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ATTORNEYS

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October 3, 2011

VIA ELECTRONIC MAIL AND U.S. MAIL
Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
Email: commentletters@waterboards.ca.gov

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

Dear Ms. Townsend and Members of the State Water Resources Control Board:

The following comments are submitted on behalf of Dianne Young, Ronald and Janet Del Carlo, RDC Farms, Inc., Eddie Vierra Farms, LLC, and Warren Schmidt as trustee of the Schmidt Family Revocable Trust (collectively referred to as "Young"), Woods Irrigation Company, South Delta Water Agency, and Central Delta Water Agency, on the Draft Order Issuing a Cease and Desist Order Against Millview County Water District to Prevent the Threatened Unauthorized Diversion and Use of Water from the Russian River in Mendocino County ("Draft Order").

In the Draft Order, the State Water Resources Control Board ("Board") declares it has jurisdiction under its cease and desist powers to evaluate the validity of claimed riparian and pre-1914 appropriative water rights. *See* Draft Order at 16. The Board's legal position, however, was recently considered and rejected by a court of law.

The San Joaquin County Superior Court Ruled the Board Lacks Jurisdiction Under Its Cease and Desist Powers in Water Code Section 1831 to Determine the Validity of Riparian and Pre-1914 Appropriative Water Rights.

When issuing Cease and Desist Order WR 2011-005 against Woods Irrigation Company earlier this year, which affected Young's riparian and/or pre-1914 water rights, the Board similarly claimed that its cease and desist powers extended to determining the validity of claimed riparian and pre-1914 appropriative water rights. Young filed a petition for writ of mandate in *Young v. State Water Resources Control Board et al.*, San Joaquin County Superior Court Case No. 39-2011-00259191-CU-WM-STK, challenging the Board's action in issuing Cease and Desist Order WR 2011-005 based on, among other grounds, the extent of the Board's cease and desist power as it relates to riparian and pre-1914 water rights. Young raised the same arguments asserted by Millview and Messrs. Hill and Gomes regarding the Board's lack of jurisdiction to determine the validity of riparian and pre-1914 water rights pursuant to Water Code Section 1831. *See*

Draft Order at 16. A true and correct copy of the Young Petition and its supporting Memorandum of Points and Authorities are attached as **Exhibit A** and **Exhibit B**, respectively.

In opposing the Young Petition, the Board advanced virtually identical arguments as are contained in the Draft Order regarding the extent of the Board's jurisdiction over riparian and pre-1914 water rights under its cease and desist powers. A true and correct copy of the Board's Opposition Brief is attached as **Exhibit C**. In response, Young objected that the Board's cease and desist powers were not as broad as the Board claimed. A true and correct copy of Young's Reply Brief is attached as **Exhibit D**.

After carefully considering the parties' briefs and respective arguments, the Court agreed with Young's position and rejected the Board's overly broad interpretation of its cease and desist powers. A true and correct copy of the Court's Amended Judgment Granting Peremptory Writ of Mandamus together with the Court's revised Statement of Decision is attached as **Exhibit E**. In so ruling, the Court specifically determined 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 §[1831]."[1] *See* Exhibit E at 3 and attached Statement of Decision at 7.

The Board lacks jurisdiction to determine the validity of Millview's and Messrs. Hill's and Gomes' claimed riparian and pre-1914 appropriative water rights using its cease and desist authority under Water Code Section 1831. Thus, the draft CDO is fundamentally flawed.

The State Board's Cease and Desist Authority Under Water Code Section 1831 Does Not Extend to, and *Expressly Excludes*, Regulating Riparian and Pre-1914 Water Rights.

Because riparian and pre-1914 water rights are *not* regulated by Division 2, Part 2 of the Water Code (*People v. Shirokow* (1980) 26 Cal.3d 301, 309; Water Code §1201), the Draft Order's position that the Board's cease and desist power under Water Code Section 1831 permits it to determine, and hence regulate, the validity of such rights when issuing a cease and desist order is legally untenable. *See* Draft Order at 16. Indeed, the agency's statutory interpretation flatly contradicts the plain language of the statute and renders Section 1831(e)'s express prohibition against *regulating in any manner* riparian and pre-1914 rights superfluous. Such an erroneous statutory interpretation is not the law and, as noted above, was rejected by the Court in *Young v. State Water Resources Control Board, et al.*

[1] The Board has appealed the adverse judgment.

1. The State Board's Statutory Interpretation of its Cease and Desist Power under Section 1831 Renders Subdivision (e) of that Statute Meaningless thereby Violating Established Principles of Statutory Construction.

The touchstone of statutory interpretation is to ascertain the Legislature's intent in enacting a statute so as to effectuate the purpose of the law. *Central Pathology Serv. Med. Clinic, Inc. v. Superior Ct* (1992) 3 Cal.4th 181, 186. The inquiry begins by examining the statutory language, giving the words their usual, ordinary meaning. *Id.* at 186-87. The words of a statute must be construed in context and must be harmonized with statutes relating to the same subject. *Id.* Interpretations that render related provisions nugatory or meaningless should be avoided. *Metropolitan Water Dist. of So. Ca. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1424.

If a statute's plain language is clear and unambiguous, construction is not necessary nor is it necessary to resort to indicia of the lawmaker's intent. *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798. But if uncertainty exists, one may consider both the legislative history of a statute and the wider historical circumstances surrounding its enactment, taking into account the consequences flowing from a particular interpretation. *Central Pathology* at 187.

At issue in this case is the scope of the Board's cease and desist authority, codified in Water Code Section 1831. While that statute gives the Board the power to issue a cease and desist order under certain circumstances, it also explicitly defines the *limit* of that power. *See* Water Code §1831(e). Subdivision (e) of the statute provides:

> This article shall not authorize the board to *regulate in any manner*, the diversion or use of water not otherwise subject to regulation of the board under this part.

Water Code §1831(e) (emphasis added).

Beginning with the statute's plain language, as established case law requires, the central dispute surrounds the meaning of the phrase "regulate in any manner."[2] In

[2] It is beyond dispute that the word "shall" is commonly understood as a mandatory command. *See Black's Law Dictionary* 958 (6th abr. ed. 1993) ("The word in ordinary usage means 'must' and is inconsistent with a concept of discretion). Thus, the phrase "shall not authorize" means an agency is *prohibited* from acting in a defined manner. Similarly, because Water Code §1201 and case law interpreting that statute exclude riparian and pre-1914 water rights from Board appropriation procedures, the statutory

other words, the meaning of "regulating in any manner" must be ascertained so as to define the parameters of the Board's cease and desist authority. Where a statutory scheme does not define a specific word or phrase, reliance on the dictionary definition of the words used to determine a statute's meaning is permitted. *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1514, 1516 (courts may defer to a dictionary definition of a term not expressly defined in a statutory scheme).

The meaning of the phrase "regulate in any manner" is not defined in Section 1831, nor is it defined in the statutes specifically relating to cease and desist orders. *Compare* Water Code §1835 (defining the word "person" for purposes of cease and desist orders). We are unaware of any case interpreting the meaning of those words in the context of Section 1831 or any general definition within the greater Water Code. Resorting to the dictionary definition is therefore warranted.

The word "regulate" means "to fix, establish, or control...[or] *to subject to governing principles or laws*." *Black's Law Dictionary* 890 (6th abr. ed. 1993) (emphasis added). The word "any" commonly means "an indefinite number." *Id.* at 61; *see also Webster's New World Dictionary* 62 (2d coll. ed. 1985) (defining "any" as without limit; to any degree or extent at all). Thus, applying the ordinary meaning of the words, Section 1831(e) prohibits the Board from subjecting claimed riparian and pre-1914 water rights to all governing principles to any degree or extent – at least in the context of issuing a cease and desist order. This prohibition necessarily includes determining the validity of such rights under governing water law principles. That is for a court to decide. *See United States v. St. Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 104. Such an interpretation harmonizes the statutory scheme regarding the rights subject to the Board's appropriative authority and those within the purview of the Board's cease and desist jurisdiction. *See, e.g.,* Water Code §1201.

To interpret Section 1831 in the manner the Draft Order urges – allowing the Board, in essence, to determine the validity of riparian and pre-1914 rights when issuing a cease and desist order – renders Subdivision (e) meaningless. Determining validity necessarily entails "regulating" those rights in some manner, which the statute expressly prohibits. Such an interpretation should be avoided. *Metropolitan, supra,* 80 Cal.App.4th at 1424.

The cases the Draft Order cites do not dictate a different result. *See* Draft Order at 19-20 (citing *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609; *Phelps v. St. Water Res. Control Bd.* (2007) 157 Cal.App.4th 89; *North Gualala Water Co. v. St. Water Res. Control Bd.* (2006) 139 Cal.App.4th 1577). None of the cases dealt with the

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language regarding "the diversion or use of water not otherwise subject to regulation of the board under this part" is also not in dispute. *See Shirokow, supra,* 26 Cal.3d at 309.

Board's power, or lack of power, to issue cease and desist orders as they relate to riparian and pre-1914 rights under Water Code Section 1831 – the issue presented here. *See Regency Outdoor Advertising, Inc. v. City of West Hollywood* (2007) 153 Cal.App.4th 825, 831 ("A case is not authority for a proposition it does not address.").

Weinberger dealt with the FDA's power to regulate drugs prior to marketing to ensure the drugs were safe and effective. As originally promulgated, a 1938 Act gave the FDA authority to regulate new drugs to ensure safety. In 1962, amendments to the Act expanded the FDA's authority to regulate for safety *and* effectiveness. The law also provided a grand-father clause for the newly codified "effectiveness" provisions. The court simply recognized the FDA had the power to determine new drug status and whether certain drugs were exempt from the efficacy requirements under the grandfather clause. *Wienberger* at 609-610, 624. Unlike here, the Act did not expressly exempt certain drugs from FDA regulation in any manner. And while *Phelps* and *North Gualala* dealt with California water issues, neither case involved a cease and desist order under Section 1831. Instead, *North Gualala* considered the Board's interpretation of Water Code Section 1200 regarding subterranean streams, something not at issue here. *North Gualala* at 1587. Likewise, *Phelps* challenged civil penalties imposed against the plaintiffs for improperly diverting water under Board-issued licenses and permits. *Phelps* at 93. Any issues regarding riparian and pre-1914 rights were decided judicially by the court – not by the Board in a cease and desist order. *Id.* at 116-119.

Had the Legislature wanted to grant the Board cease and desist powers over riparian and pre-1914 rights it easily could have done so. It did not. In fact, it did the exact opposite by enacting Water Code Section 1831(e).

2. The Board's Authority to Investigate Pursuant to Water Code Section 1051 is Irrelevant to Determining the Jurisdictional Parameters of Its Cease and Desist Power Under Water Code Section 1831.

The Draft Order claims that interpreting Water Code Section 1831 to limit the Board's cease and desist power over riparian and pre-1914 water rights is "inconsistent" with the Board's statutory authority to investigate and take enforcement action against the unauthorized diversion or use of water. *See* Draft Order at 16-17. This argument was also considered and rejected by the Court in the *Young* case. *See* Exhibit E at Statement of Decision at 7.

In fact, the Court specifically found that the jurisdictional issue regarding the Board's cease and desist power did *not* involve the Board's power to investigate. Rather, the issue is whether the Board exceeds its jurisdiction by determining the validity of a riparian or pre-1914 appropriative water right when issuing a cease and desist order.

See id. The Court unambiguously found that the Board does exceed its jurisdictional powers by issuing a cease and desist order to determine the validity of riparian and pre-1914 water rights.

For these reasons, our clients urge the Board not to issue the Draft Order against Millview and Messrs. Hill and Gomes. Doing so necessarily requires the Board to regulate or determine the validity of their claimed riparian and/or pre-1914 appropriative rights. Water Code Section 1831 does not bestow such a power on the Board.

Respectfully submitted,

Jennifer L. Spaletta by JLS

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Warren Schmidt as trustee of the Schmidt Family Revocable Trust

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EXHIBIT A

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Attorneys for Petitioners

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

PETITION FOR ALTERNATIVE and PEREMPTORY WRIT OF ADMINISTRATIVE MANDAMUS (CCP §§ 1094.5, 1085, 1087) AND/OR WRIT OF PROHIBITION (CCP §1102-1105)

Petitioners petition this Court for a writ of mandate and/or prohibition ordering respondent California State Water Resources Control Board ("State Board") to set aside its February 1, 2011 Cease and Desist Order against Woods Irrigation Company ("Order WR 2011-005"). A true and correct copy of Order WR 2011-005 is attached hereto as Exhibit A.

THE PARTIES

1. Petitioner DIANNE E. YOUNG is an individual residing in Carmel, California who owns real property on Roberts Island in San Joaquin County.

2. Petitioners RONALD and JANET DEL CARLO are individuals residing in Stockton, California who own real property on Roberts Island in San Joaquin County.

3. Petitioner RDC FARMS, INC. is a California corporation which owns real property on Roberts Island in San Joaquin County.

4. Petitioner EDDIE VIERRA FARMS, LLC is a California limited liability company which owns real property on Roberts Island in San Joaquin County.

5. Petitioner WARREN P. SCHMIDT is the Trustee of the SCHMIDT FAMILY RECOVABLE TRUST which owns real property on Roberts Island in San Joaquin County. Warren P. Schmidt's son Howard J. Schmidt has statutory power of attorney for his father.

6. All of Petitioners' lands are used for commercial, irrigated farming and have been for decades. Each Petitioners claims their own riparian and/or pre-1914 appropriative water rights to divert water from Middle River for use on their own lands.

7. Each of the Petitioners are shareholders in Woods Irrigation Company, a non-profit California corporation which operates a joint distribution system to enable Petitioners and other landowners to exercise their respective riparian and pre-1914 water rights from Middle River.

8. Each Petitioner owns real property within the original Woods Irrigation Company service area as established in 1911 through recorded water service contracts which run with the land. True and correct copies of the 1911 agreements are attached hereto as Exhibits B and C. Petitioners only means of exercising their respective water rights is through the Woods Irrigation Company diversion and distribution system.

9. Respondent State Water Resources Control Board ("State Board") is a public agency of the State of California, duly created by the California Legislature pursuant to The State Board of Article 3, Chapter 2, Division 1, section 174 et seq. of the Water Code consists of five members appointed by the Governor of the State of California. The State Board issued Order WR 2011-005 on February 1, 2011.

10. Respondent Charles R. Hoppin is the chairperson of the State Board and is sued herein in his capacity as a board member.

11. Respondent Tam M. Doduc is a board member of the State Board and is sued herein in her capacity as a board member.

12. Respondent Frances Spivy-Weber is a board member of the State Board and is sued herein in her capacity as a board member.

13. Real Party in Interest Woods Irrigation Company is a California non-profit corporation based in Stockton, California, that was the named respondent party in Order WR 2011-0005.

14. Real Party in Interest Modesto Irrigation District is a California Irrigation District ("MID"), an independent, publicly owned utility which provides electric, irrigation and domestic water services to customers in the greater Modesto area, parts of Ripon, Escalon, Oakdale and Riverbank. MID intervened in and appeared as an interested party in the proceedings leading up to Order WR 2011-0005.

15. Real Party in Interest San Luis and Delta Mendota Water Users Authority ("Authority") is a joint powers authority, established under California's Joint Exercise of Powers Act (Gov. Code, § 6500 et seq.). Authority consists of 29 public-agency members, each of which contracts with United States Bureau of Reclamation to receive water from the Central Valley Project ("CVP"). Authority intervened in and appeared as an interested party in the proceedings leading up to Order WR 2011-0005.

16. Real Party in Interest State Water Contractors ("SWC") is a California non-profit mutual benefit corporation. SWC represents, and its members include 27 public agencies throughout the state established under the laws of the State of California which receive nearly all

of the water diverted by the State Water Project ("SWP"). SWC intervened in and appeared as an interested party in the proceedings leading up to Order WR 2011-0005.

17. Real Party in Interest County of San Joaquin ("County") is a County and Political subdivision of the State of California. All of the property and water rights at issue in the CDO hearings are located within the County of San Joaquin. County intervened in and appeared as an interested party in the proceedings leading up to Order WR 2011-0005.

18. Real Party in Interest San Joaquin County Flood Control and Water Conservation District ("District") is a political subdivision of the State of California formed pursuant to a special act of the Legislature, Chapter 46 of the Statutes of 1956, as amended, and includes all of the territory within San Joaquin County. District intervened in and appeared as an interested party in the proceedings leading up to Order WR 2011-0005.

19. Real Party in Interest Central Delta Water Agency ("CDWA") is a political subdivision of the State of California created by the California Legislature under the Central Delta Water Agency Act, chapter 1133 of the statutes of 1973 (Water Code Appendix, 117-1.1, et seq.), by the provisions of which CDWA came into existence in January of 1974. CDWA intervened in and appeared as an interested party in the proceedings leading up to Order WR 2011-0005.

20. Real Party in Interest South Delta Water Agency ("SDWA") is a political subdivision of the State of California created by the California Legislature under the South Delta Water Agency Act, chapter 1089 of the statutes of 1973 (Water Code Appendix, 116-1.1, et seq.), by the provisions of which SDWA came into existence in January of 1974. SDWA intervened in and appeared as an interested party in the proceedings leading up to Order WR 2011-0005.

FACTUAL ALLEGATIONS

21. On December 28, 2009, the State Board issued a draft Cease and Desist Order against Woods Irrigation Company for alleged unauthorized diversion of water. A true and correct copy of the draft order is attached hereto as Exhibit D.

22. On January 11, 2010, counsel for Woods Irrigation Company requested a hearing. A true and correct copy of the request is attached hereto as Exhibit E.

23. On April 7, 2010 the State Board issued a Notice of Public Hearing for the Woods Irrigation Company proposed Cease and Desist Order. A true and correct copy of the notice is attached hereto as Exhibit F.

24. The State Board served the notice on Woods Irrigation Company, the State Board prosecution team and the three parties who had complained about the alleged unauthorized diversion (Modesto Irrigation District, San Luis & Delta Mendota Water Authority, and the State Water Contractors). See Exhibit F, last page.

25. The State Board did not serve the notice on any of the landowners who receive water from the Woods system, including any of these Petitioners. See Exhibit F, last page.

26. In May 2010 some of these Petitioners learned of the hearing and the fact that the scope of the landowners' water rights, as opposed to any water rights that might be owned separately by Woods, appeared to be placed at issue in the hearing scheduled to begin in June 2010.

27. Three landowners who exercise their water rights through Woods (Eddie Vierra Farms, LLC, R.D.C. Farms, Inc. and Warren P. Schmidt) submitted written due process objections to the State Board on May 12th and May 20, 2010, explaining the lack of notice, and urging the Board to continue the hearing to allow landowners to intervene. True and correct copies of these letters are attached hereto as Exhibits G, H, and I.

28. The landowners' concerns were echoed in a letter to the State Board from counsel for Woods. A true and correct copies of this letters are attached hereto as Exhibit J.

29. Even counsel for parties adverse to Woods on the merits of the Woods water rights, Modesto Irrigation District, San Luis & Delta Mendota Water Authority, and the State

Water Contractors, wrote to the hearing officer to clarify that given the scope of the notice for the hearing, only the scope of any water rights held by Woods, as an entity, separate and apart from rights held by the landowners, could be at issue. These parties urged the hearing officer to continue the hearing to address the due process problem. A true and correct copy of their letter is attached hereto as Exhibit K.

30. The State Board declined to continue the hearing or allow the landowners to intervene. Instead, the hearing officer wrote to each of the parties who had lodged a due process objection letter, stating:

> The Woods CDO hearing will not bind non-parties to the hearing. Whether landowners who receive water through Woods would be otherwise impacted by the proceeding will depend upon the terms of an order either issuing or not issuing a CDO against Woods. The Hearing Officers may, if appropriate or necessary, hold open the hearing to allow for submission of additional evidence or to allow for participation of additional parties.

True and correct copies of the State Board's letters are attached hereto as Exhibits L, M, N and O.

31. The hearing proceeded over several days in June and July 2010. See Exhibit A, Order 2011-0005, page 7.

32. The State Board issued a draft Order on December 15, 2010, which was distributed for comment. ("Draft Order #1"). A true and correct copy of Draft Order #1 is attached hereto as Exhibit P.

33. The Draft Order unquestionably dealt with the merits of pre-1914 appropriative and riparian water rights for the landowners within Woods, and made no determination one way or another whether Woods – the corporation – had any water rights at all. Draft Order #1 included language prohibiting Woods from delivering water to landowners in excess of 77.7 cfs. See Exhibit P at 60-61.

34. Counsel for at least two of the Petitioners here, R.D.C. Farms, Inc. and Eddie Vierra Farms, LLC, submitted written comments on Draft Order #1, raising the same due process concerns raised in the letters to the hearing officers prior to the hearings. A true and correct copy of this letter is attached hereto as Exhibit Q.

35. The State Board issued a revised Draft Order on January 26, 2011 ("Draft Order #2). A true and correct copy of Draft Order #2 is attached hereto as Exhibit R.

36. Draft Order #2 contained the same due process problems as the first draft. See Exhibit R at 61-63.

37. On January 28, 2011, Petitioners' counsel submitted another round of comments to the State Board regarding the serious due process violations in the draft order. A true and correct copy of this letter is attached hereto as Exhibit S.

38. At the February 1, 2011 State Board meeting, the State Board voted to adopt the Woods Irrigation Company Cease and Desist Order, with additional minor modifications from Draft Order #2. The Board released the final Order WR 2011-0005 on February 17, 2010. A true and correct copy of Order WR 2011-0005 is attached hereto as Exhibit A.

39. Order 2011-0005 prohibits Woods from diverting more than 77.7 cubic feet per second ("cfs") *to serve water to any landowner who claims a water right* in addition to the 77.7 cfs *unless and until* that landowner proves up the water right to a State Board staff person. If the staff person does not agree with the landowner's claimed right, the landowner's remedy is to appeal the decision to the full Board. In the meantime, the landowner may not exercise his or her water right through the Woods facilities.

40. Petitioners only means of exercising their respective water rights is through the Woods diversion system. Without the use of the Woods system, Petitioners cannot feasibility get water to their lands for irrigation.

41. Petitioners' understand that the 77.7 cfs limit in Order WR 2011-0005 will result in curtailed deliveries to them, and all other landowners served by the Woods system. Petitioners' anticipate that in the irrigation season, the curtailed deliveries will result in crop loss due to insufficient water.

42. Petitioners will be irreparably harmed if Woods limits diversions to Petitioner under Petitioners' water rights as required by Order WR 2011-0005.

JURISDICTION AND VENUE

43. Jurisdiction is proper under Code of Civil Procedure sections 1094.5 and 1094.6 and California Water Code section 1126 because Petitioners have filed this challenge within 30 days of the State Board's issuance of Order WR 2011-0005. Petitioners are not required to file a motion for reconsideration of Order WR 2011-0005 by law, but did so on March 2, 2011.

44. Venue is proper under Code of Civil Procedure section 393(b) as it involves an action by public officials which affects landowners in San Joaquin County and will cause injury to business operations in San Joaquin County.

FIRST CAUSE OF ACTION

Violation of Due Process
(California Constitution art. 1, section 7, Water Code section 1834)

45. Petitioners incorporate by reference the allegations in paragraphs 1 through 44 above.

46. Petitioners' right to divert water for irrigation of their respective properties, pursuant to their claimed riparian or pre-1914 appropriative water rights, is a right subject to procedural due process protection including notice and opportunity to be heard.

47. State Board Order WR 2011-0005 makes factual determinations regarding the scope of Petitioners' water rights and orders curtailed diversions under those water rights based on the factual determinations made.

48. The State Board did not provide notice or opportunity to be heard to Petitioners prior to conducting the proceedings leading up to and including issuance of Order WR 2011-0005.

49. The State Board's failure to provide notice and opportunity to be heard to Petitioners violated Petitioners constitutional due process rights as well as the procedural mandates of Water Code section 1834.

50. The State Board's action in adopting Order WR 2011-0005 was therefore unlawful.

51. Petitioners have exhausted all administrative remedies required to be exhausted by law.

52. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law.

SECOND CAUSE OF ACTION

Lack of Jurisdiction

53. Petitioners incorporate by reference the allegations in paragraphs 1 through 52 above.

54. The State Board issued Order WR 2011-0005 pursuant to the cease and desist order authority granted to it in Water Code section 1831(d)(1). See Exhibit A, Order WR 2011-0005 at page 9.

55. The State Board's authority pursuant to Water Code section 1831(d)(1) to a issue cease and desist order is limited to cases involving diversion of surface water subject to Division 2 of the Water Code.

56. Water Code section 1831(e) states that "this article shall not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board under this part." "This part" refers to Division 2, Part 2 of the Water Code.

57. Riparian and pre-1914 appropriative water rights are not subject to regulation by the State Board under Part 2 of the Division 2 of the Water Code. See Water Code section 1201.

58. The State Board's proceedings leading up to and including issuance of Order WR 2011-0005 amounted to a regulation of riparian and pre-1914 appropriative water rights outside of the limits of the State Board's jurisdiction and authority as set forth in Water code section 1831(d)(1) and Water Code section 1831(e).

PRAYER

WHEREFORE, Petitioners pray:

1. This Court issue an alternative writ of mandate and/or prohibition commanding respondent to set aside Order WR 2011-0005 or, in the alternative, show cause why it should not do so, and thereafter, issue a peremptory writ of mandate and/or prohibition commanding respondent to set aside Order WR 2011-0005; and
2. For an award of costs and attorneys fees as this court deems reasonable and just, including but not limited to pursuant to the authority of the court as set forth in Code of Civil Procedure section 1021.5.
3. For such other relief as the court deems reasonable and just.

Respectfully submitted,

DATED: March 1, 2011

HERUM / CRABTREE
A California Professional Corporation

By: 
JENNIFER L. SPALETTA
Attorneys for Petitioners

VERIFICATION

I, DIANNE E. YOUNG, verify:

I have read the foregoing PETITION FOR ALTERNATIVE and PEREMPTORY WRIT OF ADMNISTRATIVE MANDAMUS.

I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed at Carmel, California on March 1, 2011.

DIANNE E. YOUNG

VERIFICATION

I, RONALD DEL CARLO, verify:

I have read the foregoing PETITION FOR ALTERNATIVE and PEREMPTORY WRIT OF ADMNISTRATIVE MANDAMUS.

I am signing this declaration on behalf of RONALD AND JANET DEL CARLO, Husband and Wife, and as an officer of R.D.C. FARMS, INC., a California Corporation, both parties to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed at Stockton, California on 3/1, 2011.

Ronald Del Carlo

RONALD DEL CARLO

VERIFICATION

I, DIANA L. YELLAND, on behalf of EDDIE VIERRA FARMS, LLC, verify:

I have read the foregoing PETITION FOR ALTERNATIVE and PEREMPTORY WRIT OF ADMNISTRATIVE MANDAMUS.

I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed at Stockton, California on 3/1, 2011.

DIANA L. YELLAND
On behalf of EDDIE VIERRA FARMS, LLC

VERIFICATION

I, HOWARD SCHMIDT, on behalf of WARREN P. SCHMIDT, Trustee of the SCHMIDT FAMILY RECOVABLE TRUST, verify:

I have read the foregoing PETITION FOR ALTERNATIVE and PEREMPTORY WRIT OF ADMNISTRATIVE MANDAMUS.

I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed at Sacramento, California on Feb. 28, 2011.

Warren P. Schmidt
by Howard P. Schmidt his attorney in fact

WARREN P. SCHMIDT,
Trustee of the SCHMIDT FAMILY
RECOVABLE TRUST, by
HOWARD SCHMIDT, his attorney in fact

JENNIFER L. SPALETTA SBN: 200032
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Attorneys for Petitioners

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

PROOF OF SERVICE

PROOF OF SERVICE

I, **JULIE M. HASSELL,** certify and declare as follows:

I am over the age of 18 years and not a party to this action. My business address is HERUM CRABTREE, 2291 West March Lane, Suite B100, Stockton, California 95207. On the date set forth below, I served a true and correct copy of the following document(s) to all parties on the attached service list:

- **Petition For Alternative and Peremptory Writ of Administrative Mandamus (CCP Section 1094.5, 1085, 1087) and/or Writ of Prohibition (CCP Section 1102-1105);**
- **Exhibits Attached To Petition For Alternative and Peremptory Writ of Administrative Mandamus (CCP Section 1094.5, 1085, 1087) and/or Writ of Prohibition (CCP Section 1102-1105);**
- **Notice of Case Assignment;**
- **Petitioners' Ex Parte Application For Alternative Writ of Administrative Mandamus and/or Prohibition (CCP Section 1094.5, 1085, 1087, 1102-1105) and Declaration of Counsel Regarding Ex Parte Hearing;**
- **Memorandum In Support of Petition For Alternative and Peremptory Writ of Administrative Mandamus and/or Writ of Prohibition;**
- **Declaration of Jennifer L. Spaletta In Support of Petitioners Application For Alternative Writ and Peremptory Writ of Mandate and/or Prohibition;**
- **Declaration of Dianne E. Young In Support of Petitioners Application For Alternative Writ and Peremptory Writ of Mandate and/or Prohibition;**
- **Declaration of Ronald Del Carlo In Support of Petitioners Application For Alternative Writ and Peremptory Writ of Mandate and/or Prohibition;**
- **Declaration of Howard J. Schmidt In Support of Petitioners Application For Alternative Writ and Peremptory Writ of Mandate and/or Prohibition;**
- **Declaration of Diana L. Yelland In Support of Petitioners Application For Alternative Writ and Peremptory Writ of Mandate and/or Prohibition;**
- **[Proposed] Order Directing Issuance of Alternative Writ of Administrative Mandamus and/or Prohibition;**
- **[Proposed] Alternative Writ of Administrative Mandamus and/or Prohibition**

[XX] **BY U.S. MAIL.** By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[ ] **BY U.S. MAIL - CERTIFIED MAIL** By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[ ] **BY FACSIMILE.** By use of facsimile machine, telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2.301 and 2.306]

[ ] **BY OVERNIGHT DELIVERY.** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.] The envelope(s) were addressed the person(s) as set forth below.

[XX] **BY ELECTRONIC MAIL (EMAIL).** By sending the document(s) to the person(s) at the email address(es) listed below.

[ ] **BY PERSONAL SERVICE.** I personally served the following person(s) at the address(es) listed below:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 3, 2011

JULIE M. HASSELL

HERUM\CRABTREE

SERVICE LIST

WOODS IRRIGATION COMPANY c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com c/o Dennis Donald Geiger, Esq. 311 East Main Street, Suite 400 Stockton, CA 95202 dgeiger@bgrn.com (via e-mail only)	
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Representing Respondents State Water Resources Control Board and Charles R. Hoppin, Tam M. Doduc and Frances Spivy-Weber Matthew Bullock, Esq. California Office of the Attorney General 1300 "I" Street Suite 125 Post Office Box 944255 Sacramento, CA 94244 Phone 916-323-6665 Email: matthew.bullock@doj.ca.gov	

EXHIBIT B

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SUPERIOR COURT OF CALIFORNIA

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Real Parties in Interest.

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

MEMORANDUM IN SUPPORT OF PETITION FOR ALTERNATIVE and PEREMPTORY WRIT OF ADMINISTRATIVE MANDAMUS AND/OR WRIT OF PROHIBITION

Date: March 10, 2011
Time: 8:15 a.m.
Dept. 13
Judge: Honorable Lesley D. Holland

Reservation No. 1533642

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I. Introduction and Summary of Argument

We do not live in a country where the government can take property first, and ask questions later.

