cease and desist order authority and regulation authority is expressly limited to only post-1914 water rights,

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1. In relevant part, WC §§103 and 109(a) state:
"In the enactment of this code the Legislature does not intend thereby to effect any change in the law relating to water rights." WC §103.

"(a) 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 and transferability of such rights." WC §109(a).

2. Notably, in the Woods Irrigation Company Order, the Board noted that evidence regarding a pre-1914 water should be viewed "in the light most favorable to the party claiming a pre-1914 water right," a standard the Board apparently forgot in this case. (Draft order In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation Company, pgs. 29-30.)

not pre-1914 water rights.

In addition to ignoring the express limitations of WC §1831, the Draft Order cites to only one case to support the contention that the Board has jurisdiction over pre-1914 water rights: Phelps v. State Water Resources Control Board (2007) 157 Cal.App.4th 89, 116-119. (Draft Order pg. 20 ("Although...the Court did not expressly address [the Board's jurisdiction] issue, the conclusion that the State Water Board did not exceed its authority by addressing the individuals' claims is implicit in the Court's holding").)

The Phelps Court made no such implication. As to the arguments regarding pre-1914 rights involved in that case, the Phelps Court specifically upheld the trial court's factual finding - not the Board's - regarding claimed pre-1914 rights. In other words, the question of the Board's jurisdiction over pre-1914 rights likely did not arise in Phelps because the validity of the pre-1914 right was adjudicated in court - where the issue should be decided.

Instead of citing any case law to support the Board's assertion of authority, the Draft Order cites to the Board's own Water Rights Orders in an effort to demonstrate that the Board has acted similarly in the past. (Draft Order pg. 22.) This notion of self-ratification is unpersuasive. If the Board acted beyond its jurisdiction in the past, Hill and Gomes are not barred from challenging the boards lack of authority now.

The Board simply does not have authority to issue a cease and desist order related to a pre-1914 water right or a riparian water right. Courts have consistently recognized and upheld this limitation of the Board's authority. See California Farm Bureau v. State Water Resources Control Board (2011) 51 Cal.4th 421, 429; People v. Shirokow (1980) 26 Cal.3d 301, 309; Nicoll v. Rudnick (2008) 160 Cal.App.4th 550, 557; People v. Murrison (2002) 101 Cal.App.4th 349, 359, fn 6. This limitation is expressly stated in Article X, Section 2 of the California Constitution: "nothing herein contained shall be construed as depriving...any appropriator of water to which the appropriator is lawfully entitled."

The Draft Order is a power grab that ignores current realities, the constitutional admonitions and WC §§103 and 109, and should not be adopted.

The Hearing Resulting in the Draft Order Lacked Due Process

The Draft Order states that Hill and Gomes were provided with notice that an issue in this matter would be "whether a pre-1914 right had been perfected." (Draft Order pg. 2.) The Board provided no such notice. Instead what was noticed and at issue in this matter has always been whether or not the valid, pre-1914 water right claimed at 2.0 cfs "has degraded to the point where the maximum authorized diversion is 15 acre-feet per annum at a maximum instantaneous rate not to exceed 500 gallons per minute or 1.1 cfs; or possibly less if the maximum rate of diversion since 2001 for a period of five (5) consecutive years has been less than this rate." (Draft CDO ¶13.) There is no mention in any notice from the Board that "whether a pre-1914 right had been perfected" was at issue.

In fact, in an attempt to further develop and understand the issues in this matter, Hill and Gomes requested an order from the Hearing Officer allowing pre-hearing discovery. The hearing officer denied that request in its entirety, stating that "[t]he legal and factual basis for the proposed enforcement action against Millview, et al. is described in the draft cease and desist order." For the Board to now base its decision on legal and factual issues not described in the draft CDO is a clear violation of fundamental due process protections.

Not only did the Board go beyond the notice in this matter regarding the validity of the pre-1914 right, the Board improperly and incorrectly changed a fundamental legal issue in this case: whether a riparian landowner can also hold an appropriative right. By injecting this issue for the first time in the Draft Order, the Board not only deprives Hill and Gomes of a fair hearing on this issue but incorrectly attempts to rescind the Board's staff's earlier, correct determination that a riparian land owner can indeed hold an appropriative right. Such has always been the law of the land. It is consistent with the fundamental principle articulated in Article X, Section 2 of the California Constitution and WC §§103 and 109: that it is in the public and economic interests of this State to put water to beneficial use and have consistency in California's water law. This is a concept that the Board has lost sight of here and as a result deprives Hill and Gomes' of due process and fundamental property rights.

