ORIGINAL

JOHN HERRICK, ESQ., S.B. #139125
Attorney at Law
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Telephone: (209) 956-0150
Fax: (209) 956-0154

DANTE JOHN NOMELLINI SBN 40992
DANTE JOHN NOMELLINI, JR. SBN 186072
DANIEL A. McDANIEL SBN 77363
NOMELLINI, GRILLI & McDANIEL
PROFESSIONAL LAW CORPORATION
235 East Weber Avenue
P. O. Box 1461
Stockton, California 95201
Telephone: (209) 465-5883
Facsimile: (209) 465-3956

Attorneys for Lloyd L. Phelps, Jr., Joey P. Ratto, Jr., Ronald D. Conn, Ron Silva, et al., South Delta Water Agency and Central Delta Water Agency

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of: Hearing to Determine Whether to Impose Administrative Civil Liability Against Lloyd L. Phelps, Jr., Joey P. Ratto, Jr., and Ronald D. Conn and Ron Silva, et al.	**CLOSING BRIEF OF LLOYD L. PHELPS, JR., JOEY P. RATTO, JR., RONALD D. CONN, RON SILVA, ET AL., SOUTH DELTA WATER AGENCY, AND CENTRAL DELTA WATER AGENCY**

TABLE OF CONTENTS

I. INTRODUCTION 2

II THE SUBJECT LANDS WERE RECLAIMED FROM SWAMP AND OVERFLOWED LAND AND CONTINUE TO ENJOY RIPARIAN WATER RIGHTS REGARDLESS OF WHETHER OR NOT THE LANDS EVER ABUTTED OR WERE SEVERED FROM THE LOW WATER BANKS OF THE RIVERS. 2

II THE ACTIONS OF PERMITTEES HAVE NOT RESULTED IN ANY INJURY TO THE SWP OR CVP, THE INTENDED BENEFICIARIES OF TERM 91 6

IV APPLICATION OF TERM 91 TO THE SUBJECT PERMITTEES WITHOUT RECOGNITION OF THE WATER MADE AVAILABLE TO THE DELTA POOL BY THEIR ACTIONS IS UNFAIR 6

V. THE CALCULATION OF PENALTY FAILED TO ACCOUNT FOR THE WATER SAVINGS RESULTING FROM PERMITTEES' FARMING AND RELATED DRAINAGE OF THE SUBJECT LANDS 7

VI. THE SUBJECT LANDS AS OVERLYING RIVER FLOW PERCOLATING THEREIN ARE RIPARIAN TO SUCH RIVER FLOW AND PERMITTEES' SUBJECT DIVERSIONS DIRECTLY FROM THE RIVERS ARE A PPROPRIATE RIPARIAN DIVERSIONS 7

VII HISTORICALLY THE DELTA LOWLANDS INCLUDING THE SUBJECT LANDS HAVE BEEN ASSUMED TO BE RIPARIAN 9

VIII. EVIDENCE OF THE ACTIONS OF THE SWP AND CVP WHICH COULD HAVE CAUSED A PREMATURE APPLICATION OF TERM 91 TO THE SUBJECT PERMITS AND LICENSES WAS WRONGFULLY EXCLUDED AND SHOULD BE RECONSIDERED 9

IX. RIPARIAN USE OF NATURAL FLOW IS NOT RESTRICTED AS TO SEASON FILLING OF THE INTERNAL CHANNELS TO IMPROVE FARM ABILITY DOES NOT EVIDENCE ANY INTENT TO FORFEIT OR DIVEST THE RIPARIAN RIGHT 10

X. PHYSICAL SOLUTION PRINCIPLE REQUIRES PROTECTION OF RIPARIAN NEEDS 12

XI. FILING OF THE INTERNAL CHANNELS TO IMPROVE FARMABILITY DOES NOT EVIDENCE ANY INTENT TO FORFEIT OR DIVEST THE RIPARIAN RIGHT14

XII. AT THE TIME RESPONDENTS' PARCELS WERE SEVERED FROM THE MAIN CHANNELS IN THE DELTA, THE EVIDENCE SUPPORTS THAT THE OWNERS INTENDED TO RETAIN RIPARIAN RIGHTS 17