Petitioners seek to set aside the State Water Resources Control Board's ("State Board") Order WR 2011-0005 because it exceeds the State Board's jurisdiction and was adopted in violation of Petitioners' constitutional rights to procedural due process.

Petitioners are individual landowners who own and farm property on Roberts Island, located just west of Stockton. Petitioners irrigate their fields with water from Middle River, which flows around Roberts Island. The water rights for these diversions are owned by Petitioners and run with their land. The water is diverted and distributed through a joint system of pumps and canals owned and operated by the Woods Irrigation Company ("Woods"), a California non-profit corporation formed in 1909 for this purpose.

In 2010, one hundred and one years after Woods was formed, the State Board initiated cease and desist order proceedings against Woods for alleged unlawful diversion of water without a valid water right. The State Board provided notice of these proceedings to Woods, the corporation. The State Board did not provide notice to any of the landowners whose water rights were at issue. Woods requested a hearing. Prior to the State Board hearing, Woods, several landowners including three of these Petitioners, and even parties adverse to Woods, warned the State Board that the hearing could not go forward without proper notice to the landowners in satisfaction of due process requirements. The State Board refused to provide this notice, or allow the landowners to intervene in the hearing. However, the State Board's hearing officer committed that any decision issued would not affect non-parties.

Regardless of this commitment, on February 1, 2010 the State Board issued an enforcement order against Woods ("Order 2011-0005"), limiting diversions by Woods to 77.7 cfs. **The order expressly prohibits Woods from diverting more than 77.7 cubic feet per second ("cfs") to serve water to any landowner who claims a water right in addition to the 77.7 cfs *unless and until* that landowner proves up the water right to a State Board staff person.** If the staff person does not agree with the landowner's claimed right, the landowner's

remedy is to appeal the decision to the full Board. In the meantime, the landowner may not ask Woods to divert more than 77.7 cfs.

The State Board has limited authority to investigate and issue cease and desist orders for threatened illegal diversions of water. Cal. Water Code § 1831. This authority expressly does not allow regulation of riparian and pre-1914 appropriative rights – which are the kind of water rights held by Petitioners. Cal. Water Code §§ 1831(e), 1201. Further, this authority requires that no action be taken without notice and opportunity to request an evidentiary hearing. Cal. Water Code § 1834. There is absolutely no authority allowing the State Board to preemptively curtail water rights under any form of claimed right, as was done here.

A diversion rate of 77.7 cfs is insufficient to irrigate the crops grown within the Woods service area. Petitioners do not have an alternative means of exercising their water rights except through the Woods diversion and distribution system. Thus, the Order WR2011-0005 directly threatens their livelihood. This is precisely the type of government action the due process doctrine was designed to prevent.

We respectfully request that this Court issue an Alternative Writ ordering the State Board set aside Order WR 2001-0005 immediately or appear before this court at an Order to Show Cause Hearing as to why the order should stand. If the State Board refuses to set aside the order voluntarily, we ask that this Court issue a Preemptory Writ directing that it do so.

As this case challenges only the legal issues associated with the issuance of Order WR 2011-0005, the Writ may issue based on the contents of the order itself and such other documents as can be provided herewith. It is not necessary for the Court to review the complete Administrative Record from the underlying proceeding.

II. Statement of Case

On December 28, 2009, the State Board issued a draft Cease and Desist Order against Woods for alleged unauthorized diversion of water. (Petition Exh. D[1]). On January 11, 2010,

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[1] Petitioners filed a separately bound set of Exhibits with their Petition for Writ, filed March 2, 2011, for the Court's convenience. The authenticity of the exhibits is established by the verified Petition as well as the supporting declaration of Jennifer Spaletta, filed herewith.

counsel for Woods Irrigation Company requested a hearing. (Petition Exh. E). On April 7, 2010 the State Board issued a Notice of Public Hearing for the Woods proposed Cease and Desist Order. (Petition Exh. F). The State Board served the notice on Woods, the State Board prosecution team and the three parties who had complained about the alleged unauthorized diversion (Modesto Irrigation District, San Luis & Delta Mendota Water Authority, and the State Water Contractors). (Petition Exh. F, last page). The State Board did not serve the notice on any of the landowners who exercise their water rights through the Woods system. *Id.*

Despite lack of actual notice, some of these Petitioners learned of the hearing and the fact that the scope of the landowners' water rights, as opposed to any water rights that might be owned by Woods, appeared to be placed at issue. Three landowners who exercise their water rights through Woods (Eddie Vierra Farms, LLC, R.D.C. Farms, Inc. and Warren P. Schmidt) submitted written due process objections to the State Board on May 12th and May 20, 2010, explaining the lack of notice, and urging the Board to continue the hearing to allow landowners to intervene. (Petition Exhs. G, H, I). The landowners' concerns were echoed in letters to the State Board from counsel for Woods. (Petition Exh. J). Even counsel for the complaining parties, Modesto Irrigation District, San Luis & Delta Mendota Water Authority, and the State Water Contractors, wrote to the hearing officer to clarify that given the scope of the notice for the hearing, only the scope of any water rights held by Woods, as an entity, separate and apart from rights held by the landowners, could be at issue. (Petition Exh. K). The complaining parties urged the hearing officer to continue the hearing to address the due process problem. *Id.*

The State Board declined to continue the hearing or allow the landowners to intervene. Instead, the hearing officer wrote to each of the parties who had lodged a due process objection letter, stating:

> The Woods CDO hearing will not bind non-parties to the hearing. Whether landowners who receive water through Woods would be otherwise impacted by the proceeding will depend upon the terms of an order either issuing or not issuing a CDO against Woods. The Hearing Officers may, if appropriate or necessary, hold open the hearing to allow for submission of additional evidence or to allow for participation of additional parties.

(Petition Exhs. L, M, N, O).

The hearing proceeded over several days in June and July 2010. (Petition Exh. A at 7). The State Board issued a draft Order on December 15, 2010 ("Draft Order #1), which was distributed for comment. (Petition Exh. P). The Draft Order unquestionably dealt with the merits of pre-1914 appropriative and riparian water rights for the landowners within Woods, and made no determination one way or another whether Woods – the corporation – had any water rights at all. *Id.* Draft Order #1 included language prohibiting Woods from delivering water to landowners in excess of 77.7 cfs. (Petition Exh. P at 60-61).

Counsel for at least two of the Petitioners here, R.D.C. Farms, Inc. and Eddie Vierra Farms, LLC, submitted written comments on Draft Order #1, raising the same due process concerns raised in the letters to the hearing officer prior to the hearings. (Petition Exh. Q). The State Board issued a revised Draft Order on January 26, 2011 ("Draft Order #2). (Petition Exh. R). Draft Order #2 contained the same due process problems as the first draft. (Petition Exh. R at 61-63). Petitioners' counsel submitted another round of comments to the State Board regarding the serious due process violations in the draft order. (Petition Exh. S; Spaletta Decl. ¶ 3). Petitioners' counsel also appeared at the February 1, 2010 State Board meeting to provide oral comments on the proposed order that highlighted the due process problem. Spaletta Decl. ¶ 3.

At the February 1, 2010 State Board meeting, the Board voted to adopt the Woods Irrigation Company Cease and Desist Order, with minor modifications from Draft Order #2. The Board released the final Order WR2011-0005 on February 17, 2010. (Petition Exh. A).

III. Statement of Facts

A. Petitioners

Petitioners each own land on Roberts Island, west of Stockton. All of Petitioners' lands are used for commercial, irrigated farming. Each of the Petitioners claims their own riparian and/or pre-1914 appropriative water rights to divert water from Middle River for use on their own lands. Petitioners only means of exercising their respective water rights is through the Woods diversion system. Each Petitioner is a shareholder in Woods Irrigation Company for the purpose of collectively diverting and distributing water. Without the use of the Woods system,

Petitioners cannot get water to their lands for irrigation. Petitioners' understand that the 77.7 cfs limit in Order 2011-0005 will result in curtailed water deliveries resulting in crop loss due to insufficient water during the irrigation season. *See* Del Carlo Decl. ¶¶ 2-7; Yelland Decl. ¶¶ 2-7; Young Decl. ¶¶ 2-7; Schmidt Decl. ¶¶ 2-7.

Some of Petitioners' claimed water rights were documented and provided to the State Board in Statements of Diversion and Use, filed in 2009, prior to issuance of the initial draft cease and desist order against Woods on December 28, 2009. *See* Del Carlo Decl. ¶¶8-9 Exh. E; Yelland Decl. ¶¶8-9 Exh. B; Young Decl. ¶¶8-9 Exh. B.

B. Woods Irrigation Company

Woods is a California non-profit corporation which was formed in 1909. (Petition Exh A. at 31). In 1911 Woods and the landowners to be served by Woods entered into water supply agreements for the provision of water through the Woods facilities, which agreements run with the land. (Petition Exh. A at 31, Exhs. B, C). Woods' operations were described by the California Supreme Court in 1958 and are similar today:

> [Woods Irrigation Company] is a nonprofit California corporation, engaged in furnishing irrigating and drainage services to land owned by its farmer shareholders. It owns no land or water rights of its own but instead maintains its pumping stations, canals and coordinating irrigating and drainage facilities on the property of its shareholders, from whom it has received grants of easements in perpetuity. Although [Woods Irrigation Company's] articles of incorporation also permit it to furnish its services to persons other than its shareholders, it has never done so.
>
> It thus appears that [Woods Irrigation Company] is not a mere water company supplying water to the public for general purposes but that it is an 'irrigation company,' engaged in performing irrigating and drainage services solely for its farmer stockholders and operating solely upon the farms of said farmer stockholders. In other words, the only services which it is performing are services in line with its purposes stated in its articles of incorporation 'of constructing, operating and maintaining ditches for the irrigation of the lands of the stockholders' and 'for the construction, operation and maintenance of ditches for the drainage of lands owned by the stockholders.' Its agreement made with each individual stockholder, which agreement is to 'run with the land,' provides for the prorating of [Woods Irrigation Company's] costs of operation on an acreage basis with the amount of water limited to the irrigation needs of the farm of the particular stockholders as such farm is described in the agreement. The trial court therefore found that '[Woods Irrigation Company's] only activity has been to

furnish irrigation water and drainage service to the farms of its stockholders on a non-profit basis.'

Woods Irrig. Co. v. Dept. of Employment (1958) 50 Cal.2d 174, 176.

The amount of water that Woods' diverts from Middle River has not been historically measured, but the capacity to divert exceeds 77.7 cfs. (Petition Exh. A at 5). State Board staff measured a diversion rate of 90 cfs during an inspection in 2009. (Petition Exh. A at 6). One cfs in twenty-four hours is about two acre-feet of water. Thus, every day that Woods' diversions are curtailed by 12 cfs is another 24 acre-feet of water that cannot be applied to crops. An acre-foot is enough water to cover an acre of land, one foot deep.

C. General Water Right Law

California recognizes three primary types of water rights for the diversion and use of surface water: (1) riparian rights, (2) pre-1914 appropriative rights and (3) post-1914 or state-issued appropriative permits and licenses. *People v. Shirokow* (1980) 26 Cal.3d 301, 307-308. The State Board has exclusive jurisdiction to issue *post-1914* appropriative permits and licenses (which are not involved here). Water Code sections 1201-1202; *Shirokow*, 26 Cal.3d at 308. The State Board's jurisdiction and authority over riparian and pre-1914 appropriative rights is limited (as discussed further in Section IV-G, below).

D. State Board Findings in Order WR2011-0005 Regarding Water Rights

In Order WR2011-0005, the State Board found that the 1911 Water Service Contracts between Woods and its landowners evidenced the intent to divert up to 77.7 cfs from Middle River, which was sufficient evidence to substantiate a pre-1914 appropriative water right for that amount. (Petition Exh A. at 4, 30-34). The State Board did not determine whether this pre-1914 right was owned by Woods or the landowners. *Id.* at page 4 ("The evidence indicates that *Woods or the landowners within the Woods* original service area had the intention before 1914 to divert up to 77.7 cfs..."). The State Board recognized that landowners within Woods may have additional water rights that would allow larger diversions by Woods. *Id.* at 5, 20. These additional rights could be riparian or pre-1914 appropriative rights.

///

The State Board acknowledged that since Woods did not own any irrigated land, it could not, as a matter of law, hold any riparian rights. Rather, any riparian rights exercised through the Woods facilities had to be owned by landowners. *Id.* at 20, *citing Lux v. Haggin* (1886) 69 Cal. 255, 391. Despite the fact that no landowners were given notice of the hearing, the State Board undertook to define the riparian rights for landowners within Woods service area. *Id.* at 19-27. In the end, the State Board concluded that only 710.86 acres of land within the Woods service area had riparian rights, and the balance did not. *Id.* at 21-22. The original Woods service area was greater than 8,000 acres. *See* Petition Exhs. B and C.

E. State Board Restrictions on Diversions to Serve Landowners in Woods

Petitioners challenge those portions of Order WR2011-0005 which restrict exercise of their water rights through the Woods system. The following portions of the Order are relevant:

> IT IS HEREBY ORDERED THAT pursuant to sections 1831 through 1836 of the Water Code, within 60 days **Woods shall cease and desist from diverting water in excess of 77.7 cfs at any time, unless and until Woods has complied with paragraphs 3 through 6, below.**
>
> ....
>
> 3. Before diverting a rate greater than 77.7 cfs, Woods shall demonstrate to the satisfaction of the Deputy Director that such a rate increase is either due to increased reasonable demand on riparian lands identified as Parcel 2 on Exhibit MSS-R-14, exh. 7A (discussed in section 4.2.3.1 of this order) **or based on additional evidence the water rights of landowners not addressed in this order, provided by Woods to the Deputy Director.**
>
> 4. Before diverting a rate greater than 77.7 cfs, Woods shall submit to the Deputy Director a list of all properties and owners who receive water delivered by Woods's diversion system, and the basis of right for such deliveries, including whether such right is riparian or appropriative, and what entity holds the right. **For rights not recognized in this order, the basis of right must be substantiated by different information than was provided during the hearing that preceded this order.** If the basis of right for property outside the original Woods service area is the transfer of an appropriative right from within the original Woods service area, the information provided to the Deputy Director must include proof of a reduction of use within the Woods service area commensurate with deliveries to the property outside the Woods service area. **If the information provided does not establish a basis of right acceptable to the Deputy Director, Woods shall not deliver water to that property.**
>
> 5. **Notwithstanding paragraphs 3 and 4, above, if a water right within the Woods service area provides information, and such information demonstrates an additional basis of right for deliveries of water acceptable to the Deputy Director,**

> **after issuance of this order, Woods may deliver water to the user upon the Deputy Director's approval.**
>
> .....
>
> Any determination of the Deputy Director pursuant to this order is subject to reconsideration pursuant to Water Code section 1122. Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of part 2 of division 2 of the Water Code (commencing with section 1825) the Attorney General, upon request of the State Water Board, shall petition the superior court for issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code § 1845, subd. (a).) The superior court or the State Water Board may impose civil liability up to $1,000 per day of violation. (*Id.* at subd. (b); Wat. Code, § 1055.)

(Petition Exh. A at 61-63).

IV. Argument

A. This Court Has Authority to Issue an Alternative Writ Commanding the State Board to Either Set Aside Order WR 2011-0005 or Appear at an OSC Hearing to Show Cause Why the Order Should Not be Set Aside.

Whether characterized as a Writ of Mandate or Writ of Prohibition, this Court is empowered to issue a Writ to the State Board to set aside any order that exceeds the Board's jurisdiction or is contrary to law – such as when the agency has deprived a party of its constitutional right to due process. Cal. Code Civ. Proc. §§ 1084, 1094.5, 1102-1103. The Court must issue the Writ in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law. Cal. Code of Civ. Proc. § 1086.

The procedure to obtain the Writ can follow one of two courses. A party may file the Petition for Writ and then proceed to have the merits of the case decided by noticed motion procedure, or a party may apply to the court to issue an Alternative Writ first, to be followed by a hearing after an order to show cause ("OSC") as to why the final Writ should not issue. *See* Cal. Code Civ. Proc. §§ 1084, 1104. Generally, the noticed motion procedure is used when the complete administrative record is needed to resolve the issues raised by the Petition. The Alternative Writ method moves much faster and is well suited for cases involving questions of law which do not require the court's review of the complete administrative record. *See Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed 2011) §11.2, p. 422.*

The Alternative Writ method asks the Court to issue two writs within a short time frame. First, the party applies ex parte for issuance of the Alternative Writ commanding the agency to either set aside its decision or appear at an OSC hearing to defend its decision. Cal. Code Civil Proc. §§ 1087, 1104. If the court orders that that the Alternative Writ issue, the Clerk signs the Alternative Writ, which is then served on the Respondent agency. The Alternative Writ sets forth the schedule for the OSC hearing and any briefing. The Court issues the final, or Peremptory Writ, following the OSC hearing.[2]

The Peremptory Writ may only be issued after ten days notice of the application to the adverse party. Cal. Code Civ. Proc. § 1088. Here, the Petition and Application for Alternative Writ were served on the State Board on March 3, 2011. Thus, the Court may not set the OSC hearing until after March 13, 2011.

B. The Constitutional Guarantee of Procedural Due Process.

Article 1, section 7 of California Constitution provides that no state may deprive any person of life, liberty or property without due process of law. The guarantee of due process binds all branches of government. *Mooney v. Holohan*, (1935) 294 U.S. 103; *Hutchinson Co. v. Coughlin* (1st Dist., 1919) 42 Cal.App. 664. Procedural due process requirements apply in adjudicatory settings, such as the State Board's cease and desist order hearing process. *See e.g. Kennedy v. City of Hayward* (1st. Dist. 1980) 105, Cal.App.3d 953. These requirements are based on common sense:

> Generally, due process is the opportunity to be heard at a meaningful time and in a meaningful manner. In order to satisfy due process, a legal proceeding must give the parties adequate means of asserting their rights. To this end, due process requires that a tribunal that assumes to determine the rights of parties must have jurisdiction over the parties and over the subject matter of the proceeding, and that the parties must be given notice and an opportunity for hearing before any order or judgment in the proceedings can be made by which they will be deprived of life, liberty, or property. Furthermore, the propriety of the deprivation must be resolved in a manner consistent with essential fairness, that is determined through fundamentally fair procedures. The fact that a person may later recover property taken by prevailing a post-deprivation hearing does not satisfy constitutional requirements…

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13 Cal Jur 3d (2004) Constitutional Law § 307, p. 562-563 (citations omitted).

C. Petitioners' Right to Continue Receiving Irrigation Water from the Woods System Pursuant to the Landowners' Claimed Water Rights is a Right Protected by Procedural Due Process.

Petitioners and their predecessors in interest have been irrigating and farming their lands on Roberts Island for a century, as evidenced by the 1911 contracts for water service recorded against their properties. Now, after literally 100 years of historic diversions these landowners face a curtailment order, without ever having been given notice or an opportunity to present evidence or argument in defense of their claimed rights. There could not be a more classic example of a deprivation of liberty or property without due process.

The California Legislature recognized this fact when it empowered the State Board to adjudicate cease and desist orders. The State Board derives its power from the California Water Code. *See* Cal. Water Code § 179. The State Board's power to issue cease and desist orders derives from Water Code §§ 1831 et seq. This statutory scheme requires that the State Board not issue a cease and desist order until after "notice and opportunity to be heard pursuant to Water Code section 1834." Cal. Water Code § 1831(c). Notice must be by personal service or certified mail. Cal. Water Code § 1834.

D. The State Board Was Fully Aware that the Woods Cease and Desist Order Would Impact the Rights of Landowners Not Before the Board.

In no uncertain terms, Order WR2011-0005 reflects the State Board's understanding that the amount of water that Woods should be allowed to divert is based on the amount of the water rights held by the landowners who use the Woods system for diversion and delivery:

> In this case, Wood's diversions are not authorized by a water right permit or license. Accordingly, the Board must evaluate whether Woods's diversions are authorized **by a valid pre-1914 appropriative right, or by valid riparian rights held by landowners within Woods's service area**, in order to decide whether Woods's diversion are unauthorized, and therefore subject to enforcement action.

See Petition Exh. A at 11 (emphasis added).

Petitioners, Woods, and even the parties adverse to Woods waived red flags in front of the Board before the hearings commenced to bring the due process violation to the Board's

attention and request a reasonable remedy. These parties urged the officer to either limit the hearing to determine only the extent of any water rights held by Woods, the corporation, or temporarily delay the hearing so as to allow the landowners the notice and opportunity to participate. (Petition Exhs. G, H, I, J, K).

Rather than simply limit the proceedings to determine any separate water right held by Woods, or grant a short continuance to provide notice and opportunity to landowners, the State Board forged ahead – affirmatively promising landowners that nonparties would not be affected by the order following the hearing. (Petition Exhs. L, M, N, O). The State Board then expressly broke this promise by adopting Order WR 2011-0005 which orders Woods not to deliver more than 77.7 cfs to landowners – even if the deliveries are pursuant to the landowners claimed water rights.

E. The State Board Failed to Provide the Required Notice and Opportunity to be Heard to Landowners Even Though It Was Not Difficult to Do So.

In short, the State Board said – we will take away your water (and hence, your livelihood) first, and ask questions later. This is precisely the type of post-deprivation recovery that procedural due process prohibits. It also flies in the face of the fundamental notions of fairness and dignified treatment embodied in our federal and state constitutions. What makes the action more disturbing, however, is how easy it would have been for the State Board to provide notice.

The State Board chose to proceed with an enforcement action against Woods Irrigation Company, a California corporation, *only*. As a matter of pure logic, the State Board should have first determined whether Woods had any of its own water rights to support the amount of diversions through the Woods system. Then, if it found none or that the rights were insufficient, proceeded to determine whether the landowners who exercise their water rights through Woods' facilities had sufficient evidence to support water rights for the additional diversions.

Before proceeding to determine matters related to the landowners' water rights, the State Board had to provide notice and if requested, an opportunity to be heard. Mailing notice by certified mail to the landowners served by Woods is not difficult, or expensive, provided the list of landowners is available. The State Board had ample tools available to obtain the list.

First, the State Board could have looked to its own records. Many landowners, such as Petitioners in this case, had filed Statements of Diversion and Use with the State Board *in 2009* claiming riparian and pre-1914 appropriative rights, diverted through the Woods system. These Statements were filed at the request of the State Board to facilitate its investigation of Delta Water Rights. *See e.g.* Del Carlo Decl. ¶¶ 8-9 Exhs. C, D, E; Yelland Decl. ¶¶ 8-9 Exh. B; Young Decl. ¶¶ 8-9 Exh. B.

Second, the State Board could have used its subpoena power to ask Woods to produce the list of landowners to whom it delivers water. *See* Water Code §§ 1075, 1076, 1080.

Third, the State Board could have simply taken the map of the current Woods service area, lodged as an Exhibit for the hearings by Woods in May 2011, and asked San Joaquin County for a list of landowner names and addresses from the property tax rolls. *See* Petition Exh. A at page 4 (noting map exhibit). What is curious is that this is precisely the method that the State Board used just one year prior to mail notice to every landowner on Roberts Island, asking that the landowners submit Statements of Use documenting the water rights to support their diversions. *See* Del Carlo Decl. Exhs. C, D.

The State Board chose none of these options. To add insult to injury, the hearing officer went so far as to promise landowners, in writing, prior to the hearing that non-parties would not be bound by any order. (Petition Exhs. L, M, N, O).

F. Woods Irrigation Company's Participation in the Hearing is Not a Proxy for Due Process to the Landowners.

Woods, a corporation, is not authorized by law or otherwise to represent and defend the individual water rights of the landowners who utilize its physical facilities for the exercise of their water rights. To the extent this was unclear to the Board, the letters from Woods counsel and individual landowners prior to the hearing made it crystal clear. (Petition Exhs. G, H, I, J).

Just as a corporation and some of its shareholders may not go to court and seek an order that impacts an absent shareholder who was never given notice of the proceeding, the State Board could not proceed against Woods, the corporation, and expect to be able to issue an order

effecting diversion rights of landowners who are shareholders of Woods but hold their own water rights. *See In re Fairwagelaw* (4th Dist. 2009) 176 Cal.App.4th 279, 286-87.

G. The State Board's Cease and Desist Authority Does Not Permit Regulation of Riparian and/or Pre-1914 Rights.

Assuming *arguendo* that this Court does not agree that the State Board violated Petitioners' due process rights in issuing Order WR 2011-0005, the Court should set aside the order because it exceeds the State Board's jurisdiction in the first instance.

The State Board's authority pursuant to Water Code section 1831 to a issue cease and desist order is limited to cases involving diversion of surface water subject to Division 2, Part 2 of the Water Code. *See* Water Code § 1831(d)(1) (authorizing cease and desist order for unauthorized use of water "subject to this division"). Water Code section 1831(e) states that "this article shall not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board under this part." Riparian and pre-1914 appropriative water rights are not subject to regulation by the State Board under Part 2 of the Division 2 of the Water Code. *See* Water Code § 1201; *Shirokow*, 26 Cal.3d at 309 (interpreting section 1201 to exclude riparian and pre-1914 appropriative rights from State Board appropriation procedures of Division 2). The State Board's proceedings leading up to and including issuance of Order WR 2011-0005 amounted to a regulation of riparian and pre-1914 appropriative water rights outside of the limits of the State Board's jurisdiction.

Notably, in the few reported decisions addressing a State Board challenge to the validity of the exercise of a claimed riparian or pre-1914 appropriative right, the decisions do not stem from the State Board's exercise of its cease and desist order power. Rather, they stem from injunctive relief actions filed in superior court by the California Attorney General, upon the request of the State Board after investigation, as described in Water Code section 1052(c). *See e.g. Shirokow*, 26 Cal.3d 301 (involving complaint filed by state at request of State Board against riparian who was also storing water without a valid permit for storage). Thus, if the State Board has the power to investigate and seek injunctive relief against riparian and pre-1914 appropriative right claimants at all, that power may be (and historically has been) exercised by

asking the Attorney General to file a complaint against the alleged wrong-doer seeking injunctive relief, as set forth in Water Code section 1052(c).

H. Petitioners Lack a Plain, Speedy and Adequate Remedy at Law.

The Court must issue the requested writ in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law. Cal. Code of Civ. Proc. § 1086. Here, the State Board has exceeded its jurisdiction, violated Petitioners' due process rights and left Petitioners with no plain, speedy and adequate remedy in light of the looming irrigation season. Order WR2011-0005 orders Woods to cease and desist deliveries to landowners in excess of 77.7 cfs. These Petitioners will need more than this during the 2011 irrigation season. The only means available to them to obtain more water, under the existing order, is to present evidence to a State Board staff person and hope that the evidence is both convincing, and that their crops don't die while it is under consideration. This is unacceptable and unlawful.

Due process requires that these landowners be given notice and an opportunity to be heard in a fair adjudicative process before their diversion rights are curtailed, not after. Further, assuming the State Board even has the jurisdiction to issue an order to cease diversions under claimed riparian or pre-1914 appropriative rights, the State Board may not delegate to its staff the task of hearing and adjudicating the issue. Rather, if jurisdiction exists, Water Code sections 1831 et seq. entitle Petitioners to a hearing, before the State Board, to determine the merits of any order curtailing their water rights, before they are actually curtailed.

V. Conclusion

Petitioners respectfully request that the Court issue the Alternative Writ and, after the OSC Hearing, the Peremptory Writ.

Respectfully submitted,

DATED: March 3, 2011

HERUM / CRABTREE
A California Professional Corporation

By: _____
JENNIFER L. SPALETTA
Attorneys for Petitioners

EXHIBIT C

2940-006
3/28/11

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SUPERIOR COURT OF THE STATE 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,

v.

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, 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

OPPOSITION TO PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS AND/OR WRIT OF PROHIBITION

Date: April 8, 2011
Time: 10:00 a.m.
Dept: 13
Judge: Honorable Lesley D. Holland
Action Filed: March 2, 2011

EXHIBIT C

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INTRODUCTION

In this action, Petitioners challenge State Water Resources Control Board (State Water Board) Order WR 2011-0005 (the Order) issued against Woods Irrigation Company (Woods).[1] The challenge is based on claims that through its Order against Woods (not a petitioner in this action), the State Water Board deprived Petitioners of a property interest without due process. However, Petitioners fail to demonstrate that they were deprived of a property interest, or that the State Water Board did not follow proper procedure. Petitioners also argue that the State Water Board lacks jurisdiction to prevent unauthorized diversions of water where the diverter makes an unsupported claim to a legal right to divert that water. Diverters cannot avoid the Board's jurisdiction by merely claiming they are not subject to it. For these reasons and as discussed herein, the Court should deny the petition.

BACKGROUND

I. THE ORDER

The State Water Board issued the Order against Woods Irrigation Company (Woods) following an adjudicative hearing lasting six days in June and July of 2010. Woods diverts water from Middle River in the southern Delta and delivers the water to landowners within its service area, including Petitioners, for purposes of irrigation. Woods is not a petitioner herein. The Order required Woods to limit diversions to a rate of 77.7 cubic feet per second (cfs).[2] The Order found that this was the extent of water rights held by Woods or exercised by Woods on behalf of its customers. The Order recognized that Woods could divert water pursuant to any water rights held by its customers, but that Woods did not submit sufficient information to support Woods' claim that its customers' rights authorized Woods to divert in excess of 77.7 cfs; Woods was therefore violating or threatening to violate the Water Code prohibition against unauthorized diversion of water. (The Order, p. 20; Wat. Code, § 1831, subd. (d)(1).) The evidence provided

[1] Petitioners previously submitted the Order to the Court as Exhibit A to the Petition, filed March 2. For the Court's convenience, a copy of the Order is also attached hereto as Exhibit A.

[2] For reference, a rate of 77.7 cfs would fill an Olympic size swimming pool in just under twenty minutes.

to the State Water Board and to the Court indicates that 77.7 cubic feet per second (cfs) is the extent of all Woods' contractual delivery obligations.

The State Water Board made no determination on rights held by Woods' customers that is binding on the customers. The Order expressly states that the State Water Board does not definitively determine the rights of any landowners, and that it only evaluates the information provided for the purpose of determining whether Woods had information it could rely upon as a basis for making diversions and deliveries. (The Order, p. 21.) Because Woods only provided information to support diversions of up to 77.7 cfs, the Order limits Woods' diversions from Middle River to that amount. The Order further establishes a procedure under which Woods may deliver additional water upon a showing that the rights exist to support those deliveries. (The Order, pp. 5, 62.) The Order does not prohibit diversion or use by Petitioners. It neither prohibits nor requires anything from anyone except Woods. Nonetheless, Petitioners claim the Order deprives them of property without due process.

II. LEGAL BACKGROUND

California law recognizes two principal types of rights to the use of surface water: riparian rights and appropriative rights. Riparian rights generally attach to the smallest parcel of real property contiguous to a watercourse held under one title in the chain of title leading to the present owner. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 774-775.) When riparian land is subdivided in a manner that severs a parcel from the watercourse, the noncontiguous parcel loses its riparian status, absent evidence that the parties to the conveyance intended to the contrary. (*Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 116-117.) Riparian rights are limited to the natural flow of the watercourse. (*Bloss v. Rahilly,* (1940) 16 Cal.2d 70, 75-76.) Riparian rights are correlative as to each other, meaning where flows are insufficient to satisfy all riparian right holders on a given watercourse, riparian right holders must reduce their diversions proportionately. (*Prather v. Hoberg* (1994) 24 Cal.2d 549, 560.) Riparian rights have a priority date relative to appropriative rights based on when the parcel at issue was patented from the government, and they are not lost by non-use. (*Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 251; *Lux v. Haggin* (1886) 69 Cal. 255, 390.)