In addition, the entire proceeding improperly placed the

burden upon Hill and Gomes and Millview to prove that their vested property right had not been forfeited. The improper shift of the burden is the result of the Board's improper invocation of the cease and desist order authority applicable to water permits and licenses, not to pre-1914 water rights.

Furthermore, while analyzing the complex water right issues in this matter and reaching the conclusions stated in the Draft Order, the Board consisted of only three members. The Board has no member that is "an attorney admitted to practice law in this state who is qualified in the fields of water supply and water rights" and it is unclear whether the Board has a registered civil engineer "qualified in the fields of water supply and water rights." WC §175. Additionally, as previously argued by Hill and Gomes, the Hearing Team and the Prosecution Team members failed to maintain the required "firewall" separating their functions, tainted these proceedings by commingling interests and deprived Hill and Gomes of a fair hearing.

Hill and Gomes specifically reserve all claims and rights related to these denials of due process and the ability to conduct discovery thereon pursuant to the California Code of Civil Procedure in any lawsuit filed on their behalf in the Superior Court of California. Discovery may be necessary to determine if the so-called "firewall" has been applied consistently in all cases involving issues related to this case (i.e. were the same persons on the same teams in this case, the Woods Irrigation Company case, and other cases involving the expansion of the Board's powers over pre-1914 water rights and riparian rights previously thought to be protected by Article X, Section 2 of the California Constitution).

Hill and Gomes have been deprived of due process every step of the way - including this matter taking over two and half years to obtain a tentative decision. Such deprivations make the Draft Order as fatally obtained as it is fatally flawed and the Draft Order should not be adopted.

<u>The Draft Order Constitutes An Improper and Unauthorized Forfeiture</u>

Regardless of the original amount of this pre-1914 right, the Draft Order constitutes an improper forfeiture of a property right. Once again, the Draft Order cites no case or statute

supporting the proposition that the SWRCB has authority to declare, adjudicate or cause the forfeiture of a vested property right. Nonetheless, that is exactly what the Draft Order does.

As stated above, the Board does not have authority to regulate pre-1914 rights. It therefore certainly does not have authority to adjudicate the forfeiture of such rights.

Even if the Board could adjudicate such a forfeiture, the Draft Order applies the wrong standard and facts to such an analysis. The Board may disagree with the court in North Kern Water Storage Dist. v. Kern Delta Water Dist. (2007) 147 Cal.App.4th 555. (Draft Order pgs. 31-34.) But North Kern, not the Board's or its staff's opinion, is the law.

North Kern sets forth the following requirements to establish forfeiture of a water right:

a) There must be a "clash of rights" consisting of:
"(1) a formal claim by a party to the lawsuit (or its predecessor in interest) providing notice to a prior appropriator that the claimant has a right to the prior appropriator's entitlement based on nonuse by the prior appropriator and that the subsequent appropriator's water rights have been interfered with, injured, or invaded by the original appropriator, and
(2) an objection by the original appropriator to the subsequent claim of right." North Kern, 147 Cal.App. 4th 566.

b) The "five consecutive years" period within which to assess water usage to determine an amount, if any, that was forfeited by the original appropriator is the five year period immediately preceding the "clash of rights." Id. at 567.

There have been no formal claims asserting that another claimant has a right to this pre-1914 water right. Lee Howard's 2006 complaint to the Board certainly did not assert that he claims a right to use this pre-1914 water right. The Sonoma County Water Agency and the Russian River Flood Control District (referred to in the Draft Order as the "Mendocino District") do not claim a right to use this pre-1914 water right. In fact, these entities take a defensive position to protect their own rights; claiming that the exercise of the pre-1914 water right takes available water for the exercise of their post-1914 water permits. As only one entity asserts entitlement to exercise this

pre-1914 water right - Millview Water District - there is no clash of rights.

Despite the foregoing, the Draft Order asserts that these entities in fact had a "clash of rights" with Hill and Gomes over the pre-1914 water right. To add to the disingenuousness of this assertion, the Draft Order asserts that this "clash" occurred in 1998 when Hill and Gomes purchased the pre-1914 water right. Given the North Kern requirements for the "clash of rights" to provide notice and an opportunity to object to the original appropriator - and a record completely devoid of such notice - the Draft Order's assertion of a clash of rights in 1998 is untenable.