A. Silva Property 17

B. Ratto Property 17

C. Conn Property 18

D. Phelps Property 19

XIII. PRE-PATENT WATER USES SUPPORT A RIPARIAN WATER RIGHT . . . 19

XIV. THE EVIDENCE SUPPORTS THE APPLICATION OF WATER TO RESPONDENTS' PROPERTIES PRIOR TO 1914 THUS CREATING PRE-1914 RIGHTS 20

A. Elements Necessary to Establish a Pre-1914 Water Right 20

B. Initial Burden of Proof to Show Prima Facie Case 21

C. The Evidence Presented Constitutes a Prima Facie Case That the Conn Property has Pre-1914 Rights 21

D. The Evidence Presented Constitutes a Prima Facie Case That the Silva Property has Pre-1914 Rights 22

E. The Evidence Presented Constitutes a Prima Facie Case That the Ratto Property has Pre-1914 Rights 23

F. The Evidence Presented Constitutes a Prima Facie Case That the Phelps Property has Pre-1914 Rights 24

G. Valid Reasons Exist o Apply for Permit when Other Rights Present 24

H. Shift of Burden 25

I. Conclusion 26

XV. CHANGES IN POINTS OF DIVERSION DO NOT AFFECT PRE-1914 RIGHTS 26

XVI. STAFF'S REBUTTAL CASE FAILED TO PROVIDE CREDIBLE EVIDENCE TO CONTRADICT RESPONDENTS' TESTIMONY AND EVIDENCE . . . 27

A. Interior Island Sloughs . . . 27

B. Accuracy of Farming Surveys . . . 28

C. Applications and Board Files as Evidence of Prior Use . . . 30

D. Tides Naturally Fill Interior Sloughs . . . 33

XVII. THE STATE IS ESTOPPED FROM SEEKING ANY LIABILITY AGAINST THE RESPONDENTS . . . 34

XVIII. APPLICATION OF TERM 91 TO DELTA LANDS IS DIRECTLY CONTRARY TO THE LANGUAGE IN THE DELTA PROTECTION ACT . . . 35

XIX. CONCLUSION . . . 36

TABLE OF AUTHORITIES

CASES

Anaheim Union Water Co. v. Fuller (1907)
150 C.327, 329 . . . . 4, 8, 9

Beck Development Co., Inc. v. Southern Pacific Transportation Co. (1996)
44 Cal.App.4th 1160, 1205 21

Blanchard v. Baker, 8 Me. 253, S. C. 23 Am. Dec. 504 10

City of San Bernardino v. City of Riverside (1921)
186 Cal. 7, 28-29 26

Crane v. Stevinson (1936)
5 Cal.2d 387 at page 399. 14

DeYoung v. Del Mar Thoroughbred Club (1984)
159 Cal.App.3d 858, 862 34

Erickson v. Queen Valley Ranch Company (1971)
22 Cal.App.3d 578, 584. . . . . 21, 25

Hudson v. Dailey (1909)
156 Cal. 617, 628 . . . . 7, 8

Lema v. Ferrari (1938)
27 Cal.App.2d 65, 72-73 25

Lux v. Haggin (1884)
69 Cal. 255, 429 . . . . 10, 11, 20

McKissick Cattle Co. v. Alsaga (1919)
41 Cal.App. 380 . . . . 15, 16

Murphy Slough Assn. v. Avila (1972)
27 C.A.3d 649, 658 5

Pabst v. Finmand (1922)
190 Cal. 124, 131. 20

People v. Gustafson (1942)
53 Cal.App.2d 230, 242-243 34

People v. Murrison (2002)
101 Cal.App.4th 349, 359, fn. 6 20

State of Cal. ex rel. State Lands Com. V. Superior Court (1995)
11 Cal.4th 50, 63, fn. 1. 15

Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. (1935)
3 Cal.2d 489, 546-547. 21

Turner v. James Canal Co. (1909)
155 Cal.82, 92 . . . . 5, 8, 15. 16

United States v. Central Stockholders Corporation of Vallejo, et al (1931)
52 F.2d 322, 377 3

United States vs. Gerlach (1950)
339 U.S. 725 at 753-755 4

Westlands Water District vs. United States (2001)
2001 WL 735764 (E.D.Cal) at page 28 13

Wolfsen vs. United States
142 Ct.Cl. 383, 162 F.Supp.403 (Ct.Cl. 1958) at page 406 13