Users acquire appropriative rights by diverting water and applying it to beneficial use. The maxim "first in time, first in right" governs the relative priority of appropriative rights and the rights of senior appropriators are served completely before those of junior appropriators. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.) Appropriators may develop rights regardless of land ownership or use on the land, may use the water outside of the watershed, and may lose their rights through non-use. (*Crandell v. Woods* (1857) 8 Cal. 136, 142; *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256; Wat. Code, § 1241; *Smith v. Hawkins* (1898) 120 Cal. 86, 88.) An appropriator may change the point of diversion, place of use, or purpose of the water use, so long as such changes do not harm other legal users of water or initiate a new right. (Wat. Code, §§ 1700-1707; Hutchins (1956) *The California Law of Water Rights*, p. 175.) Prior to December 19, 1914, the effective date of the Water Commission Act, diligent appropriation and application of the water to beneficial use sufficed to establish the right. Appropriative rights established before that time are referred to as "pre-1914 rights."

Since 1914, obtaining a water right permit from the State Water Board (or its predecessor agency) pursuant to division 2 (commencing with section 1000) of the Water Code has been the exclusive means to obtain an appropriative water right. (Wat. Code, § 1225; *Pleasant Valley Canal Co., supra*, 61 Cal.App.4th at p. 777.) Division 2 of the Water Code sets forth a comprehensive regulatory scheme designed to ensure that water rights are exercised in an orderly fashion, and that the water resources of the State are put to beneficial use to the fullest extent possible. (*People v. Shirokow* (1980) 26 Cal.3d 301, 308-309.) Under division 2, the State Water Board issues permits and licenses that authorize the use of water, subject to specified conditions.

Among the State Water Board's responsibilities, in addition to administering the permit and license system under division 2 of the Water Code, are the prevention of the waste or unreasonable use of water, the protection of instream beneficial uses, and the protection of the public interest. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.) The public trust doctrine also imposes upon the State Water Board the affirmative duty to protect public trust interests in water - including interests in commerce, fisheries, recreation, and ecology - in navigable water bodies. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The public trust doctrine

also applies to activities that harm the fishery in a non-navigable water. (*People v. Truckee Lumber Co.* (1897) 116 Cal. 397; see *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585.)

Among the powers granted to the State Water Board to enforce the Water Code is the authority to issue a cease and desist order upon the State Water Board's determination that any person is violating, or threatening to violate, the prohibition against unauthorized diversion or use of water set forth in Water Code section 1052. (Wat. Code, § 1831, subds. (a), (d)(1).) Water Code section 1052 provides that the diversion or use of water subject to division 2 of the Water Code in a manner other than that authorized under division 2 is a trespass.

III. NATURE OF PETITIONERS' WATER RIGHTS

Petitioners argue they have been deprived of property in the form of "claimed riparian and pre-1914 appropriative rights." (Young Decl., para. 4; Del Carlo Decl., para. 4; Schmidt Decl., para. 4; Yelland Decl., para. 4.) Petitioners also claim "other rights." (Young Decl., Ex. B; Del Carlo Decl., Ex. E; Yelland Decl., Ex. B.)[3] Petitioners do not allege what portion of the alleged rights are riparian, appropriative, or "other." Petitioners do not make any claim as to the size of the rights, either in terms of volume, rate, or otherwise. Petitioners make no attempt to quantify their rights by season or month. Petitioners claim a priority date of "approximately 1909." (Young Decl., para. 5; Del Carlo Decl., para. 5; Schmidt Decl., para. 5; Yelland Decl., para. 5.) Elsewhere, three Petitioners claim a priority date generally of the "1800s." (Young Decl., Ex. B; Del Carlo Decl., Ex. E; Yelland Decl., Ex. B.) Not only are Petitioners' claims extremely vague, Petitioners' mere claims of right fall far short of proving that Petitioners do in fact hold valid water rights.

STANDARD OF REVIEW

Code of Civil Procedure section 1094.5 governs judicial review of water rights orders. (Wat. Code, § 1126, subd. (c).) The Court's inquiry under section 1094.5 extends to "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and

[3] These exhibits are Statements of Water Diversion and Use, which are not evidence of a water right. (Wat. Code, § 5106, subd. (a).)

whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) In any case involving judicial review of a water right cease and desist order where it is claimed that the findings are not supported by the evidence, the Court exercises its independent judgment on the evidence. (Wat. Code, § 1126, subd. (c).) However, the State Water Board's findings must be afforded a strong presumption of correctness, and Petitioners bear the burden of proving that the Board's findings are contrary to the weight of the evidence. (*Fukada v. City of Angels* (1999) 20 Cal.4th 805, 817.) Furthermore, it is Petitioners' burden to produce an adequate record, and without it the Court must presume the State Water Board's findings are supported by the evidence. (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 354.)

ARGUMENT

I. PETITIONERS HAVE NOT BEEN DENIED DUE PROCESS

In their first cause of action, Petitioners claim they have been deprived of due process. "A person may not be deprived of . . . property without due process of law." (Cal. Const., Art. I, § 7, subd. (a).) Procedural due process guarantees apply to "governmental deprivation of a significant property interest." (*Laupheimer v. California* (1988) 200 Cal.App.3d 440, 450; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Petitioners claim that the State Water Board violated the due process clause of the Constitution because Petitioners were not allowed to avail themselves of the notice and hearing process delineated in Water Code section 1834 before the State Water Board issued the Order against Woods. Petitioners have the burden to prove the elements of their claim. (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal. App. 4th 156; *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal. App. 4th 98, 106; See also *Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 817; *Dowell v. Superior Court of San Francisco* (1956) 47 Cal. 2d 483, 492.) To carry that burden, Petitioners must show: 1) Petitioners hold a protected property interest; 2) the State Water Board deprived Petitioners of said property interest; and 3) Petitioners were not afforded due process when deprived of said property interest. (Cal. Const., Art. I, § 7.) Petitioners have failed on all three counts. They have

not asserted, much less proven, what property they hold. They have not shown any deprivation. They have not demonstrated that the State Water Board failed to comply with the process requirements in Water Code section 1834. For all three of these reasons, Petitioners' first cause of action must fail.

A. Petitioners have not asserted, much less proven, what property rights they hold.

A legitimate claim of entitlement is required before due process rights attach. (Cal. Const., Art. I, section 7; *Laupheimer v. California* (1988) 200 Cal.App.3d 440, 450; *Board of Regents v. Roth* (1972) 408 U.S. 564, 577; *Fuchs v. Los Angeles County Civil Service Com.* (1973) 34 Cal.App.3d 709, 715 [worker's hope of promotion did not constitute protected property interest].) "A due process right to a hearing cannot be assessed in the abstract." (*Laupheimer v. California, supra,* 200 Cal.App.3d at p. 456.)

Petitioners claim to have been deprived of the right to divert water for irrigation pursuant to riparian or pre-1914 water rights, but they have not provided evidence that supports their claim to water rights; they have not even made a definite claim as to what extent or type of rights they possess. Nowhere in the Petition or Petitioners' brief do Petitioners state what water rights they claim to have, beyond a vague claim of "riparian and pre-1914 rights." (See, e.g., Young Decl., para. 4; Del Carlo Decl., para. 4; Schmidt Decl., para. 4; Yelland Decl., para. 4.) Before making a ruling on Petitioners' due process claim, the court must of necessity make a determination of what rights Petitioners hold. After all, the Court cannot determine whether the limitations in the Order deprived Petitioners of property if the Court does not know what property Petitioners hold. Petitioners have failed to provide this information to the Court. What volume or rate of diversion do Petitioners claim under pre-1914 appropriative rights? How many acres of riparian property do Petitioners hold? What is the reasonable amount of use for those acres?[4] Petitioners have not even made assertions as to the extent of their rights, much less provided the Court with evidence to support those assertions.[5] Petitioners cannot show that the Order, limiting diversion by Woods

[4] As discussed above, riparian rights are limited to use on the riparian lands, and all water use is constrained to reasonable use. (Cal. Const., Art. X, § 2.)

[5] Other than the two 1911 water supply contracts attached as exhibits to their petition, Petitioners have not (continued...)

to 77.7 cfs, deprived Petitioners of a right unless they first delineate the right they claim to hold and make some showing to the Court that they indeed own what they claim. Absent this foundational showing, a fundamental element of a due process cause of action is missing, and Petitioners' first cause of action must fail.

B. Petitioners have not shown that the Order deprived them of a protected property interest

1. Petitioners have not shown the Order will limit legal deliveries of water from Woods

Even if Petitioners were to demonstrate to the Court what water rights they hold, they must still show that the Order - limiting Woods' diversions to 77.7 cfs - deprived Petitioners of a property interest. (Cal. Const., Art. I, § 7; *Laupheimer v. California, supra,* 200 Cal.App.3d at p. 450.) Petitioners have not done this. The only evidence before the Court touching on this issue consists of two 1911 contracts demonstrating Woods' total contractual delivery obligations. Those obligations equal 77.7 cfs. (See the Order, p. 28.) The Order limits diversions by Woods to that same 77.7 cfs. Absent a showing of some right to more than 77.7 cfs, Petitioners have not even shown a contractual impairment, much less a deprivation of property.[6]

Petitioners themselves assert only that they "understand that if diversions are limited to 77.7 cfs during the irrigation season there will not be sufficient water to irrigate the crops grown on [Petitioners'] property." (Young Decl., para. 7; Del Carlo Decl., para. 7; Schmidt Decl., para. 7; Yelland Decl., para. 7.) Petitioners do not provide any basis for this "understanding." The record before the Court evidences only one instance when diversions exceeded 77.7 cfs (the Order, p. 6),

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(...continued)
provided any evidence that they or their predecessors acquired pre-1914 appropriative rights by diverting water and applying it to beneficial use prior to 1914. Similarly, Petitioners have provided little or no evidence in support of their claimed riparian rights. The minimal information Petitioners provide the Court suggests the only Petitioner with riparian property is either Ronald and Janet Del Carlo or R.D.C. Farms, Inc., and that parcel is very small. (Del Carlo Decl., Ex. A [map highlighting one parcel contiguous to Middle River]; compare Young Decl., Ex. A [map highlighting no contiguous parcels]; Yelland Decl., Ex. A [same]; Schmidt Decl., Ex. A [same].)

[6] It is worth noting that the Order only determines that there is not sufficient evidence to impose a cease and desist order for diversions up to 77.7 cfs. It does not determine that Woods actually has the right to divert 77.7 cfs. In this respect, the Order is a conservative imposition of regulatory authority. The State Water Board gave all reasonable inferences to Woods so as to allow for the full 77.7 cfs diversion. Those inferences do not necessarily inure to Petitioners' claims, and nothing in the Order suggests that greater diversion restrictions than those imposed in the Order would deprive anyone of a valid water right.

and no evidence that diversion was pursuant to a legal right. Petitioners have failed to explain to the Court how the State Water Board has deprived Petitioners of any protected property interest.

2. Regardless, limiting Woods' deliveries cannot effect a deprivation of Petitioners' property interest

Even if the Order had the effect of limiting legal deliveries of water from Woods to Petitioners, this would still not demonstrate a deprivation of Petitioners' property. The Order makes no finding as to the extent of Petitioners' rights, and Petitioners were not parties to the State Water Board adjudicative proceeding. To the extent Petitioners have riparian or pre-1914 rights, they still have them. That would be the case even if Woods was flatly prohibited from making deliveries to Petitioners. A decision that affects the manner in which a right may be used is not the same as a decision determining or extinguishing the right. (See *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 721.) More importantly, the Order does not impose any conditions on the Petitioners as to whether and how they exercise their rights -- it imposes conditions only on Woods. Those conditions may affect Wood's ability to make deliveries, but Petitioners cite no authority for the proposition that imposing conditions on the operations of a business deprives that business' customers of the property that the business serves. Put another way, the property right in water includes an amount, a point of diversion, a place of use and a purpose of use. It does not include a right to have the water delivered by any particular company.

C. The State Water Board followed the procedures required in Water Code section 1834.

Petitioners claim that the State Water Board did not follow the procedural mandates of Water Code section 1834. Before issuing a cease and desist order for unauthorized diversion of water, the State Water Board must give notice and an opportunity for a hearing "to the person allegedly engaged in the violation." (Wat. Code, § 1834, subd. (a).) The Order does not allege a violation by Petitioners, and it does not impose any requirements or prohibitions on Petitioners. Therefore, section 1834 does not require that Petitioners be given notice and an opportunity for a hearing.

The administrative proceeding that culminated in the adoption of the Order was conducted in accordance with chapter 4.5 of the Administrative Procedure Act (Gov. Code, § 11400 et seq.) (APA). Under the APA's Administrative Bill of Rights, procedural protection is granted to "the person to which the agency action is directed." (Gov. Code, § 11425.10, subds. (a)(1) & (2).) Again, the Order is not directed to Petitioners, but to Woods, and Woods, as the affected party, received due process.[7]

Petitioners claim Woods was not authorized to represent and defend them, and that a corporation cannot litigate a matter that "impacts an absent shareholder." (Petitioners' Brief, p. 12.) But corporations routinely defend litigation that affects their shareholders without joining their shareholders, even though shareholders necessarily will be impacted by any order that affects the corporation's profitability or ability to stay in business. So too here, where an enforcement action is brought against a water company, and the remedy does not impose any enforceable obligation on any entity except the company itself, the company may defend itself, and it is not necessary to join the shareholders, or the customers. An order issued to a business does not deprive its customers or shareholders of due process, even though the impact on the business may very well impact its customers or shareholders.

Petitioners have not demonstrated that the Order deprived them of a protected property interest. The Order does not require or prohibit anything from Petitioners. It does not bind Petitioners, and is not directed at Petitioners. Petitioners' due process cause of action should be denied.

[7] Furthermore, Petitioners were given the opportunity to submit information to the deputy director demonstrating that they hold water rights that authorize an increase in deliveries from Woods. They have chosen not to avail themselves of this option. Moreover, Petitioners have not shown that such demonstration could not still occur prior to any alleged deprivation. There is still ample time to present evidence of additional water rights before the limitation on Woods diversions will curtail deliveries. Woods can divert 77.7 cfs without any showing, and it is unlikely that more than that will be needed, if ever, until peak deliveries are required, probably late in the irrigation season.

II. THE STATE WATER BOARD DID NOT EXCEED ITS JURISDICTION WHEN IT ISSUED THE ORDER AGAINST WOODS

A. A Diverter cannot evade State Water Board jurisdiction by simply claiming it is outside State Water Board jurisdiction

Petitioners' second cause of action contends that the State Water Board lacked authority to issue the Order. Petitioners base their argument on Water Code section 1831, which only authorizes the Board to issue a cease and desist order in cases involving the diversion of surface water subject to regulation pursuant to division 2 of the Water Code, and riparian and pre-1914 appropriative rights are not subject to regulation pursuant to division 2. Petitioners argue that, based on section 1831, a diverter may place itself outside the jurisdiction of the State Water Board simply by claiming, without substantiation, that it holds a riparian or pre-1914 appropriative right.

Petitioners' contention regarding the State Water Board's authority lacks merit because it is inconsistent with the Board's statutory authority to investigate and take enforcement action against the unauthorized diversion or use of water. Water Code section 1051 authorizes the Board to investigate, take testimony, and ascertain whether water attempted to be appropriated is appropriated in accordance with state law. (See also Wat. Code, § 183 [authorizing the Board to hold hearings and conduct investigations to the extent necessary to carry out the powers vested in it].) If the Board finds that a person has diverted or used water without authorization, the Board may impose administrative civil liability in an amount not to exceed five hundred dollars for each day during which the unauthorized diversion or use occurred. (Wat. Code, § 1052, subds. (a) & (b).) The Board also has authority to issue a cease and desist order in response to a violation or threatened violation of the prohibition against the unauthorized diversion or use of water. (Wat. Code, § 1831, subd. (d)(1).) The Legislature has directed the Board to take vigorous action to prevent the unlawful diversion of water. (Wat. Code, § 1825.)

Water Code section 1831, subdivision (d)(1) authorizes the Board to issue a cease and desist order in response to the unauthorized diversion or use of water "subject to [division 2 of the Water Code (commencing with section 1000)]." Section 1831, subdivision (e) provides that the Board's authority to issue a cease and desist order does not authorize the Board to regulate the

diversion or use of water "not otherwise subject to regulation of the board under [part 2 of the Water Code (commencing with section 1200)]." Petitioners argue that riparian and pre-1914 appropriative rights are not subject to regulation under division 2 of the Water Code (which includes part 2), and therefore Water Code section 1831 does not authorize the State Water Board to issue a cease and desist order against a diverter who claims to hold a riparian or pre-1914 appropriative right.

This argument is flawed because it begs the question, namely whether a given diversion claimed to be authorized by a riparian or pre-1914 appropriative right is in fact authorized by a valid riparian or pre-1914 appropriative right. If it is not, the diversion is unauthorized, and therefore subject to enforcement action. Petitioners are correct that the diversion of water consistent with a valid riparian or pre-1914 appropriative right would not constitute an unauthorized diversion of water subject to division 2 of the Water Code and would not be subject to a cease and desist order pursuant to Water Code section 1831, subdivision (d)(1). (See Wat. Code, §§ 1201, 1202.) But if the claimed riparian or pre-1914 appropriative right in question is not valid, then the diversion of water under the claimed right would constitute an unauthorized diversion of water subject to division 2 of the Water Code, and the diversion would be subject to a cease and desist order pursuant to Water Code section 1831, subdivision (d)(1). Similarly, a diversion would be unauthorized and subject to enforcement action to the extent that it exceeds the amount of water that may be diverted under a valid right, or is otherwise inconsistent with the parameters of the right.[8]

[8] Another problem with Petitioners' interpretation of Water Code section 1831 is that their assertion that riparian and pre-1914 appropriative rights are not subject to regulation under division 2, part 2 is overbroad and incorrect. Although water diverted and used under valid riparian and pre-1914 appropriative rights is not subject to appropriation pursuant to part 2 of the Water Code (see Wat. Code, §§ 1201, 1202), riparian and pre-1914 appropriative rights are not completely unregulated. (See, e.g., Wat. Code, §§ 1707 [authorizing the Board to approve a petition to change any type of right for purposes of protecting instream, beneficial uses], 2500-2900 [authorizing the Board to determine all the rights to a stream system]; 5101 [requiring all diverters to file statements of diversion of use, unless certain exceptions apply].)

Essentially, Petitioners argue that a diverter can baldly claim its diversions are authorized by riparian and pre-1914 appropriative rights, and the diverter can then assert on this basis that the State Water Board lacks the authority to decide whether the diversions are authorized (and take enforcement action if they are not). The United States Supreme Court rejected a similar argument that an entity can avoid an agency's jurisdiction by claiming to be exempt from the agency's jurisdiction in *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609. In that case, the Court rejected the contention that the Food and Drug Administration (FDA) lacked jurisdiction to determine the validity of a manufacturer's claim that a certain drug was not a "new drug," within the meaning of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 301 et seq.), and therefore the manufacturer was exempt from the Act's requirement to submit substantial evidence of the drug's effectiveness to the FDA, and obtain FDA approval of a new drug application (NDA). (*Id.* at pp. 623-627.) The Court held:

> It is clear to us that FDA has power to determine whether particular drugs require an approved NDA in order to be sold to the public. FDA is indeed the administrative agency selected by Congress to administer the Act, and it cannot administer the Act intelligently and rationally unless it has authority to determine what drugs are 'new drugs' . . . and whether they are exempt from the efficacy requirements . . . .

(*Id.* at p. 624.) Likewise, the State Water Board cannot administer the water right permit system effectively, or carry out its statutory mandate to prevent the unlawful diversion of water, unless it has authority to decide the validity of a diverter's claim to be exempt from the permitting system. In many cases, such as this one, this will entail evaluating the validity of a diverter's riparian or pre-1914 appropriative claim of right.

The Court of Appeal's holding in *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89 lends further support to the conclusion that the State Water Board has authority to take enforcement action against a diverter who claims to hold a riparian or pre-1914 appropriative right if the Board determines that the claim is invalid. The *Phelps* case involved administrative enforcement proceedings similar to this proceeding. In that case, the State Water Board concluded that certain individuals had diverted and used water illegally, and issued an order imposing administrative civil liability against them. (State Water Board Order WR

2004-0004.) In reaching the conclusion that the individuals had diverted water illegally, the State Water Board addressed the individuals' riparian and pre-1914 appropriative claims of right, and concluded that the individuals' diversion and use of water was not authorized by valid riparian or pre-1914 appropriative rights. (*Id.* at pp. 23-29, 34.)

On appeal, the court upheld the State Water Board's conclusions regarding the individuals' riparian and pre-1914 appropriative claims. (*Phelps v. State Water Resources Control Board, supra*, 157 Cal.App.4th at pp. 116-119.) Although the Board's authority to decide the validity of the individuals' claims was not challenged in *Phelps*, so that the Court did not expressly address that issue, the conclusion that the State Water Board did not exceed its authority by addressing the individuals' claims and taking enforcement action is implicit in the Court's holding.[9]

In this case, Woods' diversions were not authorized by a water right permit or license issued by the State Water Board. Accordingly, the State Water Board had to evaluate whether diversions were authorized by valid riparian or pre-1914 appropriative rights in order to determine whether the diversions were unauthorized diversions subject to enforcement action. After reviewing extensive evidence submitted at the hearing, the Board rejected Woods' claim that its diversions in excess of 77.7 cfs were authorized by riparian and pre-1914 rights, and found that Woods was threatening to divert in excess of 77.7 cfs without a known basis of right. (The Order at pp. 30-37, 61.) In the absence of the Board's administrative record, the Court must presume that the Board's finding is supported by the evidence (*Elizabeth D. v. Zolin, supra*, 21 Cal.App.4th at p. 354.), and therefore the State Water Board had the authority to issue a cease and desist order against Woods for the threatened unauthorized diversion of water.

B. The State Water Board need not file a complaint with the superior court to enjoin unauthorized diversions.

Petitioners further argue that the State Water Board can only investigate and seek injunctive relief against diverters claiming riparian and pre-1914 rights by requesting aid from the Attorney

[9] (See also *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1589 [holding that the State Water Board's interpretation of the statutory definition of a subterranean stream was entitled to judicial deference because the Board's permitting authority over groundwater is limited to water flowing in subterranean streams and the Board has the power to determine whether groundwater is subject to the Board's permitting authority].)

General and filing a complaint with the superior court, as set forth in Water Code section 1052, subdivision (c). (Petitioners' Memorandum in Support of Petition for Writ (Petitioners' Brief), pp. 13-14.) Petitioners argue that the few reported decisions addressing a State Water Board challenge to the validity of a claimed riparian or pre-1914 stem from injunctive relief actions filed in superior court by the Attorney General, and they cite to *People v. Shirokow* (1980) 26 Cal.3d 301 as an example.

Petitioners overlook the *Phelps* decision, discussed above. In addition, the investigatory procedure used in *Shirokow* is of limited value in determining the State Water Board's authority in this proceeding because *Shirokow* was decided before the Water Code was amended to authorize the Board to initiate administrative enforcement proceedings in response to the unauthorized diversion or use of water. *Shirokow* was decided in 1980. Water Code sections 1052 and 1831 were not amended to authorize the State Water Board to impose administrative civil liability or issue a cease and desist order in response to the unauthorized diversion or use of water until 1987 and 2002, respectively. (Stats. 1987, ch. 756, § 1; Stats. 2002, ch. 652, § 6.)

Petitioners suggest it is notable that there is a dearth of reported decisions addressing a State Water Board challenge to the validity of a claimed riparian or pre-1914 appropriative right stemming from the Board's exercise of its cease and desist power. (Petitioners' Brief, p. 13:20-22.) The State Water Board agrees that this lack of appellate challenge is notable, particularly because, since Water Code sections 1052 and 1831 were amended, the Board has consistently exercised that authority.[10] The lack of appellate review is not because the State Water Board has not used the authority on a regular basis, but because diverters have not challenged that authority.

For the foregoing reasons, Petitioners' argument that the State Water Board exceeded its jurisdiction by issuing the Order lacks merit. Consistent with the State Water Board's statutory

[10] See, for example, State Water Board Order WR 2001-22 at pp. 25-26, 65 [requiring a report substantiating a claimed pre-1914 appropriative right]; Order WRO 2004-0004 at pp. 23-29, 34-35 [imposing administrative civil liability after concluding that diverters did not hold valid riparian or pre-1914 appropriative rights]; Order WR 2006-0001 at pp. 12-16, 20-21 [imposing administrative civil liability and issuing a cease and desist order after determining the validity and extent of a claimed pre-1914 right and concluding that the diverter had diverted more water than authorized under the right]; Order WR 2009-0060 at pp. 5-6, 57 [issuing a cease and desist order for diversions in excess of total amount authorized to be diverted under both permitted and licensed rights and riparian and pre-1914 appropriative rights previously quantified by the Board].

authority to investigate and take enforcement action in response to unauthorized diversions, the Board has the authority to evaluate the pre-1914 appropriative and riparian claims of right advanced by diverters to the extent necessary to determine whether those diversions are unauthorized, in whole or in part, and whether it would be appropriate to issue a cease and desist order.

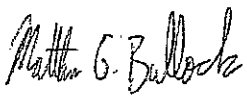
CONCLUSION

For the reasons stated above, the writ petition must be denied.

Dated: March 28, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DENISE FERKICH HOFFMAN
Supervising Deputy Attorney General



MATTHEW G. BULLOCK
Deputy Attorney General
Attorneys for
State Water Resources Control Board

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EXHIBIT A

State Water Resources Control Board

Division of Water Rights

1001 I Street • Sacramento, California 95814• (916) 341-5300
Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000
FAX (916) 341-5400 • http://www.waterboards.ca.gov/waterrights

Linda S. Adams
Acting Secretary for Environmental Protection

Edmund G. Brown Jr.
Governor

February 17, 2011

VIA ELECTRONIC MAIL

TO: Enclosed Mailing List

ORDER 2011-0005 ISSUING A CEASE AND DESIST ORDER

Enclosed is Order 2011-0005, which was adopted by the State Water Resources Control Board (State Water Board) on February 1, 2011. A copy of the order will also be posted at: http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/wro2011.shtml
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/woods_irrigation/index.shtml

No later than 30 days after adoption of the order, any interested person may petition the State Water Board for reconsideration of the matter upon any of the following causes: (Cal. Code Regs. tit. 23, § 768)

(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
(b) The decision or order is not supported by substantial evidence;
(c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
(d) Error in law.

Petitions should be addressed to:

Charles L. Lindsay, Chief
Hearings Unit
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
Email: llindsay@waterboards.ca.gov

Petitions for reconsideration may also be hand delivered to the following address:

Records Unit
Attention: Charles L. Lindsay
Division of Water Rights
State Water Resources Control Board
Cal/EPA Headquarters
1001 I Street, 2nd Floor
Sacramento, CA 95814-2828

Couriers delivering petitions for reconsideration must check in with lobby security and have them contact the Division of Water Rights Records Unit, second floor. The Records Unit will receive and date-stamp the petitions.

If you have any questions regarding this letter, please contact me at (916) 341-5359, or at emona@waterboards.ca.gov.

Sincerely,

Ernest Mona
Hearings Unit

Enclosures:
E-Mail Service List
Order

WOODS IRRIGATION COMPANY CDO HEARING
ORDER 2011-0005 SERVICE LIST
(VIA ELECTRONIC MAIL)

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MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin O'Laughlin & Paris LLP PO. Box 9259 Chico, CA 92927 towater@olaughlinparis.com kpetruzzelli@olaughlinparis.com vkincaid@olaughlinparis.com	STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moscovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 spowell@kmtg.com
THE SAN LUIS & DELTA-MENDOTA WATER AUTHORITY Jon D. Rubin/Valerie C. Kincaid Diepenbrock ♦ Harrison 400 Capitol Mall, 18th Floor Sacramento, CA 95814 jrubin@diepenbrock.com jseaton@diepenbrock.com	CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com
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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-0005

In the Matter of
Draft Cease and Desist Order Against
Unauthorized Diversions by
Woods Irrigation Company

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ORDER ISSUING A CEASE AND DESIST ORDER

BY THE BOARD:

1.0 INTRODUCTION

This order issues a Cease and Desist Order (CDO) against Woods Irrigation Company (Woods), requiring that Woods cease and desist diverting from Middle River at a rate not to exceed 77.7 cubic feet per second (cfs) unless it meets certain requirements.

This order is based on the record of an adjudicative hearing conducted by the State Water Resources Control Board (State Water Board or Board) on June 7, 10, 24, 25 & 28 and July 2, 2010, which was first noticed on April 7, 2010. The hearing proceedings were governed under California Code of Regulations, title 23, section 648 et seq. and the statutes specified in the regulations. In the hearing, a Prosecution Team made up of individuals in the State Water Board, Division of Water Rights (Division) and counsel appeared and presented evidence and argument in favor of the draft CDO. The Prosecution Team was separated by an ethical wall from the State Water Board hearing team, barring ex parte communications regarding substantive issues and controversial procedural issues within the scope of the hearing.

As there is insufficient evidence to determine that diversions up to 77.7 cfs are unauthorized, the CDO does not prohibit Woods's diversions in their entirety, as urged by parties Modesto Irrigation District, San Luis and Delta-Mendota Water Authority, and State Water Contractors (collectively, the MSS parties). The evidence indicates that Woods or landowners within the Woods original service area had the intention before 1914 to divert up to 77.7 cfs of water for irrigation within its original service area, that Woods had an irrigation system in place to cover a significant amount of the service area prior to 1914, and that Woods expanded the water management works after 1911. The evidence further indicates that some of this water was diverted under the riparian rights of Woods landholders, while some of it was diverted under appropriative rights. Additionally, the evidence indicates that the water rights associated with the 77.7 cfs Woods diversion passed with the land as it was subdivided subsequent to the 1911 service contracts executed between Woods and individual landowners. While the evidence proffered is not necessarily sufficient to definitively establish the existence and scope of the water rights for all purposes (for example, as against a competing water right holder who claims a lack of due diligence), it is sufficient for the State Water Board to decline to issue an enforcement order halting those diversions.

Woods has presented several legal theories under which all lands in the Woods service area would have maintained riparian water rights. The State Water Board rejects these theories.

The evidence further establishes that Woods has the capacity to divert, and has in the past diverted, at a rate higher than 77.7 cfs; that Woods does not monitor how much water it diverts, or to whom it delivers; and that Woods does not track under what claim of right water is diverted. This CDO prohibits such diversions, to the extent that diversions in excess of 77.7 cfs are not being used solely for increased need on riparian lands identified in this order, or to serve other rights for which Woods offers sufficient proof in the future. In order to abate the threat of unlawful diversions, the CDO also requires monitoring and reporting, including an accounting of how much water is delivered to whom and under what basis of right. The order also requires Woods to stop providing water outside of its original service area, absent a showing to the satisfaction of the Deputy Director for Water Rights (Deputy Director) that such landowners either have their own water rights or that other lands within the Woods service area have reduced their use in an amount commensurate with the deliveries to lands outside the original service area.