Furthermore, the Draft Order specifically states that the forfeiture period asserted is "the 20-year period from 1967-1987." (Draft Order pg. 30.) Clearly that period does not immediately precede any claims of the opposing parties herein, if there were such claims. However, the assertion is indicative of the Board's recognition that there simply is no evidence to support a forfeiture finding. Using a "20-year period" wherein the Statements of Use the Board improperly relies upon never covered more than a three consecutive year period is an attempt to mask the fact that the Board simply has no evidence of non-use, or even diminished use, of available water for a five consecutive year period. The Board is clearly aware, but intentionally avoids, the fact that the forfeiture period is necessary because the difference between the authorized amount and the highest amount available and used at any one time during the forfeiture period establishes the amount of forfeiture. North Kern, 147 Cal.App.4th at 568. In other words, it takes only one instance - during the five consecutive year period - of use in the full amount of available water to avoid a forfeiture. Neither the prosecution team nor any "clashing claimant" produced evidence the Board can rely upon to determine that this right was forfeited or diminished for non-use during any consecutive five-year period.

In relying upon Statements of Use filed within the "20 year period" - which cannot be used to the detriment of the submitter (see WC §5108) - the Board completely ignores the blatant deficiencies of these statements:

1) No continuous five year period is covered to adequately assess usage during he "forfeiture period."
2) The 1979, 1980, 1981, 1985, 1986 and 1987 statements do

not state any amount of water diverted, only a purpose of use.
3) The statement with 1970, 1971 and 1974 usages states the exact same amount used for all three years, and was signed in 1970.
4) Under WC §5108 these Statements are not "evidence."
5) Neither the statements nor any other evidence address what water was "available" for use during this period.

In addition to improperly dismissing the North Kern requirements, the Draft Order misrepresents the application of WC §1241 - which Hill and Gomes submit is inapplicable to a pre-1914 right. (Draft Order pgs. 11-12, fn 4.) The Draft Order asserts that the Governors Commission to Review California Water Rights Law, Final Report (1978) and subsequent amendments to WC §1241 make it "clear" that WC §1241 applies to pre and post-1914 water rights "uniformly". The Draft Order goes on to cite to Sawyer, Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use (2005) 36 McGeorge L. Rev. 209, 222-225 for support of the Board's position that WC §1241 applies to both pre and post-1914 water rights. That is simply not true. What Sawyer's scholarly article actually pointed out was the exact opposite:

> "The test for forfeiture remains the same as it was before Assembly Bill 1147 was enacted. In particular, the Legislature did not make Water Code section 1241 applicable to pre-1914 rights, although that may have been the intent of that section when it was originally enacted. The language of Water Code section 1241 highlights the inapplicability of section 1241 to rights not subject to the permit system, requiring notice to the 'permittee.' In addition, the Legislature did not make any changes in the substantive rules governing forfeiture. For example, the Legislature left intact the language of Water Code section 1241 specifying that forfeiture may occur based on non-use "for a period of" five years, indicating that non-use over any five year period, not just the period immediately before the initiation of forfeiture proceedings, may establish a forfeiture."

36 McGeorge L. Rev. 209, 224-225 [emphasis added].

To compensate for its inadequate legal and factual analysis, the Board improperly places the burden upon Hill and Gomes to prove their right was not forfeited. Such impropriety is a

function of the improper application of the cease and desist order proceedings - and the appurtenant burdens of proof. There is no legal authority cited or citable to support placing the burden of proving non-forfeiture on the right holder. Such misapplication of the law and disregard for fundamental property right protections are exactly why these issues should be decided by the judiciary, not the Board.

The Board's attempt to usurp authority over pre-1914 water rights has already been struck down once by the judiciary. It will be struck down again in this case. To avoid unnecessary expenses to tax payers, rate payers and private individuals and to signal to property owners everywhere that property rights are not vulnerable to unsanctioned encroachment in California, the Board should not adopt the Draft Order.

Respectfully Submitted,

Jared G. Carter

Enclosures

Superior Court of California, County of San Joaquin
Statement of Decision, Case No. 39-2011-00259191-CU-WM-SK

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN

DIANNE E. YOUNG, RONALD and JANET DEL CARLO, RDC FARMS, INC., EDDIE VIERRA FARMS, LLC, WARREN P. SCHMIDT, Trustee of the SCHMIDT FAMILY RECOVABLE TRUST,

Petitioners,

vs.