CONSTITUTION AND STATUTES

1928 California Constitutional amendment (Article X, section 2) 11

Delta Protection Act (WC 12200 et seq.) 13

Evidence Code Section 115 21

Water Code section 1201 13

Water Code Section 5100 et seq 34

Water Code Section 5101(f) 34

Water Code Sections 12200 35

Water Code Section 12201 35

Water Code Section 12202 35

Water Code Section 12205 35

Water Code Section 12931 14

OTHER

California Jurisprudence III Water Section 172 12

Water Rights Laws In The Nineteen Western States (1976)
by Wells A. Huchins, J.D., Vol. II at pages 16, 189-192, 245 and 246 .... 12, 19

I. INTRODUCTION

This case deals with the State Water Resource Control Board Staff's ("Staff") attempts to apply Term 91 to four diverters in the Delta. Those diverters are Ronald Conn, Ron Silva, Joey Ratto, and Lloyd Phelps ("Respondents"). They farm respectively (approximately) 160, 169, 55, and 392 acres on Upper Roberts Island in San Joaquin County. Attached hereto is a map generally designating the location of these lands. This map was submitted as SDWA 3-D and is part of the Record on this case.

In applying Term 91, Staff has identified two years during which the Respondents continued to irrigate their lands after receiving notices of curtailment under Term 91. Respondents do not dispute the notices or their continued irrigation, but maintain they have other rights which allow diversions during the relevant times and/or are precluded from being assessed the penalties sought.

Respondents assert numerous theories and offered evidence and testimony in support of their position which is briefly, that all Delta lands are riparian, that their lands retained riparian status at severance, that their lands abutted interior island waterways and thus remain riparian, that they have pre-1914 rights, that Term 91 cannot be applied to Delta lands, that the penalties sought are wrongfully calculated, and that the State is estopped from seeking penalties.

II. THE SUBJECT LANDS WERE RECLAIMED FROM SWAMP AND OVERFLOWED LAND AND CONTINUE TO ENJOY RIPARIAN WATER RIGHTS REGARDLESS OF WHETHER OR NOT THE LANDS EVER ABUTTED OR WERE SEVERED FROM THE LOW WATER BANKS OF THE RIVERS.

All of the Patents from the State of California covering the subject lands clearly delineate the lands as swamp and overflowed. (See SDWA 1 - Exhibits B, C, D, and E.)

> Prior to the construction of levees, the river flow would pass over all of the land and dendritic channels for a number of months of most years. The entire area comprised the bed of the river with a variable depth. Water would be shallowest over the channel bank area. During periods of low river flow, water would flow only through the dendritic channels. (See SDWA 3.)

Starting in about 1879, the major levees were constructed along the channels now referred to as the San Joaquin River, Old River and Middle River. The other channels running

through the area were eventually dammed by the levees and many equipped with floodgates. (See SDWA 3.)

Even without the internal sloughs and the replacement irrigation pipelines and canals the subject lands would have received water from the usual fall, winter, spring and summer flows to be reasonably expected from the average annual rainfall and precipitation of snow and the melting of the snow in the mountains in the early spring and summer. In United States v. Central Stockholders Corporation of Vallejo, et al (1931) 52 F.2d 322, 377. The court confirmed:

> It appears therefrom that this litigation is the result of the holding of the Supreme Court of the State of California in the Herminghaus Case, hereinbefore referred to, in which it was held that the owner of riparian land subject to annual overflow by the waters of the San Joaquin River, was entitled to have his lands so overflowed because of the benefit derived therefrom in the irrigation of said lands and in the fertilization thereof by the silt and other fertilizing values contained in the water of the stream, that this right was not only appurtenant to the riparian lands upon the stream itself, but also appertained to lands situated upon sloughs where said slough received water from the river at the time of high water. In other words, that the owners of lands riparian to sloughs which were only filled with water flowing therein at the times of flood water in the main stream were entitled to have such natural situation remain without such an interference with such flood as results from impounding the flood waters where, by reason of such regulation of the flow of the stream the crest of the high water would be insufficient, to permit of overflow into the aforesaid sloughs. (Emphasis added.)

Similar to the swamp and overflowed lands situated upon sloughs which only received water from the river at the time of high water, the swamp and overflowed lands within the interior of Upper Roberts Island which abutted river flow during the seasonal flows as well as at the time of high water are riparian to the San Joaquin River, Old River and Middle River flow even if they did not abut or were never a part of a parcel abutting the low water banks of the rivers.