As the individual landowners within the Woods service area did not present evidence regarding their rights in this proceeding, the CDO accounts for the possibility that additional landowners within the Woods service area may provide evidence of valid water rights that would enable them to receive additional water beyond that covered by the 77.7 cfs diversion. The CDO provides for revisions based upon submission of evidence of such rights that satisfies the Deputy Director.

2.0 BACKGROUND AND PROCEDURE

Woods is an irrigation company that diverts water from Middle River, conveys the water to customers in a service area on Middle Roberts Island, and provides drainage services to a slightly larger area on Middle Roberts Island, as depicted on the map in Exhibits WIC 6A & WIC 6S.[1] While Woods owns the pumps and operates the irrigation and drainage system, it does not have title to any irrigated lands within the service area. (RT, Vol. II, pp. 451:25-452:7.)

[1] Throughout this Order, citations to the record indicate where in the record support for the statement is found. However, it does not indicate that such citation is the only support for the contention, or that other information regarding the issue was not considered. The State Water Board has looked at the record as a whole in reaching its conclusions.

On February 18, 2009, the Division requested by letter that Woods submit information supporting its right to divert water. (Exhibit PT-4.) From March to October of 2009, Woods and the Division communicated regarding information to support water rights for Woods's diversions at Middle River, and the Division inspected the facilities twice. (See Exhibit PT-1, p. 2.) Division staff measured a combined diversion rate of 90 cfs during the second inspection. (*Ibid.*)

On December 28, 2009, the Assistant Deputy Director for Water Rights issued a notice of proposed cease and desist order, including a draft CDO, to Woods for the alleged violation and threatened violation of the prohibition against the unauthorized diversion or use of water. (Exhibit PT-7.) The draft CDO would have required, in summary, that Woods end diversions in excess of 77.7 cfs unless and until Woods met conditions within specified timeframes, including:

(1) Filing a Statement of Water Diversion and Use that contained sufficient support for Woods's claimed pre-1914 appropriative right and any other type of right exercised at Woods's diversions.

(2) Submitting a list of all properties and owners receiving water delivered by Woods's facilities, including the basis of right for any properties receiving water either outside Woods's service area, or in excess of Woods's claimed pre-1914 right. If no basis of right acceptable to the Assistant Deputy Director for Water Rights were established for a property, Woods would immediately cease delivery of water to that property.

(3) Providing a monitoring plan that included: a schedule for measuring diversions and discharges; measures to ensure reasonable beneficial use of diverted water and to minimize discharges back into Delta waters; and a representation of the process Woods will take to ensure the above measurements occur.

By letter dated January 11, 2010, Woods requested a hearing. (Exhibit PT-8.) On April 7, 2010, the State Water Board issued a notice for a hearing to be held on June 7, 2010. The hearing notice identified the key hearing issues as:

(1) Should the State Water Board adopt the draft CDO?

(2) If the draft CDO is adopted, should any modifications be made to the measures in the draft order, and what is the basis for any such modifications?

The State Water Board received timely Notices of Intent to Appear at the Woods CDO hearing from:

- Woods Irrigation Company (Woods)
- The State Water Board's Prosecution Team (Prosecution Team)
- Modesto Irrigation District (MID)
- San Luis and Delta-Mendota Water Authority (SLDMWA)
- State Water Contractors (SWC)
- County of San Joaquin and San Joaquin County Flood Control and Water Irrigation District (County)
- Central Delta Water Agency (CDWA)
- South Delta Water Agency (SDWA)

County, CDWA and SDWA requested to participate, but not present direct testimony.

The hearing was held but not completed on June 7, 2010, and on June 10, 2010, the State Water Board noticed continuance of the hearing on June 24, 25, and 28, 2010. The parties agreed to these continuance dates. The hearing was held but not completed on June 24, 25, and 28, 2010. On June 28, 2010, the State Water Board noticed continuance of the hearing for June 29, 2010. However, on June 28, 2010, Woods, joined by County, SDWA and CDWA, requested that the hearing be continued for a later date, and the parties agreed to July 2, 2010. On June 29, 2010, the State Water Board noticed continuance of the hearing, and it was held and completed on July 2, 2010.

3.0 LEGAL BACKGROUND

Before addressing the arguments raised specifically concerning the Woods CDO Hearing, a brief overview of California water rights law would be helpful. California law recognizes two principal types of rights to the use of surface water at issue in this matter: riparian rights and appropriative rights. Riparian rights generally attach to the smallest parcel of real property contiguous to a watercourse held under one title in the chain of title leading to the present owner. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 774-775.) Riparian rights are limited to the natural flow of the watercourse. (*Bloss v. Rahilly*, 16 Cal.2d 70, 75-76.) Riparian rights are correlative relative to each other; where flows are insufficient to satisfy all riparian right holders on a given watercourse, the riparian right holders must reduce their diversions proportionately. (*Prather v. Hoberg* (1994) 24 Cal.2d 549, 560.) Riparian rights have a priority date relative to appropriative rights based on when the parcel at issue was patented, and are not lost by non-use. (*Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 251; *Lux v.*

Haggin (1886) 69 Cal. 255, 390.) This order discusses riparian rights in more detail in sections 4.2 and 4.4.

Users acquire appropriative rights by diverting water and applying it to beneficial use. The maxim "first in time, first in right" governs the relative priority of appropriative rights and the rights of senior appropriators are served completely before those of junior appropriators. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.) Appropriators may develop rights regardless of land ownership or use on the land, may use the water outside of the watershed, and may lose their rights through non-use. (*Crandell v. Woods* (1857) 8 Cal. 136, 142; *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256; Wat. Code, § 1241; *Smith v. Hawkins* (1898) 120 Cal. 86, 88.) An appropriator may change the point of diversion, place of use or purpose of the water use, so long as such changes do not harm other legal users of water or initiate a new right. (Wat. Code, §§ 1700-1707; Hutchins (1956) *The California Law of Water Rights*, p. 175.) Prior to December 19, 1914, the effective date of the Water Commission Act, diligent appropriation and application of the water to beneficial use sufficed to establish the right. Appropriative rights established before that time are referred to as "pre-1914 rights." Since that date, obtaining a water right permit from the State Water Board (or its predecessor agency) pursuant to division 2 (commencing with section 1000) of the Water Code has been the exclusive means to obtain an appropriative water right. (Wat. Code, § 1225; *Pleasant Valley Canal Co., supra*, 61 Cal.App.4th at p. 777.) Division 2 of the Water Code sets forth a comprehensive regulatory scheme designed to ensure that water rights are exercised in an orderly fashion, and that the water resources of the State are put to beneficial use to the fullest extent possible. (*People v. Shirokow* (1980) 26 Cal.3d 301, 308-309.) Under division 2, the State Water Board issues permits and licenses that authorize the use of water, subject to specified conditions. This order discusses pre-1914 rights in more detail in section 4.3.

Among the State Water Board's responsibilities, in addition to administering the permit and license system under division 2 of the Water Code, are the prevention of the waste or unreasonable use of water, the protection of instream beneficial uses, and the protection of the public interest. (Cal. Const., art. X, § 2; Wat. Code, §§ 100, 275.) The public trust doctrine also imposes upon the State Water Board the affirmative duty to protect public trust interests in water, including interests in commerce, fishery, recreation, and ecology, in navigable water bodies. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The public trust doctrine also applies to activities that harm the fishery in a non-navigable water. (*People v. Truckee Lumber Co.* (1897) 116 Cal. 397; see *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585.)

Among the powers granted to the State Water Board to enforce the Water Code is the authority to issue a CDO on the determination that any person is violating, or threatening to violate the prohibition against unauthorized diversion or use of water set forth in Water Code section 1052. (Wat. Code, § 1831, subds. (a), (d)(1).) Water Code section 1052 provides that the diversion or use of water subject to division 2 of the Water Code in a manner other than that authorized under division 2 is a trespass. State Water Board Resolution No. 2007-0057 delegates authority to the Deputy Director to issue a CDO where no hearing has been timely requested. The October 4, 2007, Memorandum of Victoria A. Whitney redelegates this authority to the Assistant Deputy Director.

Water Code section 1845, subdivision (b) provides that any person who does not comply with a CDO may be liable for an amount not to exceed one thousand dollars for each day in which the violation occurred. In addition to imposing administrative civil liability pursuant to this provision, the State Water Board may request the Attorney General to petition the superior court for injunctive relief. (*Id.*, § 1845, subd. (a).)

4.0 DISCUSSION

4.1 The State Water Board Has Authority to Evaluate the Validity and Extent of the Pre-1914 Appropriative and Riparian Claims of Right Advanced by Woods to the Extent Necessary to Decide Whether Woods's Diversions Are Unauthorized

Woods et al.[2] and County contend that the State Water Board lacks authority to issue a cease and desist order against Woods, or to impose any monitoring or reporting requirements on Woods, because Woods claims to hold a pre-1914 appropriative water right, and Woods claims that the property owners within its service area hold riparian water rights. In support of this contention, Woods et al. and County argue that the Water Code does not expressly authorize the Board to determine the validity or extent of a riparian or pre-1914 appropriative claim of right, except in a statutory adjudication to determine all of the rights to water of a stream system (see Wat. Code, §§ 2500-2900), or in a court reference to the State Water Board of a suit for a determination of the rights to water (see Wat. Code, §§ 2000-2076). Woods et al. and County argue that, outside of a statutory stream adjudication or court reference, any dispute concerning the validity of a riparian or pre-1914 appropriative claim of right can only be resolved by a court of law. Woods et al. and County also argue that water diverted under a riparian or pre-1914

[2] Woods, SDWA and CDWA submitted a joint brief. For ease of reference, this Order refers to these parties collectively as "Woods et al."

appropriative right is not subject to appropriation pursuant to division 2 of the Water Code (commencing with section 1000), and therefore riparian and pre-1914 appropriative rights are not subject to regulation by the State Water Board, except to the extent necessary to prevent waste or unreasonable use, or a violation of the public trust doctrine. Finally, Woods et al. and County argue that, by its terms, Water Code section 1831 does not authorize the Board to issue a cease and desist order against a diverter who claims to hold a riparian or pre-1914 appropriative right because riparian and pre-1914 appropriative rights are not subject to regulation pursuant to division 2 of the Water Code.

Woods et al. and County's contention regarding the State Water Board's authority lacks merit because it is inconsistent with the Board's statutory authority to investigate and take enforcement action against the unauthorized diversion or use of water. Water Code section 1051 authorizes the Board to investigate, take testimony, and ascertain whether water attempted to be appropriated is appropriated in accordance with state law. (See also Wat. Code, § 183 [authorizing the Board to hold hearings and conduct investigations to the extent necessary to carry out the powers vested in it].) If the Board finds that a person has diverted or used water without authorization, the Board may impose administrative civil liability in an amount not to exceed five hundred dollars for each day during which the unauthorized diversion or use occurred. (Wat. Code, § 1052, subds. (a) & (b).) The Board also has authority to issue a cease and desist order in response to a violation or threatened violation of the prohibition against the unauthorized diversion or use of water. (Wat. Code, § 1831, subd. (d)(1).) The Board may require compliance with a cease and desist order immediately, or in accordance with a time schedule set by the Board. (*Id.* § 1831, subd. (b).) The Legislature has directed the Board to take vigorous action to prevent the unlawful diversion of water. (Wat. Code, § 1825.)

The State Water Board's authority to evaluate the validity of a riparian or pre-1914 appropriative claim of right is inherent to the State Water Board's statutory authority to investigate and take enforcement action in response to the actual or threatened unauthorized diversion or use of water. In cases where a diversion is not authorized by a water right permit or license, but the diverter claims to hold a riparian or pre-1914 appropriative right, ascertaining whether the water diverted has been appropriated in accordance with State law, as expressly authorized by Water Code section 1051, necessarily will entail evaluating and deciding whether the riparian or pre-1914 appropriative claim of right is valid. Similarly, taking enforcement action as authorized by Water Code section 1052 or 1831 necessarily will entail evaluating any riparian or pre-1914 appropriative claims of right advanced by a diverter. Otherwise, the mere assertion of a riparian

or pre-1914 appropriative claim of right, without providing information to support such an assertion, would effectively thwart the Board's ability to exercise its enforcement authority, and to fulfill its statutory mandate to prevent illegal diversions. (See Wat. Code, § 1825 [directing State Water Board to take vigorous action to prevent the unlawful diversion of water].)

In this case, Woods's diversions are not authorized by a water right permit or license. Accordingly, the Board must evaluate whether Woods's diversions are authorized by a valid pre-1914 appropriative right, or by valid riparian rights held by landowners within Woods's service area, in order to decide whether Woods's diversions are unauthorized, and therefore subject to enforcement action.

Woods et al. and County's argument that, by its terms, Water Code section 1831 does not authorize the State Water Board to issue a cease and desist order against a diverter who claims to hold a riparian or pre-1914 appropriative right lacks merit as well. Section 1831, subdivision (d)(1) authorizes the Board to issue a cease and desist order in response to the unauthorized diversion or use of water "subject to [division 2 of the Water Code (commencing with section 1000)]." Section 1831, subdivision (e) provides that the Board's authority to issue a cease and desist order does not authorize the Board to regulate the diversion or use of water "not otherwise subject to regulation of the board under [part 2 of the Water Code (commencing with section 1200)]." Woods et al. and County argue that riparian and pre-1914 appropriative rights are not subject to regulation under division 2 of the Water Code (which includes part 2), and therefore Water Code section 1831 does not authorize the State Water Board to issue a cease and desist order against a diverter who claims to hold a riparian or pre-1914 appropriative right.

This argument is flawed because it begs the question, namely whether a given diversion claimed to be authorized by a riparian or pre-1914 appropriative right is in fact authorized by a valid riparian or pre-1914 appropriative right. If it is not, the diversion is unauthorized, and therefore subject to enforcement action. Woods and County are correct that the diversion of water consistent with a valid riparian or pre-1914 appropriative right would not constitute an unauthorized diversion of water subject to division 2 of the Water Code. (See Wat. Code, §§ 1201, 1202.) Accordingly, the diversion of water as authorized under a valid riparian or pre-1914 appropriative right would not be subject to a cease and desist order pursuant to Water Code section 1831, subdivision (d)(1). But if the claimed riparian or pre-1914 appropriative right in question is not valid, then the diversion of water under the claimed right would constitute an unauthorized diversion of water subject to division 2 of the Water Code, and the diversion would be subject to a cease and desist order pursuant to Water Code section 1831, subdivision (d)(1).

Similarly, a diversion would be unauthorized and subject to enforcement action to the extent that it exceeds the amount of water that may be diverted under a valid right, or is otherwise inconsistent with the parameters of the right.[3]

Essentially, Woods and County claim that Woods's diversions are authorized by riparian and pre-1914 appropriative rights, and argue on this basis that the State Water Board lacks the authority to decide whether Woods's diversions are authorized or not. The U.S. Supreme Court rejected a similar argument that an entity can avoid an agency's jurisdiction by claiming to be exempt from the agency's jurisdiction in *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609. In that case, the Court rejected the contention that the Food and Drug Administration (FDA) lacked jurisdiction to determine the validity of a manufacturer's claim that a certain drug was not a "new drug," within the meaning of the Federal Food, Drug, and Cosmetic Act, and therefore the manufacturer was exempt from the Act's requirement to submit substantial evidence of the drug's effectiveness to the FDA, and obtain FDA approval of a new drug application (NDA). (*Id.* at pp. 623-627.) The Court held:

> It is clear to us that FDA has power to determine whether particular drugs require an approved NDA in order to be sold to the public. FDA is indeed the administrative agency selected by Congress to administer the Act, and it cannot administer the Act intelligently and rationally unless it has authority to determine what drugs are 'new drugs' . . . and whether they are exempt from the efficacy requirements . . . .

(*Id.* at p. 624.) Likewise, the State Water Board cannot administer the water right permit system effectively, or carry out its statutory mandate to prevent the unlawful diversion of water, unless the Board has authority to decide the validity of a diverter's claim to be exempt from the permitting system. In many cases, such as this one, this will entail evaluating the validity of a diverter's riparian or pre-1914 appropriative claim of right.

The Court of Appeal's holding in *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89 lends further support to the conclusion that the State Water Board has authority to rule on the validity of a riparian or pre-1914 appropriative claim of right to the extent necessary to decide whether to take enforcement action against the claimant. The *Phelps* case

[3] Another problem with Woods et al. and County's interpretation of Water Code section 1831 is that their assertion that riparian and pre-1914 appropriative rights are not subject to regulation under division 2 is overbroad and incorrect. Although water diverted and used under valid riparian and pre-1914 appropriative rights is not subject to appropriation pursuant to part 2 of the Water Code (see Wat. Code, §§ 1201, 1202), riparian and pre-1914 appropriative rights are not completely unregulated under diversion 2. (See, e.g., Wat. Code, §§ 1707 [authorizing the Board to approve a petition to change any type of right for purposes of protecting instream, beneficial uses], 2500-2900 [authorizing the Board to determine all the rights to a stream system], 5101 [requiring all diverters to file statements of diversion of use, unless certain exceptions apply].)

involved administrative enforcement proceedings similar to this proceeding. In that case, the State Water Board concluded that certain individuals had diverted and used water illegally, and issued an order imposing administrative civil liability against them. (State Water Board Order WRO 2004-0004.) In reaching the conclusion that the individuals had diverted water illegally, the Board addressed the individuals' riparian and pre-1914 appropriative claims of right, and concluded that the individuals' diversion and use of water was not authorized by valid riparian or pre-1914 appropriative rights. (*Id.* at pp. 23-29, 34.)

On appeal, the court upheld the State Water Board's conclusions regarding the individuals' riparian and pre-1914 appropriative claims. (*Phelps v. State Water Resources Control Board, supra*, at pp. 116-119.) Although the Board's authority to decide the validity of the individuals' claims was not challenged in *Phelps*, so the Court did not expressly address that 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. (See also *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1589 [holding that the State Water Board's interpretation of the statutory definition of a subterranean stream was entitled to judicial deference because the Board's permitting authority over groundwater is limited to water flowing in subterranean streams and the Board has the power to determine whether groundwater is subject to the Board's permitting authority].)

4.1.1 The *Racanelli* Decision Does Not Support Woods et al. and County's Contention Regarding the State Water Board's Authority

Woods et al. and County argue that certain statements concerning the State Water Board's authority over riparian and pre-1914 appropriative rights contained in *United States of America v. State Water Resources Control Board* (*Racanelli*) (1986) 182 Cal.App.3d 82 support their contention that the Board lacks authority to rule on the validity or extent of riparian or pre-1914 appropriative rights. *Racanelli* contains a comprehensive overview of water right law, including a discussion of the State Water Board's role in determining whether water is available for appropriation by a water right applicant, and the Board's role in adjudicating water rights as part of a statutory stream adjudication or court reference. (*Id.* at pp. 100-106.) As part of this discussion, the court stated that, in order to determine whether surplus water is available for appropriation, the Board must examine riparian and prior appropriative rights, but the Board's estimate of available surplus water does not constitute an adjudication of the rights of the riparians and senior appropriators, whose rights remain unaffected by the issuance of a water right permit. (*Id.* at pp. 102-104.) The court also stated that "the Board plays a limited role in

resolving disputes and enforcing rights of water rights holders, a task left mainly to the courts." (*Id.* at p. 104.)

There are several problems with Woods et al. and County's reliance on these statements. First, the statements were not essential to the court's holding, and therefore are dicta.[4] Second, the court's statements are of limited value in determining the State Water Board's authority in this proceeding because *Racanelli* was decided before the Water Code was amended to authorize the Board to initiate administrative enforcement proceedings in response to the unauthorized diversion or use of water. *Racanelli* was decided in 1986. Water Code sections 1052 and 1831 were not amended to authorize the State Water Board to impose administrative civil liability or issue a cease and desist order in response to the unauthorized diversion or use of water until 1987 and 2002, respectively. (Stats. 1987, ch. 756, § 1; Stats. 2002, ch. 652, § 6.)[5]

The third problem with Woods et al. and County's reliance on the court's statements in *Racanelli* is that the statements actually support the conclusion that the Board has the authority to determine the validity and extent of a riparian or pre-1914 appropriative right to the extent necessary to exercise its enforcement authority. The court recognized that the Board is required to examine riparian and pre-1914 appropriative claims of right in order to determine whether surplus water is available for appropriation. Likewise, the Board may be required to

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[4] The holding in *Racanelli* concerned the validity of water quality objectives for the Delta that had been established by the State Water Board, and the validity of the Board's decision to modify the water right permits for the Central Valley Project and State Water Project to require compliance with the objectives. (*Racanelli, supra,* 182 Cal.App.3d at. at p. 98.) *Racanelli* did not directly involve the Board's authority over riparian and pre-1914 appropriative rights.

[5] In its closing brief, County asserts that the legislative history of the 2002 legislation that amended Water Code section 1831, Assembly Bill No. 2267 (2001-2002 Reg. Sess.), "clearly indicates that the legislative changes do not expand the legal authority for the Board to issue cease and desist orders." (County Closing Brief at p. 8.) County focuses on a sentence in the Senate floor analysis of the bill which states, in an inartful paraphrase of Water Code section 1831, subdivision (e), that the provision is intended to "clarify" that the bill "does not also expand the powers of the SWRCB." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 2267 (2001-2002 Reg. Sess.) as amended Aug. 19, 2002, at p. 1. We take official notice of the Senate floor analysis of the bill pursuant to California Code of Regulations, title 23, section 648.2 and Evidence Code section 452, subdivision (c).) But the same analysis clearly indicates that the bill was intended to expand the State Water Board's cease and desist order authority: "This bill expands the State Water Resources Control Boards (SWRCBs) [sic] enforcement authority by authorizing the SWRCB to issue cease and desist orders, not only when a permit holder is in violation of a water right permit, but also in the case of illegal diversions and other violations of SWRCB orders and decisions." (*Ibid.*) As stated earlier, Water Code section 1831, subdivision (e) provides that the Board's authority to issue cease and desist orders does not authorize the Board to regulate the diversion or use of water "not otherwise subject to regulation of the board under [part 2 (commencing with section 1200) of division 2 of the Water Code]." Part 2 of the Water Code contains provisions governing the acquisition and regulation of water right permits and licenses. Accordingly, based on the statutory language itself, subdivision (e) appears to have been intended to clarify that the legislation expanding the Board's enforcement authority was not intended to expand the Board's permitting authority. But the Board already had permitting authority over the diversion or use of water not authorized by or in excess of that authorized by valid riparian or pre-1914 appropriative rights, and the 2002 legislation authorized the Board to issue cease and desist orders, and to adopt any findings of fact and conclusions of law necessary to decide whether to issue a cease and desist order, in response to any such unauthorized diversions or uses.

examine riparian and pre-1914 appropriative claims of right in order to determine whether diversions are unauthorized, and therefore enforcement action is warranted.[6]

It bears emphasis that, consistent with the court's statement in *Racanelli*, the State Water Board's determination as to the validity of a riparian or pre-1914 appropriative claim of right in the context of an enforcement proceeding does not constitute a determination of the right as that term is used in the context of a statutory stream adjudication or a court reference. A statutory stream adjudication is akin to a quiet title action, in which all the rights to a stream system are established and quantified, and the priority and other parameters of the rights are defined. (See Wat. Code, §§ 2501, 2700, 2769.) Depending on the nature of the proceeding, a court reference may entail the same type of definitive and comprehensive definition of water rights. The determination of rights in a statutory stream system adjudication is binding on all parties claiming rights to the stream system, whether or not they participated in the adjudication. (*Id.*, § 2774.)

By contrast, if the validity and extent of a riparian or pre-1914 appropriative right is determined in the context of an enforcement proceeding, the validity of the right is determined for the more limited purpose of deciding whether enforcement action is warranted. For this more limited purpose, it may not be necessary to define all of the parameters of a right. For example, the priority of a right might not be relevant to the issue of whether diversions under the right are unauthorized. In addition, the State Water Board's determination in an enforcement proceeding that a claim of right is valid may not be based on the same amount or quality of evidence that would be required to substantiate the right in a statutory stream adjudication or court reference. The Board's decision whether to take enforcement action is discretionary, and the Board may elect not to take enforcement action against a diverter, even if the evidence substantiating the diverter's claim of right is deficient in certain respects. (See *Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 596-598 [California Department of Insurance Commissioner's decision whether to take enforcement action against insurers discretionary]; *Citizens for a Better Environment – California v. Union Oil of California* (9th Cir. 1996) 83 F.3d 1111, 1118-1120

[6] Like the statements in the *Racanelli* decision, County's reliance on a statement contained in a law review article written by Andrew H. Sawyer, Assistant Chief Counsel to the State Water Board, is unavailing. In the article, Mr. Sawyer allowed that the State Water Board's continuing authority over pre-1914 appropriative rights under the public trust doctrine and Water Code section 275 "does not amount to regulatory authority over proprietary right issues to the same extent as for permitted and licensed rights." (Sawyer, *Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use* (2005) 36 McGeorge L.Rev. 209, 223, fn 89.) Mr. Sawyer went on to state, however, that the Board "may review and make findings on issues concerning claimed pre-1914 rights to the extent reasonably necessary to carry out the [Board's] other responsibilities." (*Ibid.*) As examples of the Board's other responsibilities, Mr. Sawyer cited to Water Code sections 1051 and 1052, which authorize the Board to investigate and take enforcement action in response to the unauthorized diversion or use of water.

[compliance schedule in cease and desist order an exercise of Regional Water Quality Control Board's enforcement discretion].)

4.1.2 Woods et al. and County's Argument that Board Has Disclaimed Its Authority Lacks Merit

Woods et al. and County also argue that the State Water Board itself has disclaimed its authority to determine the validity of claimed riparian and pre-1914 appropriative rights. In support of this argument, Woods et al. and County cite to several water right decisions adopted by the State Water Board or its predecessors between 1959 and 1971, which include statements to the effect that the Board does not have jurisdiction over riparian and pre-1914 appropriative rights. Woods et al. and County also cite to several informational documents that were posted on the Board's website, which include similar statements. Woods et al. and County's reliance on these decisions and documents is misplaced, as explained below.

Woods et al. and County's reliance on the State Water Board decisions is misplaced because none of them are on point. The decisions cited by Woods et al. and County all concerned whether or under what conditions to approve water right applications or petitions. None of the decisions addressed the Board's authority to determine the validity of a riparian or pre-1914 appropriative claim of right in the context of an administrative enforcement proceeding. In fact, none of the decisions could address this issue because they were all adopted before the Water Code was amended to authorize the Board to initiate administrative enforcement proceedings in response to the unauthorized diversion or use of water. As stated above, the decisions were adopted between 1959 and 1971, and Water Code sections 1052 and 1831 were not amended to authorize the State Water Board to impose administrative civil liability or issue a cease and desist order in response to the unauthorized diversion or use of water until 1987 and 2002, respectively. (Stats. 1987, ch. 756, § 1; Stats. 2002, ch. 652, § 6.)

Not only is Woods et al. and County's reliance on older State Water Board decisions misplaced, but Woods et al. and County overlook the fact that, since Water Code sections 1052 and 1831 were amended, the Board has consistently exercised its authority to determine the validity of claimed riparian and pre-1914 appropriative rights to the extent necessary to prevent the unauthorized diversion or use of water. (See, e.g., State Water Board Order WR 2001-22 at pp. 25-26, 65 [requiring a report substantiating a claimed pre-1914 appropriative right]; Order WRO 2004-0004 at pp. 23-29, 34-35 [imposing administrative civil liability after concluding that diverters did not hold valid riparian or pre-1914 appropriative rights]; Order WR 2006-0001 at pp. 12-16, 20-21 [imposing administrative civil liability and issuing a cease and desist order after

determining the validity and extent of a claimed pre-1914 right and concluding that the diverter had diverted more water than authorized under the right]; Order WR 2009-0060 at pp. 5-6, 57 [issuing a cease and desist order for diversions in excess of total amount authorized to be diverted under both permitted and licensed rights and riparian and pre-1914 appropriative rights previously quantified by the Board].)

Woods et al. and County also cite to several informational documents in support of their argument that the State Water Board has disclaimed its authority to determine the validity of riparian and pre-1914 appropriative rights. Woods et al. and County cite to a pamphlet entitled "Information Pertaining to Water Rights in California," (water rights pamphlet). (County's Request for Official Notice (June 30, 2010) Exhibit 1.) In addition, County cites to the answers to two "Frequently Asked Questions" posted on the State Water Board's website (FAQ document). (County's Request for Official Notice (June 30, 2010) Exhibit 2.) As stated in the hearing officer's July 19, 2010 ruling on County's request that official notice be taken of these documents, the documents were produced and placed on the State Water Board's website by an unknown State Water Board staff person or persons at an undefined time.

Woods et al. and County's reliance on these documents is misplaced because they are not regulations that have been adopted by the State Water Board, and therefore they cannot be used as guidance in this proceeding. (See Gov. Code, §§ 11340.5, subd. (a), 11342.600 [prohibiting an agency from using a guideline, manual, or other standard of general application that has not been adopted as a regulation for purposes of implementing or interpreting the law administered by the agency].)

In addition, assuming for the sake of argument that the documents may be used as guidance, the documents themselves are ambiguous, and do not clearly stand for the proposition that the State Water Board has disclaimed its authority to determine the validity of riparian and pre-1914 appropriative rights in the context of an enforcement proceeding. For example, County cites to the FAQ document for the proposition that the Board will not investigate complaints involving riparian or pre-1914 appropriative rights. (County's Request for Official Notice (June 30, 2010) Exhibit 2, p. 8.) But the FAQ document also indicates that the Board will investigate alleged illegal diversions. (*Ibid.*) Woods et al. and County also point to a statement in the water rights pamphlet to the effect that the State Water Board does not have the authority to determine the validity of riparian and pre-1914 appropriative rights, but may assist the courts in such determinations, and County points to a similar statement in the FAQ document to the effect that such rights can only be confirmed by the courts. These statements are correct to the extent that

they were intended to mean that the State Water Board's adjudication of riparian and pre-1914 appropriative rights in a statutory stream adjudication or court reference must be confirmed by the appropriate court. (See Wat. Code, §§ 2016-2019, 2075-2076, 2750-2774.) If on the other hand these statements were intended to mean that the Board does not have the authority to evaluate the validity of claimed riparian and pre-1914 appropriative rights to the extent necessary to decide whether there has been an unauthorized diversion or use of water, then these statements are inconsistent with the State Water Board's statutory enforcement authority and established Board precedent, as discussed above. [7]

For the foregoing reasons, Woods et al. and County's arguments that the State Water Board does not have authority in this case, or has disclaimed its authority, lack merit. Consistent with the Board's statutory authority to investigate and take enforcement action in response to unauthorized diversions, the Board has the authority to evaluate the pre-1914 appropriative and riparian claims of right advanced by Woods to the extent necessary to determine whether Woods's diversions are unauthorized, in whole or in part, and whether it would be appropriate to issue a cease and desist order against Woods. Similarly, the Board may impose monitoring and reporting requirements to the extent necessary to ensure that Woods complies with the cease and desist order.