STATE WATER RESOURCES CONTROL BOARD, CHARLES R. HOPPIN, TAM M. DODUC, FRANCES SPIVY-WEBER and DOES 1 through 100, inclusive,

Respondents.

WOODS IRRIGATION COMPANY, SAN JOAQUIN COUNTY, THE SAN JOAQUIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, SOUTH DELTA WATER AGENCY, CENTRAL DELTA WATER AGENCY, MODESTO IRRIGATION DISTRICT, SAN LUIS & DELTA-MENDOTA WATER USERS AUTHORITY, STATE WATER CONTRACTORS and ROES 1 through 100 inclusive.

Real Parties in Interest.

Case No.: 39-2011-00259191-CU-WM-STK

STATEMENT OF DECISION

Hearing Date: April 8, 2011
Dept.: 13
Judge: Honorable Lesley D. Holland

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I. INTRODUCTION

Petitioners' Petition for Peremptory Writ of Administrative Mandamus and/or Writ of Prohibition ("Petition") came regularly for hearing on April 8, 2011 before the Honorable Lesley D. Holland, Judge of the Superior Court of California, County of San Joaquin, in Department 13. The following appearances were noted:

1. Herum/Crabtree by Jennifer L. Spaletta and Ricardo Z. Aranda for Petitioners Dianne E. Young; Ronald and Janet Del Carlo; RDC Farms, Inc.; Eddie Vierra Farms, LLC; and Warren P. Schmidt, Trustee of the Schmidt Family Revocable Trust (collectively "Petitioners").

2. Kamala D. Harris, Attorney General of California, by Deputy Matthew G. Bullock for Respondents California State Water Resources Control Board ("State Board"), Charles R. Hoppin, Tam M. Doduc, and Frances Spivy-Weber (collectively "Respondents").

3. John Herrick, Attorney at Law, for Real Party in Interest Woods Irrigation Company ("Woods").

4. O'Laughlin & Paris LLP by Valerie C. Kincaid for Real Party in Interest Modesto Irrigation District ("MID").

5. Diepenbrock Harrison by Jon D. Rubin for Real Party in Interest San Luis & Delta-Mendota Water Authority.

6. Harris, Perisho & Ruiz by S. Dean Ruiz for Real Parties in Interest South Delta Water Agency and Central Delta Water Agency.

7. Kronick, Moscovitz, Tiedemann & Girard by Stanley C. Powell for Real Party in Interest State Water Contractors, Inc.

8. Neumiller & Beardslee by DeeAnne Gillick for Real Parties in Interest San Joaquin County and San Joaquin County Flood Control and Water Conservation District.

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The hearing was completed in two hours. Pursuant to Cal. Rule of Court Rule 3.1590(n) the parties requested a statement of decision. No statement of decision was made orally on the record in the presence of the parties.

On April 11, 2011 the Court issued its Ruling on Petition for Writ of Administrative Mandamus and/or Writ of Prohibition, declaring Water Board Order 2011-0005 to be a nullity and without force and effect, and directing Petitioners to prepare the statement of decision.

II. STATEMENT OF DECISION

The Court has read and considered the points and authorities, declarations, and other writings submitted in support of and in opposition to said motion, and has heard and considered the arguments of counsel. Following the hearing of April 8, the Court has re-read the following: Verified Petition and supporting exhibits, Petitioners' Ex Parte Application and supporting points and authorities and declarations, Respondents' Answer to Petition for Writ and Opposition to Petition for Writ (including exhibits thereto), as well as all papers filed by the various Real Parties in Interest in support of or in opposition to the Petition. The Court makes the following statement of decision, consistent with its April 11, 2011 Ruling, in support of its granting a peremptory writ of administrative mandamus and/or prohibition setting aside respondent California State Water Resources Control Board's February 1, 2011 Cease and Desist Order Against Woods Irrigation Company ("Order WR 2011-0005").

Issuance of a writ is appropriate to "compel the admission of a party to the use and enjoyment of a right...to which the party is entitled and from which the party is unlawfully precluded by that inferior...board." Code of Civil Procedure § 1085. Issuance of a writ is appropriate in all cases where there is not a "plain, speedy and adequate remedy, in the ordinary court of law." Code of Civil Procedure §§ 1086, 1103.