[7] The pamphlet is dated 1990. At that time, the State Water Board did not have authority to issue a cease and desist order in response to the unauthorized diversion or use of water, and the State Water Board did not have authority to administratively impose penalties for violation of Water Code section 1052 except for violations occurring during critically dry years. (See Wat. Code, §.1052, subd. (b), as amended by Stats. 1987, ch. 756.) Although the pamphlet is incorrect if it is interpreted as a statement about the State Water Board's enforcement authority under existing law, as applied to the State Water Board's enforcement authority in 1990 it amounts to nothing more than a generalization made without expressly recognizing an exception to that generalization.

4.2 Some Lands Within the Woods Service Area Have Likely Maintained Riparian Rights

4.2.1 General Description of Riparian Rights

As discussed in State Water Board Order WRO 2004-0004 (hereinafter "*Phelps*"):

> 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]); (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.

(*Id.*, at pp. 9-10 fn omitted.)

Riparian rights typically have a high priority and are not lost by non-use. They are subject to certain limitations, as well. For example, they are subject to reduction in common with other riparians on a watercourse in times of shortage. They may only be used on the contiguous parcel, and within the watershed of the stream to which they are riparian. Because the right depends on the water naturally available, a riparian right cannot provide the basis to store water in wet periods for use in dry periods. Nor can it be used to divert water that is available through return flows of imported water or water released after seasonal storage in upstream reservoirs. (See generally 1 Slater, California Water Law and Policy (2002) § 3.06 pp. 3-14 – 3-15 [riparian rights are narrowly construed].)

A parcel of land may retain a riparian right to a waterbody to which it was once riparian, even after losing contiguity to that waterbody, where there is evidence of an intention to maintain a riparian right at the time when the parcel was severed. Evidence of such an intent typically consists of language in the deed[8] that severed the parcel from the waterbody, but may also consist of other evidence, such as a ditch present at the time of conveyance that connects the severed parcel to the waterbody or a contract to maintain irrigation service from the waterbody.

[8] Woods et al. argue that certificates of purchase are insufficient evidence to show severance of a riparian right, despite statements by Mr. Wee, an expert witness for MID, to the contrary. They do not cite to any certificates of purchase in the record, and a review of Mr. Wee's evidence provided none. Therefore, this order does not further address this argument.

to the parcel entered into before conveyance. (See *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 538; *Hudson v. Dailey* (1909) 156 Cal. 617, 624-25; *Phelps, supra*, at pp. 27-28.)

4.2.2 Relevance of Riparian Rights to This Proceeding

MSS parties argue that the State Water Board cannot find that Woods itself holds riparian water rights, because: (1) the proceedings and holdings of *Woods Irrigation Company v. Department of Employment (DOE)* (1958) 50 Cal.2d 174 estop Woods from asserting ownership of riparian water rights;[9] (2) the evidence does not support a finding that Woods owns riparian water rights, and (3) the Delta Pool theory does not support Woods's claim of riparian water rights. MSS parties' brief does not cite anywhere in the record in which Woods claims to have a riparian right, and a review of the evidence did not indicate such a claim, outside of a statement in a March 4, 2009 letter from Dennis Geiger to John O'Hagan. (Exhibit PT-5.) A riparian right is part and parcel of the land in which it adheres, and can therefore be owned only by the landowner. (*Lux v. Haggin* (1886) 69 Cal. 255, 391.) Given Woods's admission that it owns no property on which it is using the water, it can own no riparian rights that are relevant to this proceeding. (RT pp. 451:25-452:7.) Because the admitted lack of ownership of irrigated land precludes Woods from diverting under its own riparian right, this order does not further discuss MSS parties' arguments concerning Woods's claim of riparian water rights. This order addresses the Delta Pool theory in relation to the landowners in the Woods service area in section 4.4.1.

This does not mean, however, that riparian rights of the lands within the Woods service area are irrelevant to this hearing. No party has presented a compelling reason that Woods could not serve water to a parcel under a landowner's riparian rights. Both the prosecution team and MSS parties acknowledge that Woods should not be prohibited from making water deliveries to landowners who hold valid water rights that would authorize them to divert in the same amount from the same source. (Exhibit PT-7; MSS Closing Brief, p. 4; see Wat. Code, §§ 1810-14.) Put another way, proof that Woods is delivering water in excess of what it is authorized to deliver under its appropriative water rights, standing alone, would constitute proof of an actual or threatened unauthorized diversion of water, and the mere assertion that the recipients might have rights of their own would be insufficient to rebut that proof. If the evidence shows that the

[9] *DOE, supra*, 50 Cal.2d 174 does not estop Woods from claiming any type of water rights. The causes of action in the present matter and *DOE* are distinct, so claim preclusion does not apply. The language in *DOE* regarding Woods' water rights was not necessarily decided in the case, and it does not appear that the question of water rights was actually litigated, so issue preclusion does not apply. Judicial estoppel is inappropriate because there is insufficient evidence that Woods actually claimed not to have water rights in the *DOE* proceeding.

deliveries are authorized under the rights held by those who receive the water, however, that prima facie case will have been rebutted. This order does not definitively determine the riparian rights of landowners within Woods's service area: any individual owner claiming such rights may do so in an appropriate proceeding. However, this order does evaluate the extent to which the information Woods provided regarding such riparian rights provides a basis upon which Woods can rely in delivering water, and upon which the State Water Board can rely in determining whether to issue a CDO. It finds that some property within Woods's service area, that which John N. and E.W.S. Woods (hereinafter referred to as the Woods Brothers) acquired on June 8, 1891, likely maintained riparian rights to Middle River, and that Woods may therefore rely on a claimed riparian right to deliver water to those lands. (See Exhibit MSS-R-14, exh. 7A [labeling the tract "Parcel 2"].)[10]

This order modifies the draft CDO to account for the likely riparian status of these lands, and to account for the potential that individual landowners may come forward with new evidence regarding their retention of riparian rights to Middle River on lands which are no longer contiguous to it.

To the extent that parties raise additional arguments concerning maintenance of riparian rights to larger tracts of land, this order discusses and dismisses those arguments in section 4.3, below.

4.2.3 Scope of Lands for Which Woods Has Demonstrated a Likelihood of Riparian Rights

4.2.3.1 "Parcel 2" Appears to Have Maintained Riparian Rights

MSS parties and Woods presented evidence concerning acquisition of lands within the future Woods service area. Prior to 1889, Stewart et al. owned the entire area, and sold it in sections from 1889 through 1992. (Exhibit MSS-R-14, exh. 7A; WIC-6D, WIC-6E, WIC-6F, WIC-6G, WIC-6H.) Stewart et al. sold the first tract, which did not abut Middle River, Burns Cut-off or the former Duck Slough, to Blossom on November 26, 1889. (*Ibid.*) The Woods Brothers apparently acquired this land from Blossom sometime between 1893 and 1909. (Compare *ibid.* with Exhibit WIC-2A.) Stewart et al.'s second transaction in the Woods service area was to sell a 710.86 acre tract of land, "Parcel 2," to the Woods Brothers on June 8, 1891. (Exhibit MSS-R-

[10] Where an exhibit includes within it exhibits from other hearings with their own numbering system, or has numbered exhibits as an attachment, a pinpoint cite to the "exhibit within an exhibit" is noted with a lowercase exh., followed by the number used to identify the specific exhibit from the other hearing or the numbered attachment.

14, exh. 7A.) Parcel 2 remained contiguous to Middle River. (*Ibid.*) The sale of this tract, and of two other tracts along Middle River sold the same day which are outside the Woods service area, separated the rest of Stewart et al.'s lands from Middle River. (*Ibid.*; Deed of June 8, 1891 transferring land from Stewart et al. to C. Bruse; Deed of June 8, 1891, transferring land from Stewart et al. to B.R. Keenan.)

The evidence indicates that the Woods Brothers and their heirs maintained possession of Parcel 2 until execution of 1911 service agreements between Woods and E.W.S. Woods and the heirs to John N. Woods, respectively. (See WIC-6O [agreement with E.W.S. Woods], WIC-6P [agreement with Jessie Lee Wilhoit and Mary L. Douglas, heirs to John N. Woods].) Pursuant to the agreements, Woods agreed to deliver water from Middle River to E.W.S. Woods and the heirs to John N. Woods for purposes of irrigation on specified lands, including Parcel 2. (WIC-6O, WIC 6Q [map of lands subject to agreement with E.W.S. Woods], WIC-6P, WIC-6R [map of lands subject to agreement with Wilhoit and Douglas].) Because the irrigation contracts were in place, and the contracts were intended as a lien upon all the lands after subdivision, it appears that the parties to any later subdivisions within Parcel 2 intended to maintain riparian rights to the tracts that lost contiguity with the river. (See *Phelps*, pp. 27-28.) Therefore, all the lands on Parcel 2 appear to have maintained riparian rights.

4.2.3.2 The Remaining Lands in the Woods Service Area Appear to Have Lost Riparian Rights to Middle River with the Transfer of Parcel 2.

Woods et al. argue that, under the standard set forth in *Murphy Slough Association v. Avila* (1972) 27 Cal.App.3d 649, the transfer of Parcel 2 did not sever riparian rights from the remaining portion of the lands held by Stewart et al, which were later sold to the Woods brothers in various land transactions. (See Exhibit MSS-R-14, exh. 7A.) These lands make up the rest of the Woods original service area, with the addition of the 500 acre tract in the middle of the service area, which was transferred first to Blossom, then to the Woods Brothers. (See MSS-R-14, Woods Exhibit 7A; Exhibit WIC-6E.)

4.2.3.2.1 Interpretation of *Murphy Slough*

At issue in *Murphy Slough* was a grant of a property interest to a narrow strip of property that divided the grantor's original parcel into a small area north of the strip adjacent to Murphy Slough and a much larger southerly section which the narrow strip separated from the waterbody. (*Murphy Slough, supra,* at pp. 651-52.) The deed referred to the grant as a transfer in fee, with the strip being sold to a reclamation company for the purpose of building a levee.

(*Id.* at pp. 652-5.) The deed also named a series of other grantors who granted interests in a similar strip of land at the same time. (*Id.* at p. 651.) Other grantors sold interests in their remaining lands approximately 10 and 20 years later, subject to a right of way for a levee and other reclamation works, and specifically recited that the land transfer included proportionate riparian rights. (*Id.* at p. 653.) Upon reviewing this evidence in combination with the actual grant language, the appellate court upheld a trial court's finding that the transfer was intended only as a grant of right-of-way, rather than as a conveyance of a fee interest, and that therefore the land south of the levee strip retained its riparian rights. (*Id.* at pp. 653, 658.)

In addition, the court opined that, even if the trial court had found that the strip of land had been transferred in fee simple, the southern tract of land would have retained its riparian rights. (*Id.* at p. 658.) Extrinsic evidence indicated that the parties did not intend to convey any riparian rights, let alone the riparian rights that would otherwise attach to the property that was not conveyed. (*Id.* at pp. 655-666.) The later-issued grant deeds further indicated that the parties did not intend for the grant of the strip of land to convey the riparian rights to the remaining lands. (*Id.* at pp. 657-658.)

In dicta, the court discusses a rationale for the rule set forth in *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, that when riparian land is subdivided such that one parcel becomes non-contiguous to the waterbody, the noncontiguous parcel loses its riparian status, absent proof of an intent to the contrary:

> 'In a grant, the grantor has title to the land subject to the grant. The proposed grantee has nothing, and therefore ... secures only such title as is granted. When the grant is silent as to riparian rights obviously such rights have not been conveyed *and remain with the grantor for the benefit of his retained lands* and for the benefit of other riparians.'

(*Murphy Slough, supra,* at pp. 656-657 [quoting *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 538-39] [Emphasis added in *Murphy Slough*].) The court states that the presumption that non-contiguous lands granted from a larger parcel without mention of riparian rights in the conveyance lose their status does not control in a situation in which the grantor retains land severed from the stream, and that "absent some expression of intent to convey or sever rights in the lands not included in the conveyance, the grant must be deemed inapposite to a consideration of the riparian status of the excluded land." (*Ibid.*) Instead the general principle of the intention of the parties to the conveyance controls. (*Ibid.*)

Pleasant Valley Canal Co. v. Borrer (1998) 61 Cal.App.4th 742, 780-781 interpreted the effect of the decision in *Murphy Slough*.

> After concluding that the intent of the parties to the conveyance was the principal consideration, and extrinsic evidence was admissible to establish intent ... the *Murphy Slough* court noted that the reclamation district had paid only a nominal sum for the strip of land, that riparian rights would have been of no use on the land ... and that the grantors had continued for 30 years after the conveyance to divert water to their property beyond the levee without any intervention by the reclamation district.

(*Ibid.*) The court then analogized the granting of a right of way for the levee in *Murphy Slough* to that for a wagon road in *Pleasant Valley*, and found that the intent of the parties was clear that this right of way did not sever the riparian right. (*Id.* at p. 781.) Thus, the same court that authored the *Murphy Slough, supra,* opinion did not apply a presumption against severance of a riparian right when the grantor maintained the non-contiguous parcel. Instead, the court relied on the case for the actual holding that looked to intent of the parties in the face of the deed's silence on the matter.

4.2.3.2.2 Interpretation of *Rancho Santa Margarita*

Rancho Santa Margarita addressed whether the presumption set forth in *Anaheim, supra,* that deeds dividing non-contiguous parcels from a larger riparian tract lose their riparian rights if the deed is silent applies to judicial partitions of property. (*Id.* at p. 538-541.) The land at issue had been held in common by six owners, and then had been partitioned by judicial decree into six separate parcels, some of which lost contiguity with the Temecula-Santa Margarita River. (*Id.* at p. 538.) The court established a presumption that the joint tenants' now separate parcels all maintained riparian rights, even where the partition decree was silent, because, prior to the partition each joint tenant owned equal shares of all the property rights associated with the lands, including the riparian rights, and a judicial partition is intended to allow each owner to keep exactly what he already owned. (*Id.* at p. 539.) *Rancho Santa Margarita* contrasted this situation with that of a grant of a non-contiguous parcel in which the grantee owns nothing, and receives only what the grantor provides. (*Ibid.*) The discussion does not contrast a grantor who retains land abutting the stream while conveying non-contiguous land with a grantor who retains non-contiguous land while conveying land abutting the stream. Rather, the court is contrasting a grant deed with a judicial partition. (*Ibid.* ["There is a fundamental distinction between a grant deed and a partition decree"].) The court does not extend this reasoning to opine on whether a grantor maintains a riparian right on non-contiguous lands when the grantor grants away the land that ties the land to the waterbody.

4.2.3.2.3 Application to the Current Facts

Both *Rancho Santa Margarita* and *Murphy Slough* deal with exceptions to the general rule concerning loss of riparian rights through subdivision of property that severs parcels from contiguity with the stream. The dicta in *Murphy Slough* regarding grant transfers are not necessary to the holding, and the *Santa Margarita* court does not even in dicta address a presumption concerning the grant of contiguous lands that separate a retained tract from a waterbody.

A review of authority cited in these cases and in major water law treatises did not reveal any California precedents, aside from the dicta in *Murphy Slough*, directly addressing the question of maintenance of riparian rights on retained non-contiguous lands where contiguity has been lost through a grant deed of a fee interest. Similarly, a search for persuasive authority in other states revealed no cases applying a presumption of maintenance of riparian rights on non-contiguous parcels, except where a narrow right-of-way strip was granted, and did find one applying a presumption that the right is lost. (See *Thompson v. Enz* (1967) 379 Mich. 667, 695 [building canals to severed non-contiguous properties insufficient to reserve riparian rights because riparian lands must abut a natural watercourse].) For the reasons described below, the State Water Board declines to extend the dicta in *Murphy Slough* to create a presumption that a grantor retains a riparian right when the grantor divides a riparian property, and keeps only the land that is not contiguous to a waterbody. Like the court in *Murphy Slough*, we seek to determine the intent of the parties, but we base our determination on the evidence as to the parties' intent, without tipping the scales by resort to a legal rule that a deed that provides no evidence of intent to retain riparian rights should nevertheless be presumed to do so.

Under English common law regarding riparian rights, and since its adoption in California in *Lux v. Haggin*, the central defining feature of a riparian right has been that the land abuts the waterbody. The land benefits from the contiguity with the waterbody by being able to share its waters in common with other lands adjacent to the water. (E.g. *Duckworth v. Watsonville Water and Light Co.* (1907) 150 Cal. 520, 526 ["The right exists because the stream runs by the land, and thus gives the natural advantage resulting from the relative situation"].) Unlike an appropriative right, the holder of the riparian land cannot separate the right from the land, and transfer it to a non-contiguous parcel. (*Id.* at pp. 526-27.) The riparian right is thus inseparable from land that abuts a stream.

In California, as in other Western states where water is a limiting factor in land development, the right of appropriation was adopted to allow non-riparian lands to access water. This made a riparian right unnecessary for non-riparian lands, as long as sufficient water was available for both appropriators and riparians. In most instances, riparians have priority over appropriators, allowing them preference in even new water uses over appropriators who have made significant investments in reliance on diversions and uses on non-riparian lands. (See e.g. *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 101-02.) Additionally, in a situation of water scarcity, riparian owners must reasonably apportion the limited water supply among themselves. Riparian properties therefore presumably benefit from limiting the acreage and number of landowners that maintain a riparian right, when there is scarcity.

A grantor of the contiguous portion of a larger parcel could reasonably choose to reap the rewards of the riparian benefit by choosing to either maintain a riparian right on the non-contiguous portion or by demanding a higher price for the contiguous parcel, based on its riparian nature. The State Water Board sees no reason to presume that silence means the grantor chose to retain the right on the non-contiguous land, as opposed to having bargained a higher price for the sale of the contiguous parcel of land. This is particularly true because silence regarding a reservation of grantor's rights in the transfer instrument should not be interpreted against the grantee unless there is strong evidence that grantee knew or should have known that grantor intended to reserve such rights. (*Holmes v. Nay* (1921) 186 Cal. 231, 237-38.)

Such a presumption would be particularly inappropriate in a case such as this one, where the retained lands maintained a riparian connection to other natural waterbodies. Here, at its severance from Middle River, the remaining Stewart et al. property was undisputedly contiguous to Burns Cut-off, and possibly also to Duck Slough, whereas the property at issue in *Murphy Slough* does not appear to border more than one waterbody. (Compare *Murphy Slough, supra,* at Appdx. 1, p. 660 [map of property not showing contiguity with any other waterbody] with Exhibit MSS-R-14, Woods Exhibit 7A.) It is unclear that the *Murphy Slough* court would have used the same dicta regarding the effect of not mentioning riparian rights to a particular waterbody, or ultimately reached the same conclusion regarding the intent of the parties, had the parcels been contiguous to other waters.

Unlike in *Murphy Slough*, there is no indication in evidence here that Stewart et al. intended to maintain a right to Middle River on their remaining properties. There is no evidence of an irrigation system to those lands, or that Stewart et al. were engaged in any farming, much less

farming that would have required irrigation. Stewart et al had recently sold a tract of land to Blossom that was not contiguous to any natural waterbody; presumably Blossom had found the land to be of value despite the clear lack of any riparian water access. Furthermore, as discussed above, the Stewart et al. lands maintained contiguity to Burns Cut-off.

In light of the centrality of actual contiguity with water to the riparian right, the problems created by increasing uncertainty in riparian rights, and the benefit that the riparian properties gain from having less competition for water, the State Water Board declines to adopt a presumption that this right extends to properties that no longer abut a stream. Here, there is no evidence that the parties intended that the remaining Stewart et al. properties maintain riparian rights to Middle River.

4.3 Pre-1914 Appropriative Rights

Prior to 1914, a person could acquire appropriative water rights by diverting water and applying it to beneficial use, as discussed in section 3.0, above. Perfecting such a water right required three elements: (1) an intent to put the water to beneficial use; (2) an actual diversion sufficient to put the water to beneficial use; and (3) diligence in applying the water to beneficial use. (*Simons v. Inyo Cerro Gordo Mining and Power Co.* (1920) 48 Cal.App. 524, 537; State Water Board Order WR 2004-04, p. 18.)

In 1872, the state established a system under which those wishing to appropriate water could post notice of and record at the county their intent to establish a water right, clarifying the timing of the first element of the appropriation. (Civ. Code, §§ 1410a-1422.) The would-be appropriator then had to work diligently to actually divert the water and apply it to beneficial use, in order to perfect the right. (*Ibid.*) The Civil Code procedure did not, however, establish an exclusive means to establish an appropriative water right: it was still possible to establish a valid, "nonstuatutory" water right by diverting water and applying it to beneficial use. (*Lower Tule River Ditch Co. v. Angiola Water Co.* (1906) 149 Cal. 496, 499.) Both "statutory" and "nonstatutory" pre-1914 water rights survived the Water Commission Act's establishment of a formal appropriative rights permitting system, and may remain valid rights to the present, unless they are lost by means applicable to all appropriative rights (e.g. abandonment, forfeiture, a finding of waste or unreasonable use).

Unlike riparian rights, appropriative rights do not become part and parcel of the land, although they may be appurtenant thereto. (*McDonald v. Bear River & Auburn Water & Min. Co.* (1859) 13 Cal. 220, 232-33.) The owner of an appropriative right may transfer the water right for use

on different property, as long as such transfer does not injure other legal users of water. (*Pleasant Valley Canal Co v. Borrer* (1998) 61 Cal.App.4th 742, 753.)

Under the progressive or continuing development doctrine, a pre-1914 appropriator may continue to develop an inchoate right from the amount reasonably and actually used at the time of the original diversion up to the "quantity intended to be applied to future needs at the time of the original diversion, which has actually [and reasonably] been put to use within a reasonable time." (*Haight v. Costanich* (1920) 184 Cal. 426, 433.)

4.3.1 Evidence Required to Demonstrate a pre-1914 Water Right for Purposes of Determining Whether to Issue a CDO

Generally, in an enforcement action, the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation. (Evid. Code § 550; Cal. Law Revision Com. Com., 29B, pt. 1 West's Ann. Evid. Code (1995 ed.) foll. § 550, p. 631-32.) At that point, the burden shifts to the alleged wrongdoer to answer such evidence, including establishing affirmative defenses. (*Ibid.*; See e.g. *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 113, 119-20 [upholding trial court findings against the targets of a State Water Board CDO who had not presented sufficient credible evidence regarding pre-1914 and riparian rights].) In this case, the prosecution team has not asserted or established that a threat of unauthorized diversion exists as to Woods's diversion of up to 77.7 cfs from Middle River. The rate of 77.7 cfs is what Woods agreed to deliver to lands within its service area pursuant to the 1911 water service agreements discussed above. (Exhibits WIC 6O; WIC 6P.) As explained in section 4.3.2, below, the 1911 agreements and other evidence in the record indicate that, to the extent that water could not be delivered to the landowners pursuant to their own water rights, Woods planned to develop a pre-1914 appropriative right to divert up to 77.7 cfs.

No other party has submitted evidence to demonstrate that Woods has not in fact developed a right to divert up to 77.7 cfs, so it is not necessary to determine whether information to develop a prima facie case for unauthorized diversion must come from the prosecution team, or if other parties may provide it at hearing. Therefore, the burden does not rest on Woods to demonstrate that it has a right to divert up to 77.7 cfs.

However, the prosecution team more than established a prima facie case of threatened and actual unauthorized diversion by Woods by: demonstrating that Woods has the capacity to and has actually diverted at a rate greater than 77.7 cfs (exhibits PT-1, p. 2; PT-7, p. 2); determining that Woods does not have any permitted appropriative right (exhibit PT-4); establishing that

Woods does not own land for which it is diverting water under a riparian right (RT pp. 451:25-452:6); and providing the information Woods submitted in response to the prosecution team's investigation prior to issuance of the draft CDO, which fails to show an intent to develop a water right of greater than 77.7 cfs and fails to give any specific information concerning its claims to divert under the rights of landowners in the service area (exhibit PT-5). It is reasonable to draw the inference from Woods's lack of submittal of evidence for a valid water right that such a right does not exist. (See Wat. Code, § 1051 [granting the State Water Board investigatory powers over state's waters]; *Phelps v. SWRCB, supra*, 157 Cal.App.4th at p. 116 [noting that State Board had notified plaintiffs that the Board would likely require proof of the claimed riparian right as a reason not to estop the State Board from challenging the riparian right]; State Water Board Order WR 2006-0001, at pp. 19-20 [increasing administrative civil liability for water district because they did not provide information concerning a pre-1914 right during initial investigation, even though "as a matter of reasonable prudence, any claimant of pre-1914 water rights should have the documentation at hand to demonstrate that it has the rights it claims"].)

Thus, the prosecution team effectively shifted the burden to Woods to produce evidence regarding any water right greater than 77.7 cfs. As discussed in section 4.1.1, above, estimating pre-1914 and riparian rights for the purpose of determining whether diversions are unauthorized can require a different level of analysis regarding alleged rights than that required in an adjudication or other proceeding to definitively determine water rights.

The State Water Board recognizes that it can be difficult to obtain evidence roughly 100 years after-the-fact that specific pre-1914 appropriative rights were diligently perfected and subsequently maintained through continuous use.

In State Water Board Order WR 95-10 ("Cal-Am Order"), the State Water Board adopted the posture, for the purposes of that order, of evaluating evidence in the hearing record in the light most favorable to the party claiming a pre-1914 water right, Cal-Am. (*Id.* at p. 17.) In the Cal-Am proceeding, the State Water Board heard evidence regarding Cal-Am's diversions and public trust impacts from those diversions on the Carmel River, and contemplated enforcement action. Cal-Am submitted extensive documents, including deeds and notices of appropriation relating to Cal-Am's water rights. (*Id.* at p. 18.) Even looking at these in the light most favorable to Cal-Am, the State Board found these notices alone insufficient to determine that any of the claimed rights were actually developed and maintained by continuous use. (*Id.* at pp. 18-21.) Rather, the order looked to information submitted to the Railroad Commission in 1914 and to a 1915 engineering report as the "best evidence" to establish the amount of water actually

developed under Cal-Am's pre-1914 water rights. (*Id.* at pp. 21-22.) Thus, even viewing evidence in the light most favorable to Cal-Am, and in the posture of considering enforcement action against Cal-Am, the State Water Board still carefully reviewed the available evidence, evaluated which evidence was most reliable, and did not make the broadest possible inferences regarding Cal-Am's submissions.

The State Water Board will take into account the difficulty of providing historical evidence in evaluating Woods's claims regarding development of a pre-1914 right. The State Water Board may require less evidence regarding such rights than it would for establishing rights perfected more recently, such as proof of use under a permit for the purposes of licensure. This is not to say, however, that the State Water Board will make every possible inference on behalf of Woods, or that mere hypotheses regarding what may have happened 100 years ago are sufficient.

4.3.2 Evidence Regarding Development of a pre-1914 Water Right

Woods and the prosecution team provided sufficient evidence regarding the development of a pre-1914 appropriative water right to demonstrate that Woods's diversions to its original service area from Middle River up to 77.7 cfs do not likely constitute unauthorized diversions.[11] The prosecution team was persuaded by Woods's submittals in response to its request for information that Woods likely has a right to divert up to 77.7 cfs, which it provided in the hearing as Exhibit PT-5. While Woods's submission at that point did not contain sufficient evidence to establish that Woods actually developed and put to beneficial use the full 77.7 cfs within a reasonable time, or that the diversion facilities as they existed at the time were capable of delivering the full amount, it was sufficient to determine the intent to develop up to 77.7 cfs and to determine that a significant amount of the water was diverted prior to 1914. (Exhibit PT-5.) The State Water Board agrees that this suffices, in this circumstance and given the difficulties in procuring evidence of pre-1914 rights, for the prosecution team to determine not to further investigate the claim of right to divert up to 77.7 cfs.

Intent

John N. and E.W.S. Woods, two brothers, purchased the lands within the original Woods service area between 1891 and 1911 through a number of different transactions. (See

[11] It is unnecessary for the purposes of this order to determine whether Woods, individual landowners, or some combination of the two hold the pre-1914 water right. The order is crafted to allow Woods to introduce evidence under either situation for the purposes of using water outside the original place of use.

MSS-R-14, Woods Exhibit 7A; Exhibit WIC-6E.). The Woods Brothers' land was later divided, the westerly tract being referred to as the E.W.S. Woods tract and the easterly as the Wilhoit-Douglass tract, after the heirs to John N. Woods. (Exhibits WIC-8, p. 7-8, WIC-8K, WIC-6O, WIC-6P.)

Exhibit WIC-6O, relating to the E.W.S. Woods tract, and Exhibit WIC-6P, relating to the Wilhoit-Douglass tract, are 1911 water supply agreements between Woods Irrigation Company and the landowners in the respective areas. These service agreements provide evidence of a plan to divert up to a combined 77.7 cfs of irrigation water on the original Woods service area's lands, even after its subdivision into smaller tracts, as they anticipate that the agreements will run with the land.

This intent is generally corroborated by the 1909 Articles of Incorporation for Woods, included in Exhibit PT-5, which state that one of the purposes of company formation is:

> To acquire water and water rights and lands and rights of way for the purpose of constructing, operating and maintaining ditches for the irrigation of the lands of stockholders of said Corporation ... and of supplying water to others than the stockholders ... and generally, to engage in, maintain and carry on the business of irrigation and supplying water for irrigation of lands owned by the stockholders of this Corporation and others ...

(*Id.* at 2nd part.)

To the extent that contracts covered lands that did not have water rights at the time of execution, the contracts demonstrate an intent to develop the remaining water by appropriation.

Timely Development of Means to Irrigate and Application to Beneficial Use

Parties submitted sufficient evidence to demonstrate that diversion works covering a large part of the area were put in place prior to 1914, and were expanded thereafter.

For example, news articles from 1898 and 1899 discuss development of an irrigation system from Middle River, and the potential to use this system to irrigate about 7,000 acres on the Woods brothers' lands on Roberts Island. (Exhibits MSS-R-14, WIC-5 & WIC-6.) A 1909 map of the Woods brothers' lands shows a water control system with canals or ditches, gates and dams covering a broad area of the lands. (Exhibit WIC-2A.) The 1911 Service Agreements reference an existing canal system. (Exhibits WIC-6O & WIC-6P.) An undated map which the State Water Board agrees is reasonable to place between 1908 and 1910, based on testimony

regarding land ownership, also shows a water control system covering much of the original Woods service area. (Exhibits WIC 6, WIC-6J.) A 1914 map of the San Joaquin Delta shows markings indicating "canals, ditches and small sloughs" in the original Woods service area. (Exhibits WIC-2B, 6K.) The water management system in place prior to 1914 covered a large part of the Woods service area. (See Exhibits WIC-2A, WIC-2B, WIC-6J, WIC-6K.) Minutes from meetings of Woods show assessments to cover the costs of delivering irrigation water in 1913 and 1914 to all the lands within the service area, and a separate drainage assessment in 1914. (Exhibit WIC-4F.) This indicates that not only was the irrigation system built, but that Woods was delivering water through the system to the various tracts within the service area.

While, as MSS parties emphasize, there is no direct evidence as to the exact capacity of the diversion-works prior to 1914, or of the rate of development of the irrigation works, the above provides sufficient evidence for our purposes from which to properly infer that the irrigation works provided water to a substantial area. As 77.7 cfs was the amount the parties intended to divert to serve the area, and given the difficulty in obtaining evidence from more than 100 years ago, it is reasonable to infer that irrigating a large part of the intended service area required a large part of 77.7 cfs.

In a 1957 complaint filed in *Woods Irrigation Co. v. Allen* (San Joaquin Superior Court, Case No. 64456), Woods asserts that it had been delivering water as envisioned by the 1911 agreements since the agreements became effective. (Exhibit WIC-4G, p. 5.) Immediately previous to this assertion, the complaint states that certain lands described in the 1911 agreements were thought at the time of the agreements to be incapable of irrigation, and that some of these had subsequently been brought under irrigation while others had proven not capable of being irrigated. (*Ibid.*; see also Exhibit WIC-4E [excluding lands not capable of irrigation from irrigation agreement].) It further claims to have assessed pro-rata fees on landowners within the district every year since operations commenced in 1911. (Exhibit WIC-4G, p. 5; see also Exhibit WIC-4F [meeting minutes showing such assessments for 1913 and 1914 services].) These statements were made in the context of an action to quiet title of Woods stock as between the landowners within the Woods service area and the heirs to the original Woods stockholders. (Exhibit WIC-4G.) The judgment entered did not reference water deliveries. (Exhibit PT-11.) These statements, though not subjected to cross examination anywhere within this record, provide indicia of reliability in that: they were not made for the purpose of substantiating Woods's water rights at the time; they were filed under oath with a court of law; Woods's suit was filed against both the heirs and the landowners, such that it was aligned with neither position should the information given support a particular side; and the statements did

not generate sufficient dispute to merit mention in the judgment. While the statements do not demonstrate an exact timeframe for development of irrigation within the Woods service area, they do support the contention that the lands therein were irrigated and that the irrigation was expanded as envisioned at the time of the agreements. There is no reason to think that this expansion was for less than 77.7 cfs, and the implication is that the full amount was used significantly prior to 1957. There is no evidence to the contrary.

This evidence is sufficient to support Woods and the Prosecution Team's contention that Woods's irrigation diversions up to 77.7 cfs do not constitute an actual or threatened unauthorized diversion, for the purpose of determining whether to issue a CDO enjoining such diversion.

4.3.2.1 The Service Agreements Do Not Establish an Intent to Develop a Pre-1914 Water Right Greater than 77.7 cfs.

Woods et al. argue that Woods and/or its shareholders demonstrated an intent to divert more than 77.7 cfs, based on the combined interpretation of the two 1911 agreements to serve water. The agreement to provide water on the Wilhoit-Douglas tract provides for a diversion rate of 32.86 cfs for roughly 3,286 acres of land, making an allocation of 1 cfs per 100 acres of land. (Exhibit WIC-6P.) The agreement to provide water on the E.W.S. Woods tract sets forth a diversion rate of 44.80 cfs. (Exhibit WIC-6O.) Woods et al. contend that the E.W.S. Woods agreement was intended also to have an allocation of 1 cfs per 100 acres of land, but that the contracting parties erred in their calculation, leaving out two tracts of land described on page 1 of the agreement, which were sized 12.74 and 769.32 acres. (See *id.* at p. 1; Closing Brief, pp. 16-17.) A third tract of land, described on page 2 of the agreement, was sized at "4,480 acres, more or less" which would correspond with a 1 cfs per acre rate if this tract were considered to be the entire area to be served. (See Exhibit WIC-6O, at p. 2; Closing Brief, pp. 16-17.) Lands and rights of way granted to railroad companies, whose acreage was not described, were excluded from the agreement. (*Id.* at p. 3.) A 1913 agreement later released 370 acres in the E.W.S. Woods tract from the agreement. (Exhibit WIC-4E.)

Ignoring the exclusions for rights of way, the text of the agreements, and language in the agreements which anticipates that certain lands would not be capable of irrigation, Woods et al. argue that the intent to furnish water to the E.W.S. Woods tract is better described as a rate of 1 cfs per 100 acres for 4,892.06 acres (48.92 cfs) than as the 44.80 cfs explicitly stated in the agreement. This would lead to a combined rate of diversion for both tracts of 81.78 cfs. Further, Woods et al. argue that instead of the 1 cfs per 100 acres rate calculated from the

Wilhoit Douglas agreement, the State Water Board should use a ratio of 1 cfs per 80 acres, for a combined diversion rate for both tracts of 102.23, because Board staff has used such a ratio in other contexts.

The State Water Board declines to assume that the parties who entered into a formal contract erred in describing exact rates of diversion that were expressed to the hundredth of a cubic foot per second, and then, without correcting the error, enrolled the contract at the county. (See Civ. Code, § 1639; *Crow v. P.E.G. Const. Co.* (1957) 156 Cal.App.2d 271 ["When the language of a contract is clear and explicit and reduced to writing, the language of the contract governs its interpretation and the intention of the parties is to be ascertained from the writing alone"]; Witkin on Contracts, § 744 [modern cases look to expressed intent in contract, under an objective standard].) The assumption that the parties intended to agree to an unstated rate calculation would be particularly unfounded where both agreements anticipate not being able to serve the entire areas described in each agreement. The State Water Board also declines to replace the stated intent of the parties to a contract with a 1 cfs per 80 acre rate, which is apparently a rough assumption concerning irrigation water use made in other contexts. (RT pp. 33:23 – 34:5.) The intent of the parties developing a pre-1914 water right as to the scope of that right defines the extent of the right, not the amount they (or their successors) later come to realize would have been useful. (*Haight v. Costanich* (1920) 184 Cal. 426, 432.)

4.3.3 Limits of the pre-1914 Appropriative Right

While the Woods service agreements discuss water deliveries of up to 77.7 cfs, they do not establish an intent to develop a new pre-1914 appropriative water right of that amount. To the extent that the agreements served properties that had already had water rights, the Woods service agreements do not indicate an intent to increase total deliveries in the area above 77.7 cfs. The service agreements reference use of the existing system and the expansion contemplated for the agreements is limited.

4.3.3.1 Relationship Between Riparian and Appropriative Rights in Woods Service Area

As described in section 4.2, certain lands in the Woods service area have maintained riparian rights. To the extent lands within the Woods service area have maintained a riparian right to divert from Middle River, these lands did not additionally develop a pre-1914 water right.

Woods et al. maintain that it is possible to develop overlapping riparian and appropriative water rights on the same parcel of land, and that the riparian water rights inherent in these tracts of land should be added to the 77.7 cfs contemplated in the Woods service agreements. (Closing

Brief, pp. 22, 25.) Essentially, this would mean assuming that water was diverted under an appropriative right on riparian lands, and that the riparian owners can then switch to diverting under riparian rights, and "double-count" the water. Woods et al. cite four decisions in support of their position: *Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247; *Pleasant Valley Canal Co v. Borrer* (1998) 61 Cal.App.4th 742; *Porters Bar Dredging Co. v. Beaudry* (1911) 15 Cal.App. 751; and State Water Board Decision D-1282. The State Water Board disagrees that such "double counting" of the water is permissible.

While it is true that it is possible to develop an appropriative right on riparian lands in certain circumstances, this development only occurs when the appropriative use of water is one that the riparian right could not provide. In a sense, the appropriative right "wraps around" the riparian one, providing water only in circumstances the riparian could not, for example, for storage, for use on non-riparian lands, or for higher priority use. (See e.g. *City of Lodi v. East Bay Mun. Utility Dist.* (1937) 7 Cal.2d 316 [appropriative right necessary to store water, even for riparian landholder]; *Pleasant Valley Canal Co. v. Borrer, supra,* 61 Cal.App.4th 742 [appropriative right used on non-riparian lands]; *Rindge v. Crags Land Co., supra,* 56 Cal.App. at p. 252 [appropriative right has higher priority].) The right is not in addition to available riparian rights, such that the right holder can divert two times as much, or transfer the appropriative right while continuing to divert under the riparian one. "The privilege of claiming dual water rights cannot be made a vehicle for acquiring the right to more water than can be put to beneficial use." (Hutchins, *supra,* at p. 209.)

The only water available for appropriation is water not needed for use on riparian lands:

> "An appropriation can gain nothing as against riparian rights which have attached ... regardless of whether the water has been put to any beneficial use upon the land ... There would remain, then, as subject to appropriation only the excess water over and above what might reasonably be subjected to a beneficial use by lands bordering the stream."

(*Rindge v. Crags Land Co., supra,* 56 Cal.App. at p. 252.) Thus, a riparian right holder cannot develop an appropriative right to what would be needed for riparian use.

Similarly, in a situation in which a senior appropriative right develops on lands that later gain riparian rights, the riparian rights do not allow the land owner to take more water, once the appropriative amount covers the amount which would have been available under the riparian right. (*Senior v. Anderson* (1900) 130 Cal. 290, 296.) The statements in the authorities Woods et al. cite do not indicate otherwise.

In *Rindge v. Crags Land Co.*, the court held that a water user on public lands who diverted and applied water to beneficial use when the land was part of the public domain could maintain such a use as an appropriator even after receiving title to the land (at which point the riparian right attached). (*Id.* at pp. 252-53.) This appropriative right had priority over later-established riparian rights. (*Ibid.*) The appropriative right was established at 4.95 miner's inches, and the riparian right remained that which the owner reasonably needed to satisfy beneficial use on the property. (*Id.* at p. 253.) *Pleasant Valley Canal Co v. Borrer* similarly involved a diversion on public lands, via the "Duncan Ditch" before the patent date. The court found that the attachment of riparian rights to the property after patenting did not transform or eliminate the earlier-developed appropriative right. (*Id.* at p. 774.) Additionally, the court considered some of the water use established prior to patenting would have been incompatible with a riparian right because it involved water use outside the smallest tract in the chain of title that had maintained contiguity with the river. (*Id.* at pp. 774-75.)

Porters Bar Dredging Co. v. Beaudry applied an abuse of discretion standard to uphold a trial court's grant of temporary relief for plaintiff in finding it permissible for a plaintiff to claim to use water under a riparian right and an appropriative right, where defendant's interference with either right would enable the plaintiff to get relief. (*Id.* at pp. 762-63.) The court notes that proof for the purposes of temporary relief does not have to be "harmonious and consistent throughout all its parts" and that where more than one cause of action is plead, a cause "may be in some material particulars contradictory to or consistent with those of the other cause [of action] stated." (*Ibid.*) It holds that there is no fatal inconsistency with pleading both a riparian and appropriative claim, and then goes on to state: "we know of no reason why a party may not acquire by appropriation a right to the use of the water of a stream to which his lands are riparian." (*Id.* at p. 753.) It then discusses the possibility that a riparian may put water to "other than a riparian use." (*Id.* at p. 754.) The court does not suggest that the plaintiff's claimed appropriative rights could have developed for waters for which plaintiff also held a riparian right.

State Water Board Decision D-1282 denied a petition to change the place of use for a licensed appropriative right. The licensee intended to move the place of use to non-riparian land, and then replace the irrigation it had been conducting under the license with a dormant riparian right. Later permits and licenses issued for lands which might also have riparian rights contained a permit term clarifying that the appropriative right "wraps around" any existing riparian rights, and is not in addition to them, following the State Water Board's interpretation of the law. The Board found that even though this permit term had not been included in the license at issue, the

limitation of the licensed right to only what was needed above the riparian right was nonetheless a necessary part of the right under the law.

None of these authorities hold that a riparian right holder may use the available natural supply of water on riparian land for a riparian purpose, and then claim that the use was under an appropriative right which developed while its riparian rights lay dormant. Accordingly, Woods holds a pre-1914 appropriative right to divert some quantity of water less than 77.7 cfs, depending on how much water Woods delivered to riparian landowners pursuant to the 1911 service agreements.

4.4 Additional Riparian Rights Theories

Woods presents several theories to justify the assertion that all lands in the Woods service area have maintained riparian rights. The State Water Board rejects these theories.

4.4.1 Delta Pool

Woods et al. argue that all water in the Delta is part of a single, lake-like "Delta Pool," and that all lands within the Woods Service Area have retained a riparian right to this pool. (Closing brief, pp. 43-44.) The argument contains no citations to the evidentiary record. The brief notes, and the State Water Board agrees, that it is possible to maintain a water right to a waterbody which does not flow, like a lake. (*Id.* at p. 44.) While the brief does not clearly articulate this, presumably Woods et al. are presenting the theory to argue that lands that maintained a riparian connection to any natural water body in the Delta may draw from Middle River.

Woods et al. has not persuaded the State Water Board that the various watercourses described in the various maps and throughout the evidence presented are, in actuality, a single lake for purposes of attachment of riparian rights. The fact that the Delta was once swamp land connected to various rivers does not indicate that all the waters are part of a single waterbody. (Compare *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, 7-11 [upholding trial court finding that Fresno Slough was not a natural watercourse for purposes of riparian rights, despite connection to Kings and San Joaquin Rivers].)

Woods's claims that all the waters in the Delta form a single pool because of the area's connection to the Pacific Ocean and to groundwater, and because the Delta as a region has a statutory boundary, are unpersuasive. (See Exhibit WIC-8, pp. 1, 7.) A stream running to the ocean does not become part of an "ocean lake" because it is influenced by the tide. Similarly,

the fact that Delta waters are subject to tidal influence does not bind them into a single waterbody. Woods et al. provide no authority to the contrary.

The fact that the Delta region has a statutory boundary in Water Code section 12220 is irrelevant to whether the waters within the Delta form a lake. Many useful boundaries, such as those for states, counties, and regional districts formed for various purposes, may be defined without any implication as to whether the waters within such boundaries form a single lake-like mass for purposes of riparian rights.

As discussed in *Phelps*, *supra,* the assumptions regarding riparian status in the Delta Lowlands Report, Exhibit WIC-8H, were made for the purposes of estimation of water use, and do not impact whether or not riparian rights actually exist through operation of law. (*Phelps*, pp. 13-14.) Section 4.4.3 provides additional discussion of the claims that interconnected groundwater forms a basis for riparian rights. As discussed there, absent a finding of shared bed and banks, the connection of groundwater with other waters is insufficient to find that surface and groundwater form the same waterbody.

The land in the Middle Roberts Island may be riparian to certain waterways but not to others. Therefore, evidence regarding connectivity to waterways (like Burns Cut-off) that are not Middle River or sloughs connected to Middle River is not relevant to whether Woods may serve such lands with water diverted from Middle River.

4.4.2 Swamp and Overflow Lands May Lose Riparian Rights

Woods et al. argue that the lands at issue necessarily have riparian rights by virtue of being reclaimed from swamp and overflow lands. They contend the transfer of these lands from federal to state ownership required reclamation, and reclamation in the Delta lands using levees, canals, ditches, floodgates and other water management systems fundamentally changed the flow systems on Roberts Island. Woods et al. state, without citation to anything in the evidentiary record, that the success of such reclamation was and is economically dependant on the ability to irrigate the land. Even if this is the case, they present no argument as to why a riparian right would be necessary for irrigation.

Woods et al. argue that the "levees and drainage and irrigation systems within the Delta lands were permanently substituted for the numerous natural watercourses ... 'in such a manner as to give rise to riparian rights.'" (Closing Brief, p. 50 [citing *Tusher v. Gabrielsen* (1988) 68 Cal.App.4th 131, 134-35].) They also present two arguments why the State Water Board should

apply an assumption that riparian rights in the Delta survived severance from contiguity with a waterbody, absent an expression of contrary intent. First, they argue that, in this context, a grantor of a parcel that became separated from contiguity with a waterbody gained no benefit from severing the riparian right of the non-contiguous parcel, as the grantor then bears additional costs for managing the irrigation system. Second, they argue that because of the high water table, abandoned land would return to swamp or waterbodies which use more water than irrigated cropland.

In *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, the California Supreme Court found that a permanent, man-made canal which funneled the waters of one natural stream into another had become a natural watercourse for the purposes of riparian rights. The canal ran through former swamp and overflow lands, which had been reclaimed in part through modifications to the natural stream channels, which caused the waters to cut the canal. (*Id.* at pp. 5-6, 19.) The canal permanently changed the course of the Kings River, conducting substantially all of its waters. (*Id.* at pp. 12, 19.)

While the State Water Board agrees that reclamation was intended to and did made permanent changes to the Delta's hydrology, it does not follow that all irrigation features were intended to substitute for natural watercourses. Reclamation may have re-shaped the then-existing natural channels by ending their flow into sloughs or building levees, and may have created new pathways through which natural flow may run. Riparian rights would attach to reconfigured or new channels that carry the natural flow of a stream. However, an irrigation canal, a drainage ditch, and a levee are not normally meant to carry the natural course of the stream. Levees are intended to prevent water from going where it normally would, whereas irrigation canals take water to land in a managed manner and drainage canals remove water from the land as needed. Any irrigation or drainage system connected to a surface flow, and in fact any diversion works so connected, makes some change in natural water flows, but this change is insufficient to cause riparian rights to attach. These are water management tools, rather than new pathways for the water of an original natural water body.

The fact that land was granted to certain parties contingent upon their reclaiming the land is not materially different from other land-grant methods, such as homesteading, that also depended on land recipients making productive use of the land. (E.g. Homestead Act of 1862, § 2; Stock Raising Homestead Act of 1916.) These other methods did not confer an automatic guarantee of water rights: the land recipients had to acquire any water rights under state law, either

through contiguity with a waterbody or by appropriation. (E.g. *Williams v. City & County of San Francisco* (1938) 24 Cal.App.2d 630, 638 [lands patented under Desert Lands Act of 1877 acquire water rights through state law].) There is no reason to conclude, or authority cited for the proposition, that settlement on lands that required drainage would somehow be different from lands that did not.

Parties have cited no evidence concerning the funding of reclamation in the Delta in general, or Middle Roberts Island or the Woods service area in particular, which links reclamation to riparian rights or irrigation systems. It appears that major reclamation on Roberts Island had been completed before Woods came into existence. (See, e.g. Exhibit MSS-R-14A, exh. 21 [discussing extensive levees around Roberts Island in 1875].) There is no evidence in the record regarding other irrigation systems that paid for such reclamation.

Woods et al.'s funding argument appears to rely on the assumption that only land carrying riparian rights would be a part of irrigation systems. As California allows water use by appropriation and through groundwater pumping, this assumption is faulty. In fact, the service agreements describe a method to pay for creating and operating an irrigation system that does not depend on any particular lands in the Woods service area having riparian rights. (Exhibits WIC-6O, 6P.) Additionally, the irrigation system at issue provides not only irrigation but also drainage services. Drainage services do not depend on any water rights at all.

Woods et al.'s argument concerning increased water use on unfarmed lands similarly relies on this faulty assumption, as farming does not depend on maintenance of riparian rights. Furthermore, cases regarding the loss of riparian rights on non-contiguous parcels of land do not rely on any determination regarding severed lands' presumed water use with or without a riparian right. (E.g. *Anaheim, supra*, 150 Cal. at p. 331; *Hudson v. Dailey* (1909) 156 Cal. 617 [finding riparian right did not pass to defendants' severed lands, but that defendants had overlying rights to pump despite allegation that this pumping interfered with plaintiff's riparian right].)

As discussed in *Phelps*, land does not become riparian by virtue of its having been flooded or swamp land, as riparian rights do not attach to land that is under water. (*Phelps, supra*, at p. 11 [citing Hutchins, The California Law of Water Rights (1956) p. 210, *Lux v. Haggin* (1886) 69 Cal. 255, 413].) Furthermore, even if riparian rights did attach to such lands, there is no reason that such riparian right would be impossible to sever from the once-flooded land. (*Ibid.* [citing

Hudson v. Dailey (1909) 156 Cal. 617, 624-25; *Anaheim Union Water Co., supra,* 150 Cal. 327, 331; *Rancho Santa Margarita, supra,* 11 Cal.2d 501, 538.])

The State Water Board declines to create a new rule that grantors of former swamp and overflow lands in the Delta need a clear expression to sever riparian rights to lands that become non-contiguous to a waterway.

4.4.3 Overlying or Riparian Rights to Underflow Cannot be Drawn from Surface Water, Even Under a Common Pool Theory

Distinguishing *Anaheim v. Fuller* (1907) 150 Cal. 327, and relying on *Hudson v. Dailey* (1909) 156 Cal. 617, and *Turner v. James Canal Co.* (1909) 155 Cal. 82, Woods et al. argue that the lands at issue all have riparian rights which they can draw from Middle River, and that lands in the Central Delta in general are incapable of being severed from riparian status, because the groundwater is in "immediate connection" with the streamflow. They further argue that even if the lands in the service area are not riparian to the groundwater, they may exercise their overlying rights by drawing water from Middle River, consistent with the no injury rule, because the groundwater and surface water form a common supply.

4.4.3.1 Woods has not provided sufficient evidence that the lands in the service area have a riparian right to Middle River via the groundwater

Hudson v. Dailey, supra, 156 Cal. at 626 states that landowners whose property overlies water "in such immediate connection with the surface stream *as to make it a part of the stream*" may also be considered riparian to the stream, as opposed to overlying landowners. (*Ibid.* [emphasis added].) Woods et al. submit that the type of connection between shallow groundwater and surface streams within the Woods service area provides such an "immediate connection." They request that, should the State Water Board find that "underflow" or "underground flow" is necessary to establish such an "immediate connection," that the Board explain such a finding and define the terms "underflow" and "underground flow." They allege that the Board's *Phelps* decision was unclear as to these terms and to the reasoning for applying an underflow requirement.

"Percolating waters" as opposed to "definite underground" or subterranean streams are the two major classifications of California groundwater "for the purpose of determining rights of use." (Hutchins, *supra*, at p. 419.) While these distinctions may not be easy to make, and the physical situation may not always fit neatly within these distinctions, the California legislature

affirmed this primary distinction for purposes of legal classification of groundwater and the rights surrounding it in the Water Code. (Wat. Code, § 1200 [enacted after *Hudson v. Dailey, supra,* 156 Cal. 617 discussed the difficulty in distinguishing between the legal classifications of groundwater and established common pool theory for priority to address this difficulty]; *N. Gualala Wat. Co. v. SWRCB* (2006) 139 Cal.App.4th 1577, 1590-91 [discussing "Alice-in-Wonderland" quality of groundwater disputes because the legal categories the Legislature has not chosen to alter "bear little or no relationship to hydrological realities"].) There is a legal presumption that groundwater is percolating water: the burden to show otherwise is on the party so claiming. (*Los Angeles v. Pomeroy* (1899) 124 Cal. 597, 628-69, 633-34.)

State Water Board Decision 1639 described the relationship between the terms "underflow" and "subterranean stream flowing through a known and definite channel." (*Id.* at pp. 6-7.) The decision states that some subterranean streams are not interconnected with a surface stream, and went on to define underflow:

> Underflow was defined in *Los Angeles v.Pomeroy* as having the following physical characteristics:
> 1. Underflow must be in connection with a surface stream;
> 2. Underflow must be flowing in the same general direction as the surface stream; and
> 3. Underflow must be flowing in a watercourse and within a space reasonably well defined. (124 Cal. at 624 [57 P. at 594].)
>
> The relationship between subterranean streams and underflow is that both must flow in a watercourse. A watercourse must consist of bed, banks or sides, and water flowing in a defined channel. (*Id.* at 626 [57 P. at 595].) Thus, underflow is a subset of a subterranean stream flowing in known and definite channels.

(State Water Board Decision 1639 at p. 7.) *North Gualala, supra,* 139 Cal.App.4th, at pp. 1604-05, specifically rejects the contention that "underflow" is a third legal category, neither subterranean stream nor percolating groundwater. If finds that: "[r]ather, the pre-1913 case law suggests that underflows of surface streams were simply a subcategory of definite underground streams." (*Id.* at p. 1605.) In light of these precedents, the definition of underflow is clear.

Hudson v. Dailey, upon which Woods et al. rely, concerned a number of defendants with groundwater rights in the vicinity of San Jose Creek. It differentiated among defendants whose land overlay "percolating water" and those whose groundwater that was so connected to the

surface water that it was a "part of the stream," even as it discussed the difficulty in distinguishing between the two. (*Id.* at pp. 626-28.) While not holding that any of the lands overlay groundwater so connected that it was "part of the stream," the court did find that "the water in the lands of many of the defendants would be of the class ordinarily designated as percolating water," and that such percolating waters may feed a stream and be necessary to its continued flow. (*Id.* at p. 628.) Under *Hudson v. Dailey,* simply finding that groundwater feeds a stream, or that changes in surface diversions affect groundwater (or vice-versa) is insufficient to qualify the groundwater as part of the surface stream.

Hudson v. Dailey extended the logic of *Katz v. Walkinshaw* (1903) 141 Cal. 134 (which held that overlying users of groundwater are bound by reasonable use under the California Constitution's Article 10, section 2, and the doctrine of correlative rights rather than the common law rule of capture) to hold that giving either riparians or overlying users a priority right to use a common supply did not make sense. Neither case addressed what, if any, rights the owners riparian to the underflow of the river had to the surface flows, or any other issues regarding point of diversion.

Thus, *Hudson v. Dailey* continues the longstanding common law distinction between percolating groundwater and groundwater flowing through known and definite channels. The "such immediate connection ... as to make it a part of the stream" language does not establish a new test for classifying groundwater: the court, in fact, declines to classify the groundwater used by various defendants, as such a determination was not relevant to the priority issue before it. Instead, the language speaks to a definition of underflow as groundwater that is a part of a surface stream. The emphasis on degree of connection focuses on the case's ultimate holding that, for purposes of determining priority of use, groundwaters closely connected to surface flows can use the same correlative priority system as surface waters, regardless of whether these groundwaters are percolating or part of the surface stream's underflow.

The State Water Board recently addressed the question of how to determine whether subsurface water is percolating water or an underground stream in State Water Board Decision 1639:

> [F]or groundwater to be classified as a subterranean stream flowing through a known and definite channel, the following physical conditions must exist:
> 1. A subsurface channel must be present;
> 2. The channel must have relatively impermeable bed and banks;
> 3. The course of the channel must be known or capable of being determined by reasonable inference; and
> 4. Groundwater must be flowing in the channel.

(*Id.* at p. 4.)

North Gualala, supra, 139 Cal.App.4th 1577, upheld this definition on review of its application in a later case, with some guidance as to interpretation of the test. The case cautioned against too broad a reading of the subterranean stream test. (*Id.* at pp. 1605-06.) First, it rejects the suggestion in State Water Board Order WR 2001-14 that all groundwater flowing in the San Fernando Valley is part of a subterranean stream. It cites *Los Angeles v. Pomeroy* for the contention that:

> '*Water moving by force of gravity in a valley or basin of wide extent* ... and moving generally through the whole or through a large portion of the basin, along through the natural voids or interstices of the earth, composed of alluvial or other deposit lying throughout the entire basin ... *do not constitute a watercourse.*'

(*North Gualala, supra,* 139 Cal.App.4th at p. 1606, fn. 19 [emphasis added].) Next, it specifically rejects the suggestion that an "impact test" is sufficient to meet the requirement of a "subterranean stream flowing through known and definite channels." (*Id.* at p. 1606.)

Here, Woods has not shown that the groundwater beneath Woods's service area meets the tests described in Gualala for a subterranean stream, much less that for underflow.[12] None of the evidence Woods et al. cite discusses bed and banks of the claimed subterranean flow of Middle River. Therefore, it is legally assumed to be percolating groundwater. (*Los Angeles v. Pomeroy, supra,* 124 Cal. at 628.) Riparian rights do not attach to percolating groundwater. (*Katz v. Walkinshaw*, 141 Cal. 116, 139 ["percolating groundwater cannot be called an underground water course to which riparian rights attach"]; see also *Hutchins, supra,* pp. 446-454 [discussing separate origins of percolating groundwater law and riparian rights, and the analogies and distinctions between the doctrines].)

4.4.3.2 Overlying Groundwater Users May Not Divert from a Surface Stream Under the "Common Pool" Theory

Woods et al. argue that the State Water Board is either bound to determine or should extend precedent to determine that even non-riparian interconnected waters may be drawn from a surface stream.

[12] Even if there had been sufficient evidence provided to demonstrate that all of the Woods service area is riparian to the underground flow of Middle River, this does not mean that the landowners would have the right to divert from the surface stream. See section 4.4.3.2.

4.4.3.2.1 *Hudson v. Dailey* Does Not Establish a Rule That Land Owners Above Interconnected Groundwater or Riparians to Underflow May Divert from the Surface Stream

Woods et al. argue that lands overlying interconnected groundwaters may divert from the surface stream, citing *Hudson v. Dailey,* to the effect that interconnected percolating, underflow and surface waters:

> should be considered a common supply, in which all who *by their natural situation have access to it* have a common right, and of which they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands. The natural rights of these defendants and the plaintiff in this common supply of water would therefore be coequal, except as to quantity, and correlative.

(*Id.* at p. 628 [emphasis added].)

The quoted language means that each of the plaintiffs and defendants may take the water under or contiguous to their land, not that owners of land above interconnected groundwater may divert from the surface stream. The quote is from a paragraph comparing the similarities between natural rights of water use based on a property's access to water, be that percolating groundwater, a subterranean stream, or surface supply. A landowner whose property does not abut a surface stream does not have access to that surface stream by virtue of its "natural situation." Conflicts regarding point of diversion were not presented in *Hudson v. Dailey.* In context, the reference to the natural advantages inherent in a particular piece of land concerned access to the common supply by virtue of a right to divert from a source that makes use of that common supply, not a reference to points of diversion on others' land, in a manner contrary to prior decisions. (See section 4.4.3.2.2, below, for discussion of *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327.)

Similarly, contrary to Woods et al.'s arguments, the language above regarding coequal rights does not lend itself to the interpretation that such "equality" erases all distinctions regarding the exercise of rights. Such a reading would erase not only law regarding point of diversion, but also all other distinctions among the differing systems that regulate groundwater and surface riparian rights. The equality language, like the rest of the decision, is directed to the issue of priority among competing demands on waters that form a common pool, and should not be read to alter, sub silentio, the long-standing rules of water use for situations not presented.

4.4.3.2.2 The State Water Board Declines to Create Such a Rule

Woods et al. request the State Water Board create a rule that landowners with a riparian or overlying right to groundwater interconnected with surface water in a common pool may divert from the surface stream. Woods et al. argue that this interpretation is consistent with *Turner v. James Canal Co.* (1909) 155 Cal. 82 and *Anaheim, supra,* 150 Cal. 327, and with case law allowing a common point of diversion from a surface stream for multiple users with rights to the stream's waters.

Turner v. James Canal Co. permits surface riparians to divert from "any convenient point" on a surface stream, including after its confluence with a larger stream, as long as such diversion point does not injure other riparian water users. It does not address the rights of landowners whose property overlies solely a subterranean stream.

Anaheim, supra, 150 Cal. 327, concerned in part the ability of a landowner who claimed that his land was at least in part riparian to the underflow of Chino Creek to divert water from the surface of that creek. The court held that such a diversion was impermissible, stating:

> We are certain that such location of the land, with relation to the stream, does not carry the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from such surface stream, and there apply it to use on the latter to the injury of lands which abut upon the proper banks of the surface stream, and, hence, that even if the Smith land were all within the watershed, such location upon the underground flow does not justify the diversion the defendants were making from the surface stream...

(*Id.* at p. 332.)

Woods et al. argue for a narrow interpretation of *Anaheim*, claiming that it applies only when diversions from the surface stream would cause injury to the landowners contiguous to the surface stream. *Anaheim's* rule is based on the reasoning that treating a right to divert from groundwater as a right to divert from the surface stream would injure riparian right holders in general, not upon proof that any particular riparian right holder would be injured. In fact, *Anaheim* concluded that the riparian plaintiffs do not have to show any harm from defendants' actions in diverting water from the surface stream under claim of right to divert as a riparian to the underflow in order to obtain an injunction. (*Anaheim, supra*, 150 Cal. at p. 333.)