A. Standard of Review.

The applicable standard of review in this matter is whether Respondents proceeded in the manner required by law or committed a prejudicial abuse of discretion (Code of Civil Procedure § 1094.5) and/or whether the State

Board exceeded its jurisdiction (Code of Civil Procedure § 1102). The Court finds that exhibits, pleadings, declarations and other materials presented by Petitioners are adequate for the purpose of showing that Respondents failed to proceed in the manner required by law and/or in excess of its jurisdiction.

B. The Court finds that the State Board denied Petitioners' Rights to Procedural Due Process.

A principal controverted issue at the hearing was whether Respondents denied Petitioners constitutional due process rights by issuing Order WR 2011-0005. Petitioners contend that Order WR 2011-0005 impairs their protectable property interests-specifically the right to continue receiving irrigation water, pursuant to Petitioners' claimed riparian and/or pre 1914 water rights, from Woods' irrigation system. Consequently, Petitioners argue that the State Board was required to provide Petitioners with notice and an opportunity to be heard before adopting the Order and the State Board's failure to do so violates Petitioners' right to due process of law under California's Constitution. Respondents, on the other hand, claim that Petitioners were not denied due process of law because Petitioners have failed to adequately allege any protected property rights or show that Order 2011-0005 could deprive Petitioners of a protected property interest. Real Parties in Interest MID, San Luis and Delta Mendota Water Authority, and State Water Contractors assert that in any event, the interests of Woods' and of Petitioners' were sufficiently aligned in the State Board hearings that Woods' participation satisfied Petitioners' right to due process. Petitioners present the more compelling argument.

The State Board's stated goal – to "vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits or licenses, and violations of the prohibition against the waste or unreasonable use of water in the Delta" is appropriate and even laudable. Further, the State Board may certainly exercise its statutory authority to "investigate whether illegal diversions and other violations of water right permit and license conditions are occurring in the Bay-Delta watershed" (quoting from Water Resources Control Board form letter, dated February 18, 2009; Cal. Const., art. X, § 2; Water Code §§ 100, 275; Respondents' Opposition Brief, 3:23-25) and, after fair notice and a fair hearing, take appropriate action. However, State agencies must proceed in the manner required by law. In the context of

this litigation, the State proceeded without giving fair notice to the Petitioners and without giving Petitioners (or other similarly-situated persons) a fair and real opportunity to present their claims.

1. Petitioners have adequately shown that they each have a claim to a protected property interest entitling Petitioners to due process in the State Board proceedings.

The Court finds that Respondents were aware at all relevant times that Petitioners did claim substantial, valuable, and old property interests and, yet, proceeded to draft and issue Order WR 2011-0005 without affording Petitioners notice and opportunity to prove such claims. Respondents effectively excluded Petitioners from the investigative/adjudicative process that resulted in Order WR 2011-0005, and Respondents cannot fairly complain that Petitioners' claims are not proven, inadequately documented, or otherwise deficient. Because of this exclusion, Petitioners have no plain, speedy, or adequate remedy except this proceeding.

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Respondents argue that Petitioners' general claim of "riparian and pre-1914 rights" is an insufficient allegation that Petitioners hold a protected property interest and that Petitioners must allege with greater specificity the nature of their claimed water rights and provide some evidence to support their claims. (Respondents' Opposition Brief, 6:13-20). The Court finds the argument that Petitioners have failed to prove the existence and extent of their claims misses the point. These Petitioners have been diverting water pursuant to some right or colorable right – according to them – for a hundred years, give or take. The State Board cannot simply assume that Petitioners' claimed property interests cannot be proven. Rather, the State Board must give notice and a fair opportunity to Petitioners to demonstrate the legitimacy of their claims.

While it is true that Petitioners have not conclusively proven the existence or complete extent of their property interests, if any, the Court finds that Petitioners have adequately shown that each has a claim to a protected property interest that would be destroyed or substantially impaired by the Board's actions. The Court finds that the claims presented by Petitioners are substantial, valuable, vital to Petitioners' continued farming operations, and ancient. The Court finds that Petitioners' claims – supported by Petitioners' sworn declarations – are sufficient for purposes of standing. The Court notes also that WR 2011-0005 admits the

possibility that landowners served by the Woods Irrigation District (i.e., Petitioners herein) could have additional rights to support the subject diversions. See, WR 2011-0005, at page 20.