No case that the parties presented and no other authority that the State Water Board has been able to find has held that landowners whose lands include groundwater may divert from

interconnected surface waters on the basis of the connection to groundwater. The State Water Board has held to the contrary. (*Phelps, supra,* p. 12.)

4.4.4 The State Water Board is Not Estopped from Contesting the Water Rights of Owners of Swamp and Overflow Lands

Woods et al. assert that the State Water Board should be estopped from contesting the riparian rights of owners of former swamp and overflow lands, because the State "was apprised how the reclamation [of swamp and overflow lands] would be accomplished, and the State intended that its conduct would be acted upon in the precise manner in which it was acted upon." Further, they assert that "there is no evidence that those relying upon the state's conduct were otherwise aware nor did the State make any effort to make them aware to the contrary, and the owners clearly relied on the continued viability of their water supply and the underlying rights" for more than 100 years.

To the extent that Woods et al. are asserting that an earlier lack of enforcement or investigation of water rights law in the Delta somehow prevents the State Water Board from investigating diversions and enforcing the law, the Board rejected this assertion in *Phelps*, and rejects it again here. (See *Phelps*, pp. 13-14 [upheld in *Phelps v. SWRCB* (2007) 156 Cal.App.4th 89, 113-16].)

The contention that the State Water Board may not enforce water right law in the Delta because the state encouraged reclamation of the area is unpersuasive. Woods et al. fail to cite to any evidence in the record regarding any promises made to any Delta landowner in the Woods current service area regarding water rights. Requiring landowners in the Delta to conform with the same water laws enacted to encourage application of water to beneficial use and to promote reasonable use throughout the state as all other water users, including all other farmers, is not contrary to use of these lands as reclaimed. Agriculture throughout the state, including in other areas brought into production with state and/or federal assistance, is subject to the California law of water rights, including the prohibition against unauthorized diversion and use. (See generally *People v. Shirokow* (1980) 26 Cal.3d 301, 309 [Any use other than riparian or pre-1914 appropriative is conditioned upon compliance with the statutory appropriation procedures administered by the State Water Board].)

4.4.5 Hereditaments Language in Deeds is Insufficient to Maintain a Riparian Right

Woods et al. argue that, because a riparian water right is a hereditament, and the deeds transferring the lands within the Woods service area from patenting until creation of Woods

contain language transferring "tenements, hereditaments and appurtenances," the deeds demonstrate an intent to maintain riparian rights.

The definition of hereditament is: "1. Any property that can be inherited, anything that passes by intestacy. 2. Real property; land." (*Black's Law Dictionary*, 7th Ed., p. 730.) As this term does not describe something more specific than real property, it is unclear why Woods et al. argue that using this term somehow would indicate an intention regarding riparian rights specifically. Riparian rights are inherent in land that is contiguous to a waterbody. The requirement for specificity in a deed or another showing of intent for the right to continue to adhere in land made non-contiguous to the river is not affected by general hereditaments language any more so than by any other language referring to property. In *Murphy Slough, supra,* the court did not interpret a deed that purported to transfer hereditaments to a strip of land to include a transfer of the riparian right. (*Id.*, 27 Cal.App.3d at pp. 652, 658.)[13]
The deeds referenced do not indicate an intent to retain riparian rights in non-contiguous lands.

4.4.6 Evidence Beyond the Deeds Does Not Indicate an Intent to Maintain Riparian Rights to Middle River on Non-Contiguous Lands

With the exception of Parcel 2, no party has provided evidence of an intent to maintain riparian rights to Middle River on the lands which became non-contiguous to the river after the transfer of Parcel 2 in 1891. The mere fact that the lands were once connected as part of a larger agrarian tract is insufficient evidence of such an intent. (*Hudson v. Dailey, supra,* 156 Cal. pp. 624-25 ["the mere fact that it was part of the rancho to which the riparian right had extended while the ownership was continuous from it to the banks of the stream would not reserve that right to the severed tract"].) *Hudson v. Dailey* states that, absent mention in a conveyance, indicia of an intent to maintain riparian rights could include prior deliveries of water from the waterbody, ditches from the waterbody to the non-contiguous parcel or other conditions indicating the right should continue. (*Ibid.*) All these examples rely on objectively verifiable evidence regarding the specific properties at issue.

[13] Even if hereditaments language in a deed were sufficient to maintain a riparian right in a parcel that becomes non-contiguous, this language is irrelevant in a deed that refers to the rights of the transferred contiguous parcel: such a deed says nothing about the rights remaining in the non-contiguous tract of land. (See Exhibit MSS-R-14, exh. 7A [showing transfer of parcel contiguous to Middle River from larger tract of lands owned by Stewart et al.].) If any meaning relating to riparian rights is attributable to the term, it would tend to cut against the retention of the right in the remaining, non-contiguous tract, as it would suggest that the right was transferred to the contiguous tract of land.

Here, there is no evidence that Stewart et al. diverted any water from Middle River for purposes of irrigation, or that any irrigation occurred in the area before 1898 when Woods began construction of a gravity flow diversion system. (Exhibit MSS-R-14, exhs. 5, 6.) If such irrigation were ongoing, it is unclear why a new diversion system would require construction or be newsworthy. There is no evidence that Stewart et al. was engaged in irrigated agriculture. Additionally, there is no evidence that Stewart et al. used water on the land for any purpose or, if it had, that they would have drawn such water from Middle River as opposed to from Burns Cut-Off (to which it was also riparian) or from the San Joaquin River, from which Stewart et al. could have developed an appropriative right.

Woods et al. argue that the lands in the Delta were intended to be used for agriculture and that therefore the intention of the parties must have been to maintain a riparian right to Middle River for all the properties. Such reasoning does not constitute specific evidence regarding the parties to a particular transaction. Furthermore, the argument's logic does not hold in a legal framework under which it is possible to develop appropriative rights to water, or in a transaction in which the property that lost connection to Middle River maintained contiguity to other waterbodies. (See Exhibit MSS-R-14, exh. 7A.)

4.4.7 Rights Based on Contiguity to Historic[14] Sloughs

Woods et al. argue that lands within the Woods service area maintained riparian rights by virtue of a connection to sloughs that received water from Middle River. It is possible in certain circumstances for a landowner riparian to a slough to draw water under a riparian right from the main watercourse connected to the slough. (See *Turner v. James Canal Co.* (1909) 155 Cal. 82.) Parties presented specific evidence regarding Duck Slough, which no longer exists, and an unnamed interior slough along the more eastern of Woods's diversion canals from Middle River.[15] Citing *Smith v. City of Los Angeles* (1994) 66 Cal.App.2d 562 and *Lindblom v. Round*

[14] The testimony and evidence refer to "historic" sloughs. Some of the evidence relating to such sloughs is in historical documents, but some is based on soil deposits and geological and hydrogeological analysis, which could relate to sloughs in pre-historic times. For ease of reference, this order uses the term "historic" to refer to evidence concerning both pre-historic and historic water bodies.

[15] Woods et al.'s closing brief refers to multiple interior island sloughs, but does not cite to evidence regarding these. While there are several references in the evidence to other potential waterways that may have been present on Roberts Island, there is not sufficient information in the record regarding these sloughs for the Board to make any meaningful determination regarding riparian rights to draw from Middle River in Woods service area. Mr. Moore, a witness for Woods, suggested that riparian features covered much of the Woods service area, at some point in time, and that there is good correlation between historic riparian features and the main canals and ditches of the Woods delivery system. (Exhibits WIC-2 [relating to WIC-2L], WIC-2K.) His testimony, however, did not clarify how long ago the historic features carried natural flow and from where. Mr. Moore also testified that the only natural sloughs connected with Middle River after reclamation were Duck Slough and the unnamed slough along the path of what is now the more easterly of Woods' diversions from Middle River. (RT pp. 270:20 – 271:10.)

Valley Water Company (1918) 178 Cal. 450, Woods et al. argue that a natural watercourse does not lose its character as such because a dam regulates the water running through it, and that therefore the properties abutting Duck Slough and the unnamed slough at the time of the service contracts have retained riparian rights to Middle River.

The mere fact that the bed and banks of what was once a natural channel remain after a permanent change in the flow of a watercourse is insufficient to show the maintenance of a riparian right to water that would once have naturally flowed in that watercourse. (*Rancho Santa Margarita, supra,* 11 Cal.2d at pp. 548-49 ["In past ages this mesa land may have been delta land, and may have been riparian to the river, but riparian rights are not determined by past geologic formations but by the present natural topography."]; *Wholey v. Caldwell* (1895) 108 Cal. 95, 100-101 [when because of natural causes "the flow is lost, the [riparian] right is lost with it ... ¶]... 'A watercourse running between the lands of A and B, which leaves its course and suddenly and sensibly makes its channel wholly upon the land of A, belongs wholly to A.'"] [quoting Hale's *De Jure Maris,* c. 1]; *McKissick Cattle Co. v. Alsaga* (1919) 41 Cal.App. 380, 387-90; *State of California ex. Re. State Lands Comm'n v. Superior Court* (1995) 11 Cal.4th 50, 79 [discussing accretion and avulsion in river systems by artificial causes].) The ability of a former riparian owner whose land has lost contiguity with the water to divert water from the new channel back to the original one depends on doing so within a reasonable time, and on not disturbing the rights of others. (*McKissick Cattle Co., supra,* 41 Cal.App. at p. 389.)

The State Water Board sees no reason why a permanent change to flows caused by long-standing reclamation projects, which have altered completely the prior swamp area, should be treated differently. (Compare *Chowchilla Farms v. Martin* (1933) 219 Cal. 1 [holding that channel formed through prior swamplands for reclamation purposes had taken on attributes of a natural channel for riparian rights purposes].) The cases Woods et al. rely on are not to the contrary. *Smith v. Los Angeles, supra,* 66 Cal.App.2d 562, concerned the definition of a natural channel for liability purposes for property damage caused in part by levee strengthening. It does not address the potential riparian rights of those bordering the channel after water had been permanently diverted to the other branch of the stream. *Lindblom, supra,* 178 Cal. 450, concerns the maintenance of riparian rights when an upstream senior appropriator has blocked off all flow to a streambed to supply mining operations, but no longer beneficially uses its diversion. The case stands for the rule that an upstream appropriation does not cause downstream riparians to lose their rights. (*Id.* at p. 433 ["a watercourse .... would not lose that [natural] character *by a mere diversion* ..."].) Such a "mere diversion" is not a permanent

alteration to the geography of the area comparable to reclamation, a process undertaken with the intent to permanently change the area from swamp to dry land.

Riparian rights remain in natural waterbodies whose flow is regulated or changed by upstream higher-priority diversions, even as the extent of the right is measured by the natural flow. (See *Lindblom, supra*, 178 Cal. at p. 457.) Thus, construction of a barrier does not necessarily deprive a natural watercourse of its character as such for riparian rights purposes, where the barrier serves to regulate flows as opposed to permanently changing the course of the waterbody.

4.4.7.1 Duck Slough

Duck Slough is a historic slough, which no longer exists. (RT pp. 716:24 – 717:2). The parties contest whether the former Duck Slough was ever connected to Middle River, and Woods and MSS parties both presented extensive evidence and conducted extensive cross-examination regarding the slough. Woods presented testimony by certified engineer Christopher Neudeck and registered geologist and certified hydrogeologist Donald Moore to the effect that Duck Slough extended from Burns Cut-off to Middle River, and that the direction of flow to the connecting waterbodies depended on the tides, but was primarily from Middle River into the slough. They testified that Duck Slough ran along the extent of the feature sometimes labeled Cross Levee and sometimes labeled High Ridge Levee, and along which Inland Drive now runs.

Mr. Moore relies on photographs enhanced through stereo-pairs analysis and compared with historic maps to support his conclusion that Duck Slough was connected to Middle River. (Exhibit WIC-2.) He further relies on comparison with soil analysis performed by Ken Lajoie in 2010 in preparation for a set of separate enforcement hearings to bolster this conclusion. (Exhibits WIC-2, WIC-2K.) Neither the photographs nor additional information on the work by Mr. Lajoie or Mr. Atwater were submitted into evidence, although it would have been within Woods's power to do so, as Woods apparently provided the photographs to other parties, Mr. Moore worked with Mr. Lajoie on developing the evidence used, and Mr. Lajoie apparently testified in other recent hearings before the Board regarding his work. (RT pp. 234:13-25; 322:24-323:10.)[16] While these factors do not make Mr. Moore's testimony inadmissible, they limit the weight the State Water Board will give to the evidence. (See Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to

[16] Section 4.6.1.1 addresses Woods et al.'s request to take official notice of the proceedings in the Dunkel, Mussi, and Pak and Young matters, which presumably include more information regarding Mr. Lajoie's work.

produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust"].)

The map showing Mr. Lajoie's soil analysis indicates that deposits from Middle River reached into Robert's Island, indicating that there was water bringing the soils up. (Exhibit WIC-2K; RT p. 205:7-17.) There is no indication of how long ago this occurred, however. The deposits could have been over geologic time, while the relevant period for determining whether riparian rights attach is the present day.

Mr. Moore testified that the feature he identified as Duck Slough contained water in 1937, based on 1937 photographs, including photographs that showed reflections from the water which were not included in the exhibits, because they were "somewhat objectionable." (RT pp. 278:11 – 279:5) He also testified that the feature had been filled in by 1940. (RT p. 308:1-17.)

On cross-examination, MSS parties introduced evidence concerning a proposed irrigation canal to run alongside the levee, on the eastern side. (Exhibit MSS-2.) It is unclear why such a canal would be necessary, if there were a slough already existing along the same path. It is also unclear that Mr. Moore could distinguish between a canal that followed High Ridge Levee and a slough that followed High Ridge Levee in the 1937 photographs.

Furthermore, the maps which Mr. Moore used to develop his interpretation of the photographs, including the Duck Slough feature, do not definitively label the feature as a slough, and one of them, the Holt Quadrangle Map, does not depict a feature in the area of Duck Slough. (See Exhibits WIC-2A, WIC-2B, WIC-2C, WIC-2D.)

Mr. Neudeck testified that he interpreted a series of maps from the late 1800's through the early 1900's to indicate that there was water in Duck Slough from Middle River to Burns Cut-off. On most of the maps, the line between Middle River to Burns Cut-off was labeled as a levee, a canal or not labeled at all, rather than being labeled Duck Slough. (See e.g. Exhibit WIC-4, exhs. 3H, 3L, 3P, 3Q, 3S.) Some maps do label Duck Slough, but on these the line either does not extend to Middle River, or it is unclear that the label is for the entire length of the line between Burns Cut-off and Middle River. (See e.g. Exhibit WIC-4, exhs. 3N, 3O.) Mr. Neudeck testified that the slough ran along the eastern side of the levee. (RT pp. 574:19-576:22.)

Mr. Neudeck interpreted events described in *Nelson v. Robinson* (1941) 47 Cal.App.2d 520, regarding seepage damage to property in the vicinity of the High Ridge Levee near Middle River

in 1924 to confirm the existence of Duck Slough, because the case discusses the filling of a slough that seeped onto plaintiff's property, which Mr. Neudeck states could have only been Duck Slough. (Exhibit WIC-4, pp. 1-2.) On cross examination, he drew a schematic of how he believed the properties, Middle River, Duck Slough, the irrigation canal, and High Ridge Levee to be situated. (MSS-8.) However, his interpretation that Duck Slough was filled-in relies on there being an error in the actual discussion of the facts. (*Id.* at p. 2.)

Mr. Neudeck testified that the slough stopped carrying water in 1926. (RT p. 513:15-22.) Mr. Neudeck further testified that a "floating steam shovel" had dredged material from Duck Slough to improve and create the High Ridge Levee (including the part of the levee adjacent to a particular parcel which is closer to Middle River than Burns Cut-off), based on a dissertation mentioning the use of such a dredge. (Exhibit WIC-4A, pp. 2-3 [referencing Exhibit WIC-4A, exh. 3K]; see also Exhibit WIC-41, exh. 3F [map showing referenced Mussi property].) On cross-examination, he acknowledged that he did not know how far down from Burns Cut-off the floating dredge progressed. (RT pp. 626:14-627:12.)

MSS parties presented testimony by Stephen Wee, a historian with an emphasis on environmental history, that Duck Slough extended from Burns Cut-off into the interior of Roberts Island to Honker Lake Mound, partly bordering High Ridge Levee. Mr. Wee analyzed the same maps submitted by Mr. Neudeck, with the conclusion that Duck Slough did not extend to Middle River. (See generally exhibits MSS-R-14, MSS-R-14A.) His analysis of the coloration of sloughs and other waterbodies on assessors maps is more convincing than Mr. Neudeck's assertion that blue coloring on assessors maps indicated waterbodies. (Exhibit MSS-R-14, pp. 2-3.) He submitted additional maps from the mid- to late-1800's depicting a slough extending from Burns Cut-off in the same location as the Duck Slough, High Ridge Levee, Cross Levee, Inland Drive feature, but not extending to Middle River. (Exhibits MSS-R-14A, exhs. 17, 18 & 19.) Exhibit MSS-3, a map from *Settlement Geography of the Sacramento-San Joaquin Delta*, John Thompson, 1937, which MSS parties presented during the cross-examination of Mr. Nomellini, similarly depicts an unlabeled water body extending from Burns Cut-off at the location of Duck Slough, but not extending to Middle River.

Mr. Wee additionally submitted evidence that an 1875 survey of Roberts Island from Middle River found no slough connecting to Middle River at the location of High Ridge Levee. (Exhibits MSS-R-14, pp. 6-7; MSS-R-14A, exhs. 21, 22.) Finally, he presented a review of historical documents relating to the building of High Ridge Levee and the attempted dredging of Duck Slough which indicate that the southern portion of High Ridge Levee was not completed by a

floating dredger in a slough, in contravention of Mr. Neudeck's testimony. (See generally Exhibits MSS-R-14, pp. 6-12; MSS-R-14A, exhs. 21-37.) These sources discuss the connection with Duck Slough near Burns Cut-off, but do not mention it extending to Middle River. (E.g. Exhibit MSS-R-14A, 21, 23, 24, 33.)

Mr. Wee testified that a gate was installed at the junction of Duck Slough and Burns Cut-off in 1876 to allow drainage from the slough to escape, but to prevent water from Burns Cut-off from entering the slough. (See MSS-R-14A, exh. 36.) He states that Duck Slough had been filled in by 1913. (RT pp. 968:20-969:14.)

As a whole, the evidence that Duck Slough never extended to Middle River is more convincing than the evidence that it did. Even if Duck Slough did at one point intersect with Middle River there is evidence that any such connection would have been dammed off before any irrigation began, and before the land on Robert's Island was subdivided and purchased by the Woods Brothers. (Exhibits MSS-R-14, pp. 6-7; MSS-R-14, exh. 6; MSS-R-14A, exhs. 21, 22.) Therefore, there is no reason to believe that such reclamation was not intended as a permanent, avulsive change in the waterbody. Moreover, Duck Slough no longer exists, and therefore any riparian rights to Duck Slough have been lost. (*Rancho Santa Margarita v. Vail*, *supra*, 11 Cal.2d at pp. 548-549; *Wholey v. Caldwell*, *supra*, 108 Cal. at pp. 100-101.) For the foregoing reasons, historic contiguity to Duck Slough cannot provide the basis for a valid water right.

4.4.7.2 Unnamed Interior Island Slough

An interior island slough appears on a range of early maps, in the location of the current Woods diversion facilities, and extending along the first part of what is now the primary eastern canal for the Woods service area. (See Exhibits WIC 2-2A, WIC 2-2B, WIC 2-2D, WIC 6-L [enlarged detail of Exhibit WIC 2-2B]; see also Exhibit WIC 2-2L and accompanying Moore testimony discussing slough.) The unnamed slough crosses parcels 2, 5 and 7 on the map showing conveyances from Stewart et al. to the Woods brothers.[17] (Exhibit MSS-R-14, Woods Exhibit 7A.) Mr. Gibbs noted in his report from the 1875 survey of the island for reclamation purposes that it would be necessary to dam the slough in order to reclaim the island. (Exhibit MSS-R-14A-21.) This report also notes that the sloughs on Roberts Island will assist in draining the interior. (*Ibid.*)

[17] Note that the conveyance of parcel 7 was of a one-half interest. The other half appears to have been transferred to Blossom. (Exhibit MSS-R-14, exh. 7A.)

No party has presented convincing evidence that the slough was intended to continue functioning as a natural watercourse under a regulated flow regime. Rather, the Gibbs report suggests that its damming was intended to alter the flow of Middle River to prevent it from entering the slough, with the goal of permanent reclamation of the island. The fact that the feature was used early on for irrigation and possibly drainage (see, e.g. Exhibit WIC-2A) and that it still is today, does not indicate to the contrary.

4.5 Issuance of a CDO is Appropriate Even If it Might Result in No Decrease or A Slight Increase in Water Use On the Island

Woods et al. argue that the State Water Board should not issue a CDO because halting Woods's diversions would result in increased water usage because of the reduced water requirements of agriculture as compared to uncultivated areas.

A diversion may be unauthorized and the State Water Board may issue a CDO regardless of whether it has a water impact on others, and whether or not it results in more or less water in the waterbody from which water is being diverted. (See Wat. Code, §§ 1052, 1225, 1831.) It is state policy that the State Water Board should "take vigorous action ... to prevent unlawful diversion of water." (Wat. Code, § 1825.) The State Water Board has identified water right enforcement of diversions in and affecting the Delta as a high priority in the updates to the overall Strategic Plan and the specific strategic workplan for the Delta, of which it now takes official notice. (The California Water Boards' 2010 Update to Strategic Plan 2008-2010, p. 6, available at: http://www.waterboards.ca.gov/water_issues/hot_topics/strategic_plan/docs/2010/final_strategic_plan_update_report_062310.pdf; June 2008 Draft Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, pp. 6, 14, available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/strategic_plan/docs/baydelta_workplan_final.pdf.) This priority is for both water quality and water supply reasons. (*Ibid.*)

While the argument that irrigation will increase water availability for other users would be relevant for a consideration of water availability, were Woods or another water user in the area to apply for a water right permit, it does not provide authority for an otherwise unauthorized diversion. The State Water Board has expended considerable resources to investigate, prosecute and hold an extensive hearing on an unauthorized diversion. Woods has not shown that issuance of such a CDO would be contrary to the public interest.

Additionally, Woods's evidence regarding the claim that the CDO will result in increased water use is not convincing. Mr. Nomellini testified that, as a general rule, each acre of agriculture saves approximately 2 acre-feet per annum of water. (See e.g. RT p. 579:5-9.) The evidence submitted to substantiate this claim is less clear, however. It shows that uncultivated areas can use less water, more water, or the same amount of water as irrigated agriculture, depending on the crops grown, whether the crops are irrigated, the type of vegetation on uncultivated areas,

and a variety of other factors. (See WIC-8F [letter from Department of Water Resources to State Water Board regarding reduced water savings, and no water savings in some areas, of Delta land fallowing because of weed growth]; WIC-8B, p. 26 [chart showing consumptive use estimates for a variety of crops and native vegetation]; WIC-8E [extensive report discussing a range of factors to consider in estimating Delta diversions and return flows, including soil type, vegetation, irrigation efficiency].) Some of these documents also address water quality impacts from irrigation. (See e.g. WIC-8E.)

Additionally, Woods has produced no evidence that the land would be taken out of agricultural production if diversions were limited to 77.7 cfs., rather than responding with efficiencies in irrigation or with adjusting crops planted. (See WIC 8E, p. 60 [showing changing cropping patterns on a different Delta island in dry and critically dry years, with no increase in native or riparian vegetation].)

4.6 Some Provisions of the Draft CDO are Unsupported in the Record

No parties presented evidence regarding the necessity to impose certain provisions of the draft CDO. No allegation of, or evidence concerning, waste or unreasonable use arose during the hearing, so the requirement that Woods's monitoring plan include information on "The measures taken to ensure reasonable beneficial diversion and use of water by Woods's users, and for the reduction of discharges of unused fresh water back into Delta waters" or other information on discharges or spilling back into Delta waters or on the crops being served is unsupported in the record and will not be included in this order.

4.7 Evidentiary Issues

4.7.1 Woods, SDWA and CDWA Evidentiary Claims

4.7.1.1 Request for Official Notice

Woods et al. requested the State Water Board to take official notice of a series of grant deeds from Stewart et al. for transfers of land contiguous to Middle River, but not within the Woods service area. The State Water Board takes official notice of these deeds under Evidence Code section 452, subdivisions (c) and (g). (See *Lockhart v. MUM, Inc.* (2009) 175 Cal.App.4th 1452, 1460-61.) The deeds tend to show that the lands remaining in Stewart et al.'s possession after June 8, 1891 (when Parcel 2 was transferred) lost contiguity to Middle River, as discussed in section 4.2.3.

Woods et al. additionally request that all evidence in the records for the Mussi, Pak & Young, and Dunkel matters[18] be incorporated into the Woods hearing, as "the issues are similar, the parties are identical, and the evidence ... is substantially interrelated." The motion does not present a theory as to why the entire records of three additional enforcement proceedings are relevant to the Woods enforcement matter.

In fact, the parties in all these proceedings are not identical: each entity facing a proposed enforcement action is different. While each of these parties has the same counsel, the same parties have intervened in each case, and there was a large degree of overlap in witnesses for each matter, the core of each hearing is whether or not the Board should issue a CDO based on a threatened or actual unauthorized diversion by the named entity.

All the parties to the current matter were given ample opportunity over five days of hearings to present all the information they believed to be relevant to the question of whether Woods had the necessary water rights to cover its diversions from Middle River. The hearing officers permitted time extensions for cases-in-chief, extensive cross-examination, redirect and re-cross examination, and rebuttals. The proper method to incorporate evidence from any other hearings would have been to present it at this hearing, and allow cross examination and rebuttal regarding the evidence, as, for example, Woods did by submitting as an exhibit the testimony that Mr. Neudeck presented in the Mussi matter. (See Exhibit WIC-4A.) Mr. Neudeck was then cross-examined based on this submittal, and both the exhibit and the oral testimony form part of the Woods hearing record. (See e.g. RT pp. 623:14-626:13, 636:4-643:18.) The MSS parties similarly submitted into evidence in this hearing evidence originally prepared for the Mussi hearing, Mr. Wee's interpretation of which was then subjected to extensive cross-examination. (See Exhibits MSS-R-14 & MSS-R-14A; RT, Vol. V, pp. 1133-1258 [generally].) The fact that the evidence from the Mussi hearing was the subject of cross-examination indicates that it is not the type of information suitable for submission for its truth upon official notice.

It was additionally clear from the hearing itself that the hearing record the State Water Board would consider was only the record from the Woods hearing. (RT pp. 317:5 – 318:10.) During the hearing, Woods appeared to understand that it was necessary to submit evidence into the record that it wished the Board to consider. (RT p. 317:17-23.)

[18] These matters are additional enforcement hearings before the State Water Board regarding alleged unauthorized diversions in the Delta, on Middle Roberts Island.

Mr. O'Laughlin, the attorney for MID, did, on the fourth hearing day, bring up the possibility of drafting a stipulation among the parties to allow into evidence certain, as-yet-to-be-agreed-upon parts of the records in the other ongoing Delta enforcement hearings, with an eye towards assisting the trial court, in the likely event that the Woods matter goes on to judicial review. (RT pp. 901:20-902:21, 904:17-20; 905: 9-20.) The hearing officer stated that such a stipulation regarding certain elements of the other hearings would be an acceptable manner in which to proceed, and would be considered. (RT pp. 904:17-20, 906:3-11.) However, the parties filed no such stipulation. The prosecution team objected to the potential for a wholesale merger of the records, and the hearing officer indicated that such a merger would not be acceptable. (RT pp. 905:21-906:2-9.)

The State Water Board declines to incorporate evidence from multiple additional days of hearings on other matters into the current record through official notice.

4.7.1.2 It was Proper to Exclude the Neudeck Testimony from the *Phelps* case from the Record

Woods et al. assert that Mr. Neudeck's testimony from the *Phelps* case was improperly excluded from the record because it does not serve only to support the Delta Pool theory and because the appellate court in *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89 did not reject the "common underground/surface supply theory."

On the third day of hearing, June 25, 2010, Mr. O'Laughlin filed a motion to strike Mr. Neudeck's testimony from the *Phelps* case, presented as Exhibits WIC 4A, exh. 3V and WIC-4D. One of the reasons given for the motion was that the testimony was irrelevant, as it served only to support a legal contention which the Board had already rejected in the *Phelps* case, namely that the groundwaters beneath the lands on Roberts Island provide a riparian right to the surface waters, because those waters are so connected.

On June 29, 2010, the hearing team requested on behalf of the hearing officer that the parties be prepared to discuss all evidentiary motions and objections at the hearing on July 2, 2010. On the last day of hearing, July 2, 2010, Mr. Herrick was unable to articulate any other reason than that presented in the motion to strike why the testimony was relevant. (RT at pp. 1268:2–1269:4.) On July 19, 2010 the hearing officer granted the motion, finding it irrelevant to the Woods proceeding.

On September 3, 2010, Woods et al. filed an opposition to Mr. O'Laughlin's motion alleging that it was procedurally improper and that it mischaracterized the relevance of Mr. Neudeck's testimony. While Woods et al. are correct that the Board did not invite motions, the Board did allow objections to be raised to admitting testimony. The motion to strike served the same function as an oral objection to admission of the testimony, which the Board did allow during the hearing, and the motion was submitted at the time the Board requested such objections. Additionally, parties were given additional time to respond to this motion and all the evidentiary objections to submission of Woods's evidence, rather than being required to respond at the time objections were made.

Woods et al.'s brief enumerates five additional theories as to why the testimony regarding the interconnection of the ground and surface waters is relevant. The State Water Board rejects all of these theories.

The brief and motion are untimely in raising these issues, which should have been addressed at the hearing and certainly before the ruling issued. The hearing officer's ruling excluding the testimony from the record stands.

4.7.1.3 Mr. Wee's Credibility

Woods et al. argue that Mr. Wee is an unreliable witness. The majority of this argument relies on statements not in the record. The parties had the ability to cross-examine Mr. Wee in the hearing, including the ability to impeach him as a witness. In fact, the parties had additional time to prepare for such cross-examination, as the final hearing date was postponed at the request of Woods's attorney, which was joined by the attorneys for County and CDWA and SDWA. (RT pp. 977:15-978:7, 1109:19-1125:24.) The State Water Board disagrees with the assertion that Mr. Wee is an unreliable witness.

4.7.2 MSS Parties' Evidentiary Objections

MSS parties seek to "renew" their evidentiary objections and motions, without responding to any of the reasons given for the hearing officer's rulings on these motions. Additionally, their brief fails to explain on what grounds they raise a hearsay objection to Exhibits WIC 2E-2K, despite the hearing officer's request that the parties address this issue in briefing. There is no reason to address these evidentiary issues again in this order.

5.0 CONCLUSION

The evidence indicates that Woods has diverted, and threatens to again divert above 77.7 cfs from Middle River without a known basis of right. Therefore the State Water Board will issue a Cease and Desist Order consistent with the rationale above.

ORDER

IT IS HEREBY ORDERED THAT pursuant to sections 1831 through 1836 of the Water Code, within 60 days Woods shall cease and desist from diverting water in excess of 77.7 cfs at any time, unless and until Woods has complied with paragraphs 3 through 6, below.

1. Within 45 days of the date of this order, Woods shall submit to the Deputy Director for Water Rights (Deputy Director) a description of the method that Woods will use, pending compliance with the monitoring requirements set forth in paragraph 2, below, to ensure that Woods's rate of diversion from Middle River is consistent with this order. Woods shall make any changes to the method that the Deputy Director requires and implement the method upon the Deputy Director's approval.

2. Within 120 days of the date of this order, Woods shall submit to the Deputy Director a diversion monitoring and reporting plan. Woods shall make any changes to the plan that the Deputy Director requires, and shall implement the plan upon the Deputy Director's approval. The plan shall be consistent with any applicable requirements of Water Code sections 5100 through 5107, and shall include, at a minimum:

(1) Provisions for monthly monitoring and recording of the amounts and rates of water diverted from Middle River;

(2) Installation of measuring devices at the points of diversion for the Woods system;

(3) An operator's manual, flow chart, or other instruction that identifies the process to be taken by Woods's employees to routinely measure and record diversions at Woods's pump stations, and the maintenance and calibration schedule of all measuring devices used to comply with this order. The instructions should be available to any of Woods's employees who are trained to operate the Woods irrigation system.

(4) Provisions for reporting monthly diversion records to the State Water Board. For the initial three-year period, diversion records shall be reported on an annual basis. Woods shall submit the first, annual report, covering diversions during the 2011 calendar year, by July 1, 2012. After the initial three-year period, Woods shall submit reports at three-year intervals, consistent with Water Code section 5104.

3. Before diverting at a rate greater than 77.7 cfs, Woods shall demonstrate to the satisfaction of the Deputy Director that such a rate increase is either due to increased reasonable demand on riparian lands identified as Parcel 2 on Exhibit MSS-R-14, exh. 7A (discussed in section 4.2.3.1 of this order) or based on additional evidence regarding the water rights of landowners not addressed in this order, provided by Woods to the Deputy Director.

4. Before diverting at a rate greater than 77.7 cfs, Woods shall submit to the Deputy Director a list of all properties and owners who receive water delivered by Woods's diversion system, and the basis of right for such deliveries, including whether such right is riparian or appropriative, and what entity holds the right. For rights not recognized in this order, the basis of right must be substantiated by different information than was provided during the hearing that preceded this order. If the basis of right for property outside the original Woods service area is the transfer of an appropriative right from within the original Woods service area, the information provided to the Deputy Director must include proof of a reduction of use within the Woods service area commensurate with deliveries to the property outside the Woods service area. If the information provided does not establish a basis of right acceptable to the Deputy Director, Woods shall not deliver water to that property.

5. Notwithstanding paragraphs 3 and 4, above, if a water user or water right holder within the Woods service area provides information, and such information demonstrates an additional basis of right for deliveries of water acceptable to the Deputy Director, after issuance of this order, Woods may deliver water to the user upon the Deputy Director's approval.

6. Before diverting at a rate greater than 77.7 cfs, Woods shall obtain the Deputy Director's approval of a supplemental monitoring and reporting plan. Woods shall implement the plan upon the Deputy Director's approval. The plan shall be consistent with any applicable requirements of Water Code sections 5100 through 5107, and include, at a minimum:

(1) Provisions for monthly monitoring and reporting of the amounts and rates of water delivered to specific users and the acreage served;

(2) A method to track water use by individual users.

(3) A supplement to the operator's manual, flow chart, or other instruction described in paragraph 2(3), above, that identifies the process to be taken by Wood's employees to routinely measure and record deliveries to individual users.

(4) Provisions for reporting monthly water delivery and use records to the State Water Board. For the initial three-year period, delivery and use records shall be reported on an annual basis. After the initial three-year period, Woods shall submit reports at three-year intervals, consistent with Water Code section 5104.

Any determination of the Deputy Director pursuant to this order is subject to reconsideration pursuant to Water Code section 1122. Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of part 2 of division 2 of the Water Code (commencing with section 1825) the Attorney General, upon request of the State Water Board, shall petition the superior court for issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845, subd. (a).) The superior court or the State Water Board may impose civil liability up to $1,000 per day of violation. (*Id.* at subd. (b); Wat. Code, § 1055.)

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 Board held on February 1, 2011.

AYE:	Chairman Charles R. Hoppin Vice Chair Frances Spivy-Weber Board Member Tam M. Doduc
NAY:	None
ABSENT:	Board Member Dwight P. Russell
ABSTAIN:	None

Jeanine Townsend
Clerk to the Board

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: ***Dianne Young, et al. v. State Water Resources Control Board, et al.***

Court No.: **San Joaquin County Superior Court No. 39-2011-00259191-CU-WM-STK**

I declare:

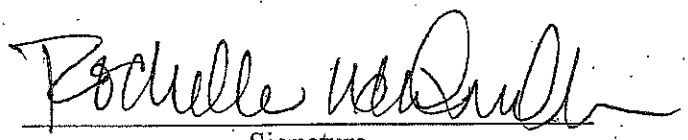
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On March 28, 2011, I served the attached **OPPOSITION TO PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS AND/OR WRIT OF PROHIBITION** by transmitting a true copy via electronic mail addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 28, 2011, at Sacramento, California.

Rochelle Uda-Quillen
Declarant



Signature

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

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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

REPLY BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF ADMINISTRATIVE MANDAMUS AND/OR WRIT OF PROHIBITION

Date: April 8, 2011
Time: 10:00 a.m.
Dept. 13
Judge: Honorable Lesley D. Holland

Per Alternative Writ Issued March 10, 2011

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners were forced to sue because the State Board issued a cease and desist order ("CDO") against Woods Irrigation Company ("Woods") that did more than just order Woods to limit diversions under Wood's water right – it also ordered Woods to limit diversions under Petitioners' separate, individual water rights. Although only Woods was made a party to the CDO proceeding, the order reached beyond Woods by (1) determining the validity and extent of riparian rights of landowners served by Woods, and (2) restricting Woods' ability to operate its pumps to deliver water to these landowners, including Petitioners, until the landowners prove up additional water rights to State Board staff in an informal process.

This distinction is critical. If the State Board's order did not go so far as to impact the landowners' water rights – we would not be here. Yet, despite ample warning, the State Board adopted an order that was broader than it needed to be and constitutionally void.

The State Board and MID try to divert the Court's focus from procedural due process to the ultimate merits of the disputed water rights. Arguments over the full extent of the landowners' water rights are not relevant here. The law did not require Petitioners to prove up their riparian and pre-1914 appropriative rights to the State Board or any other authority before exercising them. Rather, for these types of water rights, an adjudication is the only way to determine the validity and extent of the right. Thus, by necessity (because there has never been an adjudication), Petitioners' water rights are "claimed." This fact does not make them any less of a significant property interest protected by due process – particularly after 100 years of use.

The State Board's claim that the order "does not prohibit diversion or use by Petitioners" ignores reality. Petitioners have submitted declarations, under penalty of perjury, that the only means available to them to divert water from Middle River is through the Woods pumps and canal system. They have no other way to divert water under their rights. Petitioners are not required to submit voluminous testimony to establish this simple fact.

The State Board's position that the order "neither prohibits nor requires anything from anyone except Woods" is similarly disingenuous. The order expressly requires that landowners prove their additional water rights to the satisfaction of a State Board staff person before Woods

is allowed to increase diversions above 77.7 cfs to provide water under the landowner's right. *See* Order WR 2011-0005 at 62, paragraph 5. Thus, the order affirmatively restricts diversions under both Woods AND the landowners' separate water rights.

MID parrots the State Board's arguments, adding that Petitioners' purported privity with Woods justified deprivation of due process in this case. Yet, none of the cases cited by MID involved the application of privity to excuse a due process violation. Further, Petitioners' privity with Woods, through the corporation/shareholder relationship, is irrelevant because Petitioners have never granted Woods the power to defend Petitioners' water rights. Instead, Petitioners and Woods expressly warned the State Board, prior to the commencement of the Woods CDO hearings, that privity did not exist. MID concurred in that warning at the time, illustrating that this privity argument is a post hoc rationalization with no basis in law or fact.

II. STANDARD OF REVIEW

The State Board has misstated the standard by relying only on Code of Civil Procedure section 1094.5. The writ of mandate is issued 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." Cal. Code Civ. Proc. § 1085. A writ of mandate is required here because the Board violated Petitioners' due process rights. The writ of prohibition arrests the proceedings of a board which exceed its jurisdiction. Cal. Code Civ. Proc. 1102. The writ of prohibition is required here because the order exceeds the Board's jurisdiction. The Court must issue the Writ in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law. Cal. Code of Civ. Proc. §§ 1086, 1103.

Code of Civil Procedure section 1094.5 provides additional procedures applicable to preparation of the administrative record and the deference afforded the board on factual findings. However, these rules are inapplicable in this case where the sole issues raised are whether the board proceeded in the manner required by law and consistent with its jurisdiction.

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III. ARGUMENT

A. The State Board Denied Petitioners' Rights to Procedural Due Process.

1. Petitioners' Asserted Rights Required Pre-deprivation Due Process Protection.

The State Board and MID incorrectly argue Petitioners must prove the full extent of their protected property interest and that the State Board's order deprived Petitioner's of that interest, before they can assert a due process violation. This is not the law. Rather, the focus of the inquiry is on whether the agency undertaking the adjudicative proceeding *followed the proper procedures* to ensure that those whose "property interests *may be* significantly effected" had ample notice and opportunity to participate. *Horn v. City of Ventura* (1979) 24 Cal.3d 605, 610. Thus, the elements include: (1) the order resulted from an adjudicatory process, (2) the process may affect Petitioners' significant property interests, and (3) Petitioners were not afforded notice and opportunity to be heard. *Horn*, 24 Cal.3d at 612-620

The first and third elements are not disputed. The CDO was an adjudicatory process and the State Board did not provide notice or opportunity to any of these Petitioners. For the second element, it is useful to compare the situation here to that in other cases. The California Supreme Court found a due process violation when a neighbor was not provided notice of a City's ministerial approval of a minor subdivision. *Horn*, 24 Cal.3d at 605, 610. The neighbor alleged that the approval hindered access to his property and would create traffic and parking congestion. *Id.* at 611. Similarly, the First District found a due process violation when a neighbor was not provided notice and opportunity to be heard before a City approved a parcel split on adjacent property. *Kennedy v. City of Hayward et al.* (1980) 105 Cal.App.3d 953. Notably, in that case, the City had provided notice to the Homeowner's Association to which the neighbor belonged, and the Association had actually appeared in the proceedings. The Court found this immaterial and insufficient to "permit a 'meaningful' pre-deprivation hearing to affected landowners." *Kennedy*, 105 Cal.App.3d at 962-963 (*citing Horn* at 617-18).

Neither the *Horn* nor *Kennedy* courts looked to whether Petitioner's property interest was in fact adversely impacted by the ultimate land use decision. Rather, the focus was on whether the interest could be impacted, and thus, notice was required: "[W]here, as here, prior notice of

a potentially adverse decision is constitutionally required, that notice must, at a minimum, be reasonably calculated to *afford affected persons* the realistic *opportunity to protect* their interests." *Kennedy* at 962, *citing Horn* at 617. Thus, whether Petitioners here would have been successful in convincing the State Board that they had water rights sufficient to prevent issuance of the CDO is not the point. Rather, constitutional due process required that they be given the opportunity to do so because it was clear the CDO could adversely impact their property interest.

There is no dispute that Petitioners' asserted riparian and pre-1914 rights to the State Board at least twice before the CDO proceedings began. First, Petitioners asserted these rights by filing Statements of Diversion and Use, in 2009, pursuant to Water Code sections 5100 et seq. *See* Del Carlo Decl. ¶¶8-9 Exh. E; Yelland Decl. ¶¶8-9 Exh. B; Young Decl. ¶¶8-9 Exh. B. Second, Petitioners and Woods both notified the State Board, in writing, prior to the commencement of the CDO hearings, that the landowners' separate riparian and pre-1914 appropriative rights appeared likely to be impacted by the hearing. Petition Exhs. G, H, I, J.

There is also no plausible dispute that the State Board understood that issuance of an order limiting Woods from diverting more than 77.7 cfs could adversely impact Petitioners. The very impetus for the CDO proceeding was the State Board's measurement of diversions by Woods of 90 cfs in 2009 – which is more than 77.7 cfs -- and was obviously being used by the landowner served by Woods who claimed additional rights. *See* Order WR 2011-0005 at 6, 20.

2. The Order Limits Deliveries of Water From Woods to Petitioners in a Manner that Deprives Petitioners' of Their Rights.

While Petitioners do not have to show that they are actually injured by the order to prove that the State Board violated their due process rights, it is not difficult to do so. The State Board admitted that Woods could divert more than 77.7 cfs if it did so pursuant to the rights of landowners located within its service area. *See* Order WR 2011-0005 at 20. Yet, the State Board proceeded to limit Woods pumping to 77.7 cfs without providing notice and opportunity to these landowners to prove the extent of these additional rights. While the order sets up a post-deprivation process for the landowners to attempt to convince staff members that they have a right to justify larger diversions, this process is wholly unsanctioned by any law or regulation.

Meanwhile, Woods cannot divert water to serve these landowners *under the landowners' – not Woods' - separate water rights*. Further, it forces the landowners to consent to regulation by the Board of their riparian and pre-1914 rights, which is statutorily prohibited. Water Code §1201.

Courts have found due process requirements triggered in much less severe cases. The cases often involve land use or permit approvals for activities that *may* have an adverse environmental impact on nearby landowners. Besides the *Horn* and *Kennedy* cases discussed above, the *Laupheimer* decision, cited by the State Board, is illustrative. There, the Sixth District held that homeowners living near two sites approved for logging by the Department of Forestry were entitled to due process protection before issuance of the logging permits, even though the trial court ultimately held that the projected adverse impacts on their property from the logging were speculative and remote. *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 450-51. There, the court explained, the mere *prospect* of deprivation of a significant property interest triggered the due process requirement. *Id.*

Here, once the State Board determined that landowners were diverting 90 cfs through Woods, part of which could be under the landowners' separate rights, and the prosecution team sought to limit diversions to 77 cfs, the prospect of deprivation of significant property interest triggered due process requirements for the landowners.

3. Petitioners' Shareholder Status with Woods is Irrelevant

MID claims that Petitioners' due process rights were not violated because Woods adequately represented their interests in the State Board hearing through "privity." MID Opp. at pp. 8-12. MID argues that even though the State Board gave no indication to Petitioners that their individual water rights would be at issue in the Woods hearing, Woods' "zealous representation" of Petitioners' interests is a sufficient substitute for actual notice and an opportunity to be heard. Yet, MID's arguments ignore the fundamental requirements to bind a non-party to a judgment through *res judicata*.

In order to bind a non-party to the judgment of an earlier lawsuit, due process requires "that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action." *Lynch v. Glass* (1975) 44 Cal.App.3d 943,

948 (plaintiff was not bound by prior judgment against corporations even though they advanced the same interest and plaintiff appeared as a witness in the case). Woods' presentation of arguments favorable to Petitioners at the hearing does not mean that Woods was a "virtual representative" of Petitioners. *Id.* Indeed, none of the cases cited by MID support finding that a corporation has the same "identity or community of interest" to adequately represent the *private interests* of its shareholders in order to satisfy due process.

Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assn. (1998) 60 Cal.App.4th 1053, 1070-1071 ("*COAST*") and *Rynsburger v. Dairymen's Fertilizer Coop., Inc.* (1968) 266 Cal.App.2d 269, relied on by MID, are easily distinguishable. In both cases, the court found that prior lawsuits brought by entities *expressly authorized* to litigate *public* issues on behalf of the *public* had preclusive effect to bar other *public* interest groups raising the same *public* issues.

In *Rynsburger,* litigation by a group of municipalities bound members of the public (citizens and residents of those municipalities) who were not parties. 266 Cal.App.2d 269, 277-78. The citizens were bound because the municipalities had statutory authority to sue on behalf of the public interest. *Id.* Similarly in *COAST*, a settlement agreement between property owners and government agencies resolving public access to property was binding on a public interest groups' subsequent action. *COAST, supra*, 60 Cal.App.4th at 1071. The court held that the subsequent action was barred because the public "was adequately represented by the state agencies *vested with authority to litigate the issue of public access...*" *Id.* at 1071. (emphasis added). By contrast, the State Board's order in this case impacts Petitioners' rights that they hold independent of any rights of Woods. While Woods as a corporation is authorized to act on the landowners' behalf to physically divert and convey water to the landowners' property, the corporation does not have any representative authority to litigate or defend petitioners' separate, individual water rights. (Petition Exhs. G, H, I, J).

Further, privity does not bind nonparties when the nonparty raises issues separate and distinct from those of the prior party. See *COAST supra,* 60 Cal.App.4th at 1074, ("The rights [not collaterally estopped] extend only to any individual or separate property rights claimed by the group or its members that were not resolved by the Settlement Agreement."); *Consumer*

Advocacy Group v. ExxonMobil Corp. (2008) 168 Cal.App.4th 675, 692 (res judicata applied to public interest group because members did not have an individual property right and they were therefore bound by prior judgment brought also brought on behalf of the public interest).

Accordingly, this situation resembles the facts of *In re FairWageLaw,* in which a court, empowered to enter a judgment dissolving a corporation, could not extend the judgment to affect the personal rights of a shareholder (liability for attorneys fees) without satisfying the shareholder's due process rights ((2009) 176 Cal.App.4th 279, 286-87) and the facts of *Kennedy*, in which a court found violation of Kennedy's due process rights when a city failed to provide him with notice and opportunity to be heard regarding a proposed lot split for adjacent property, even though the Homeowner's Association to which Kennedy belonged had recieved notice and actually appeared on the matter. (1980) 105 Cal.App.3d 953.

MID suggests that the result in *In re FairWageLaw* would have been different if the majority shareholders advanced the same interest as the dissenting shareholder at trial. MID Opp. at 11. However, *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, held otherwise. (shareholder in company was not collaterally estopped from bringing his own lawsuit against a defendant after the defendant obtained summary judgment against other shareholders in a separate lawsuit even though his claim was identical to those of the other shareholders).

Finally, MID overlooks a critical third factor necessary for privity: "[t]he circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication." *Lynch, supra,* 44 Cal.App.3d 943, 948. *See also COAST, supra,* 60 Cal.App4th, at 1070; *Sutton v. Golden Gate Bridge, Highway & Transportation Dist.* (1998) 68 Cal.App.4th 1149, 1155; *Brown v. Rahman* (1991) 231 Cal.App.3d 1458, 1462; *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 826 (all cited by MID). Here, Petitioners could not have reasonably expected to be bound by Order WR 2011-0005 because the State Board explicitly informed them that "the Woods CDO hearing will not bind non-parties to the hearing." (Petition Exhs. L, M, N, O). Thus, privity did not exist.

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B. The State Board's Cease and Desist Authority Under Water Code Section 1831 *Expressly Excludes* Regulating Riparian and Pre-1914 Water Rights.

Although riparian and pre-1914 water rights are *not* regulated by Division 2, Part 2 of the Water Code (*People v. Shirokow* (1980) 26 Cal.3d 301, 309; Water Code §1201), the State Board nevertheless argues that its cease and desist power under Water Code section 1831 permits it to determine, and hence regulate, the validity of such rights when issuing a cease and desist order. *See* State Board Opp. at 11. The agency's interpretation, however, flatly contradicts the plain language of the statute and impermissibly renders Section 1831(e) superfluous.

1. The State Board's Interpretation Violates the Rules of Statutory Construction.

Courts must construe the words of a statute in context and harmonize statutes relating to the same subject (*Central Pathology Serv. Med. Clinic, Inc. v. Superior Ct* (1992) 3 Cal.4th 181, 186-87), while avoiding an interpretation that renders related provisions nugatory or meaningless. *Metropolitan Water Dist. of So. Ca. v. Imperial Irrig. Dist.* (2000) 80 Cal.App.4th 1403, 1424.

Subdivision 1831(e) provides:

> This article shall not authorize the board to *regulate in any manner*, the diversion or use of water not otherwise subject to regulation of the board under this part.

Water Code §1831(e) (emphasis added). Beginning with the statute's plain language, "regulate in any manner," the word "regulate" means "to fix, establish, or control…[or] *to subject to governing principles or laws*." *Black's Law Dictionary* 890 (6th abr. ed. 1993) (emphasis added). The word "any" commonly means "an indefinite number." *Id.* at 61; *see also Webster's New World Dictionary* 62 (2d coll. ed. 1985) (defining "any" as without limit; to any degree or extent at all). Thus, applying the ordinary meaning of the words, Section 1831(e) prohibition necessarily includes determining the validity of rights under governing water law principles.

Such an interpretation harmonizes the statutory scheme regarding the rights subject to the Board's appropriative authority and those within the purview of the Board's cease and desist jurisdiction. *See e.g.,* Water Code §1201. Contrary to the State Board's argument, this interpretation also harmonizes the board's authority to investigate and take action as necessary to prevent unlawful diversion of water. If no riparian or pre-1914 right is asserted, and a diverter either does not have a State Board issued permit or license, or is operating outside of such permit

or license, it makes perfect sense that the State Board use its CDO authority in section 1831 to cease the threatened or actual unlawful diversion. Conversely, however, if the validity of a claimed riparian or pre-1914 appropriative right must be determined before the board can determine if a diversion is unlawful, Water Code section 1052 provides the means to do this. The State Board can request that the Attorney General file an action in Superior Court for declaratory and injunctive relief to define the riparian or pre-1914 right.

To interpret Section 1831 is the manner the State Board urges – allowing, in essence, a merger of two determinations: (1) the validity and extent of riparian and pre-1914 rights, and (2) whether a particular diversion exceeds established rights, renders Subdivision (e) meaningless. Determining validity necessarily entails "regulating" those rights in some manner, which the subsection 1831(e) expressly prohibits. Such an interpretation must be avoided.

The cases the State Board cites do not dictate a different result. *See* Opp. Br. at 12-13 (citing *Weinberger v. Hynson, Westcott and Dunning, Inc.* (1973) 412 U.S. 609; *Phelps v. St. Water Res. Control Bd.* (2007) 157 Cal.App.4th 89; *North Gualala Water Co. v. St. Water Res. Control Bd.* (2006) 139 Cal.App.4th 1577). None of the cases dealt with the State Board's power, or lack of power, to issue cease and desist orders as they relate to riparian and pre-1914 rights under Water Code section 1831 – the issue presented here. *See Regency Outdoor Advertising, Inc. v. City of West Hollywood* (2007) 153 Cal.App.4th 825, 831 ("A case is not authority for a proposition it does not address.").

Weinberger dealt with the FDA's power to regulate drugs prior to marketing to ensure the drugs were safe and effective. As originally promulgated, a 1938 Act gave the FDA authority to regulate new drugs to ensure safety. In 1962, amendments to the Act expanded the FDA's authority to regulate for safety *and* effectiveness. The law also provided a grand-father clause for the newly codified "effectiveness" provisions. The Court simply recognized the FDA had the power to determine new drug status and whether certain drugs were exempt from the efficacy requirements under the grandfather clause. *Wienberger* at 609-610, 624. Unlike here, the Act did not expressly exempt certain drugs from FDA regulation in any manner.

While *Phelps* and *North Gualala* dealt with California water issues, neither case involved

a cease and desist order under Section 1831. Instead, *North Gualala* considered the board's interpretation of Water Code section 1200 regarding subterranean streams. *North Gualala* at 1587. Likewise, *Phelps* challenged civil penalties imposed against the plaintiffs for improperly diverting water under State Board-issued licenses and permits. *Phelps* at 93. Any issues regarding riparian and pre-1914 rights were decided judicially by the court – not by the State Board in a cease and desist order. *Id.* at 116-119.

2. The Court is the Final Arbiter of Water Code Section 1831's Meaning and is Not Bound by the State Board's Prior Erroneous Statutory Interpretations.

An agency's interpretation of a statute "does not implicate the exercise of a delegated lawmaking power; instead it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts." *Yamaha Corp. of America v. St. Bd. of Equalization* (1998) 19 Cal.4th 1, 11. The final responsibility for interpreting the statute rests with this Court (*Id.* at 12) "even though this requires the overthrow of an earlier erroneous administrative construction." *Merrill v. Dept. of Motor Vehicles* (1969) 71 Cal.2d 907, 918, fn.15. The State Board's past unlawful application of Section 1831(e) does not, and cannot, shield the present illegality of its conduct. *See Merrill, supra,* 71 Cal.2d at 918, fn.15. Thus, past water rights decisions applying a similarly erroneous statutory interpretation are irrelevant. *See* Opp. Br. at 14, fn. 10. So, too, is the fact that previous diverters have not challenged the State Board's cease and desist authority. *Id.* at 14.

IV. CONCLUSION

Petitioners respectfully request that the Court issue the Peremptory Writ and direct that the State Board set aside Order WR 2011-0005 as issued in a manner contrary to law and in excess of the agency's jurisdiction.

Respectfully submitted,

DATED: April 4, 2011

HERUM / CRABTREE
A California Professional Corporation

By: 
JENNIFER L. SPALETTA
Attorneys for Petitioners

HERUM\CRABTREE ATTORNEYS

PROOF OF SERVICE

I, **JULIE M. HASSELL,** certify and declare as follows:

I am over the age of 18 years and not a party to this action. My business address is HERUM CRABTREE, 2291 West March Lane, Suite B100, Stockton, California 95207. On the date set forth below, I served a true and correct copy of the following document(s) to all parties on the attached service list:

REPLY BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF ADMINISTRATIVE MANDAMUS AND/OR WRIT OF PROHIBITION

[XX] **BY U.S. MAIL**. By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[ ] **BY U.S. MAIL - CERTIFIED MAIL** By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[ ] **BY FACSIMILE**. By use of facsimile machine, telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2.301 and 2.306]

[ ] **BY OVERNIGHT DELIVERY**. By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.] The envelope(s) were addressed the person(s) as set forth below.

[XX] **BY ELECTRONIC MAIL (EMAIL).** By sending the document(s) to the person(s) at the email address(es) listed below.

[ ] **BY PERSONAL SERVICE**. I personally served the following person(s) at the address(es) listed below:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 4, 2011

JULIE M. HASSELL

SERVICE LIST

WOODS IRRIGATION COMPANY c/o John Herrick, Esq. Law Office of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Telephone: (209) 956-0150 Facsimile: (209) 956-0154 jherrlaw@aol.com c/o Dennis Donald Geiger, Esq. Geiger, Coon & Keen LLP 311 East Main Street, Suite 400 Stockton, CA 95202 Telephone: (209) 408-0434 Facsimile: (209) 948-9451 dgeiger@bgrn.com **(via e-mail only)**	MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin Valerie C. Kincaid O'Laughlin & Paris LLP P.O. Box 9259 Chico, CA 92927-9259 Telephone: (530) 899-9755 Facsimile: (530) 899-1367 towater@olaughlinparis.com vkincaid@olaughlinparis.com kpetruzzelli@olaughlinparis.com
STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 Telephone: (916) 32-4500 Facsimile: (916) 321-4555 spowell@kmtg.com	THE SAN LUIS & DELTA-MENDOTA WATER AUTHORITY Jon D. Rubin Diepenbrock Harrison 400 Capitol Mall, 18th Floor Sacramento, CA 95818 Telephone: (916) 492-5000 Facsimile: (916) 446-4535 jrubin@diepenbrock.com jseaton@diepenbrock.com
CENTRAL DELTA WATER AGENCY c/o S. Dean Ruiz, Esq. Harris, Perisho & Ruiz Brookside Corporate Center 3439 Brookside Road, Suite 210 Stockton, CA 95219 Telephone: (209) 957-4254 Facsimile: (209) 957-5338 dean@hpllp.com	SOUTH DELTA WATER AGENCY c/o S. Dean Ruiz, Esq. Harris, Perisho & Ruiz Brookside Corporate Center 3439 Brookside Road, Suite 210 Stockton, CA 95219 Telephone: (209) 957-4254 Facsimile: (209) 957-5338 dean@hpllp.com

SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT c/o DeeAnn M. Gillick Neumiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 Telephone: (209) 948-8200 Facsimile: (209) 948-4910 dgillick@neumiller.com mbrown@neumiller.com	*Representing Respondents State Water Resources Control Board and Charles R. Hoppin, Tam M. Doduc and Frances Spivy-Weber* Matthew Bullock, Esq. California Office of the Attorney General 1300 "I" Street, Suite 125 Post Office Box 944255 Sacramento, CA 94244 Phone (916) 323-6665 Email: matthew.bullock@doj.ca.gov
Michael A.M. Lauffer, Chief Counsel Office of the Chief Counsel State Water Resources Control Board 1001 I Street, 22nd Floor Sacramento, CA 95814-2828 Telephone: (916) 341-5183 Facsimile: (916) 341-5199 mlauffer@waterboards.ca.gov	

EXHIBIT E

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Attorneys for Petitioners

Filed 6-13-11
ROSA JUNQUEIRO, CLERK
By MARY FRANCES BILGER
DEPUTY

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

~~[Proposed]~~ AMENDED JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS

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

Exhibit E

HERUM \ CRABTREE ATTORNEYS

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..

The exhibits, pleadings, declaration and other materials submitted by Petitioners having been received into evidence and examined by the court, arguments having been presented, and the court having made a revised statement of decision, which was signed and filed on May 31, 2011.

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IT IS ORDERED THAT:

1. Judgment is entered in favor of Petitioners as prevailing parties in this proceeding. This Judgment is consistent with the May 31, 2011 revised statement of decision, attached hereto as Exhibit A, with the exception that the reference to Water Code § 1931 on page 7, line 24 is changed to Water Code § 1831.

2. A peremptory writ of mandamus shall issue from the court, remanding the proceedings to Respondents and commanding Respondent California State Water Resources Control Board to set aside its February 1, 2011 Cease and Desist Order Against Woods Irrigation Company ("Order WR 2011-0005").

3. This Court shall reserve jurisdiction to determine Respondents' compliance with the writ.

4. Petitioners shall be awarded their costs of suit.

5. This Court shall reserve jurisdiction to determine Petitioners' entitlement to attorney's fees pursuant to a timely and properly noticed Motion.

Date: 6/13/11

F. CLARK SUEYRES

JUDGE OF THE SUPERIOR COURT

HERUM CRABTREE ATTORNEYS

EXHIBIT "A"

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:

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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

PROOF OF SERVICE

I, **PEGGY L. GARCIA,** certify and declare as follows:

I am over the age of 18 years and not a party to this action. My business address is HERUM CRABTREE, 2291 West March Lane, Suite B100, Stockton, California 95207. On the date set forth below, I served a true and correct copy of the following document(s) to all parties on the attached service list:

[Proposed] AMENDED JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS

[XX] **BY U.S. MAIL.** By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[ ] **BY U.S. MAIL - CERTIFIED MAIL** By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[ ] **BY FACSIMILE.** By use of facsimile machine, telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2.301 and 2.306]

[ ] **BY OVERNIGHT DELIVERY**. By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.] The envelope(s) were addressed the person(s) as set forth below.

[XX] **BY ELECTRONIC MAIL (EMAIL).** By sending the document(s) to the person(s) at the email address(es) listed below.

[ ] **BY PERSONAL SERVICE.** I personally served the following person(s) at the address(es) listed below:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 9, 2011

Peggy L Garcia
PEGGY L. GARCIA

HERUM CRABTREE ATTORNEYS

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