Accordingly, the Court finds that Respondents failed to proceed in the manner required by law. Respondents unlawfully precluded Petitioners' enjoyment and use of claimed property interests – substantial, century-old, valuable, vital – without due process of law.

2. Order WR 2011-0005 impairs Petitioners' claims to riparian and/or pre-1914 water rights.

Petitioners have shown that Order WR 2011-0005 will certainly limit water deliveries to their farms. Respondents' position – that Order WR 2001-0005 somehow does not impair Petitioners' claims to riparian and/or pre-1914 water rights because the order is limited to Woods – is pure sophistry. The record plainly shows that Order WR 2011-0005 – in the real world – effects an immediate and potentially disastrous denial or impairment of Petitioners' claimed real property interests.

3. Petitioners' rights were not protected by Woods' participation in the State Board proceedings.

The notice and opportunity to Woods Irrigation Company was not sufficient to satisfy Petitioners' due process rights, especially in light of the record here which shows that Respondents had notice of the general nature of Petitioners' claims, had notice that Petitioners' diversion of water (i.e., exercise of their property interests) was almost exclusively through Woods Irrigation Company, had notice that Woods was not defending any rights except its own, and where Respondents assured Petitioners that their interests would not be impaired by whatever determination was made in connection with Woods' rights.

Real Parties MID's, State Water Contractors' and San Luis & Delta-Mendota Water Authority's argument that Petitioners' interests were protected by Woods Irrigation Company – that Woods and Petitioners' interests were in privity – is unpersuasive both on the law and the facts presented here. In fact, the record presented supports Petitioners' contention that Respondent assured them that the proceedings concerning Woods would not impair Petitioners. (Petition, Exhibits L, M, N, and O).

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4. **Order 2011-0005 cannot be saved in part and therefore must be voided in its entirety.**

Real Parties in Interest MID, San Luis and Delta Mendota Water Authority, and State Water Contractors argue that even if Petitioners were denied due process, this Court could narrowly tailor a peremptory writ that would leave portions of Order WR 2011-0005 in place. However, the court finds that it does not appear that Order WR 2011-0005 can be saved. No one at the hearing on April 8 was able to articulate language that might "save" or preserve portions of the order. Therefore, the Court finds that the entire order must be voided.

C. This Proceeding Does Not Determine the Merits or Validity of Petitioners' Claimed Water Rights.

Finally, this Court wishes to be clear that the ruling herein is not an adjudication or final determination of the merits or validity of Petitioners' claimed water rights. Rather, this ruling is predicated on the lack of procedural fairness that preceded enactment of Order WR 2011-0005 – i.e., the Water Board did not proceed in the manner required by law, acted without or in excess of jurisdiction, and thereby denied Petitioners due process of law.

D. Ruling on the Second Cause of Action Regarding the State Board's Jurisdiction.

The Court's tentative ruling was intended to reach the issues raised in Petitioners' second cause of action.

The issue presented in the second cause of action was not the State Board's power to investigate. Rather, as Petitioners contend, the issue was whether the State Board exceeded its jurisdiction. The Court finds in Petitioners' favor – i.e., that the State Board lacked jurisdiction to determine the extent of riparian and pre-1914 appropriative water rights through the use of its limited cease and desist order authority pursuant to Water Code § 1931.

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E. Order WR 2011-0005 is a Nullity.

Accordingly, Order WR 2011-0005 is hereby declared to be a nullity and without any effect or force whatsoever. The requested writ of administrative mandamus and writ of prohibition, as appropriate, shall issue.

III. CONCLUSION

The court finds that Judgment should be entered:

a. Declaring Petitioners the prevailing parties in this matter.

b. Ordering a peremptory writ of mandamus pursuant to Code of Civil Procedure §§ 1085-1097, to issue from this court, commanding respondent to set aside Order WR 2011-0005;

c. Reserving jurisdiction with this Court to determine Respondents' compliance with the writ;

d. Awarding Petitioners their costs of suit; and

e. Reserving jurisdiction with this Court to determine Petitioners' entitlement to attorney's fees pursuant to a timely and properly noticed Motion.

Let judgment be entered accordingly. Petitioners' attorneys shall prepare the form of judgment and writ.

Date: May 31, 2011

Lesley D. Holland,
Judge of the Superior Court