Even after major levee construction, the interior of Upper Roberts Island has maintained hydraulic connectivity to the channelized waters without the sloughs, pipelines and canals when the major levees were breached or overtopped and continuously by way of water seeping from or otherwise passing through the levees at a sufficient rate to wet the root zone of the land. As the levees were improved, the frequency of levee overtopping and breaching was reduced. Seepage

and other flow has not significantly decreased however, drainage pumping is used to keep the seepage and other water passing through the levees below the surface of the ground so as to allow for cultivation.

The water diverted from the main river channels to serve the subject lands is essentially the same water that would have been utilized by the natural vegetation predating cultivation and by the crops predating major levee construction and drainage. As explained hereinafter, a savings in consumptive use of water of about 2 acre feet per acre per year has resulted from the reclamation of the subject lands for farming purposes.

In the case of United States vs. Gerlach (1950) 339 U.S. 725 at 753-755, the United States Supreme Court recognized riparian rights to the natural seasonal overflow of the San Joaquin River of uncontrolled grasslands.

In Anaheim Union Water Co. v. Fuller (1907) 150 C.327, 329, the California Supreme Court held that ". . . land may be riparian to a stream, although it does not abut thereon except when the stream is swollen by floods." The subject lands herein before the Board abutted not just the floodwater but the usual overflow of the San Joaquin River.

Whether the swamp and overflowed lands in the Delta including the subject lands are deemed to be similar to lands within the bed of the channel of the watercourse or similar to lands which abut the watercourse only at the time of seasonal overflow or at the high bank of the river, the riparian character is clear.

For the subject lands which are part of the swamp and overflowed lands within the Sacramento-San Joaquin Delta, the construction of levees controlled the spreading of surface flow and allowed for operation of drainage ditches and other facilities to control water passing through the levees. Drainage ditches and pumps have been used to reduce the time that seepage and other river flow through the levees results in flow over and through the surface of the land thereby allowing for the growing of crops rather than tules, willows and other swampland vegetation.

The construction of levees which reduced but did not eliminate the hydraulic connectivity of the swamp and overflowed land to the river flow did not extinguish the riparian status of the

subject lands.

In the case of Murphy Slough Assn. v. Avila (1972) 27 C.A.3d 649, 658 where a deed purportedly conveyed a fee interest to a strip of land along the river on which a levee was constructed, the court held:

> Even if the trial court had concluded that the deed conveyed a fee interest to the grantee, it seems clear to us such a conveyance would have no effect on the riparian rights of the grantors' remaining lands not included in the conveyance, absent some expression to the contrary. (*Rancho Santa Margarita v. Vail, supra*, 11 Cal.2d 501, 538-539; *Hudson v. Dailey, supra*, 156 Cal. 617; Hutchins, Cal. Law of Water Rights (1956) pp. 189-192.)

For the subject lands there is no similar conveyance which could even give rise to an argument of intended forfeiture of the riparian rights as to remaining lands.

All of the subject swamp and overflowed parcels at all times retained hydraulic connectivity to the river flow by way of overflow, seepage, sloughs and later pumps, pipelines and ditches.

The fact that the method and degree of hydraulic connectivity to the river flow changed does not result in a loss of the riparian right. In the case of Turner v. James Canal Co. (1909) 155 Cal.82, 92, the California Supreme Court explained:

> Inasmuch as the J. G. James Company's lands are riparian to Fresno slough, and the slough is, for a considerable period each year, connected with, and properly a part of, the San Joaquin river, *it follows that, for the irrigation of such lands, it has, during such periods, a right to take its share of the water from the main river at any convenient point thereon*, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land. (Emphasis added.)

There is no injury to any party and particularly the SWP or CVP by reason of the subject lands being served with water from the rivers by way of pumps and pipelines as opposed to utilization of overflow, and seepage and other river flow through the levees.

All water not consumptively used on the Delta swamp and overflowed lands including the subject lands is pumped back into the Delta pool. Unless the subject lands could be maintained completely free of vegetation and continually drained to avoid surface evaporative losses, the

farming of the subject lands results in a beneficial savings of water rather than any possible injury.

III. THE ACTIONS OF PERMITTEES HAVE NOT RESULTED IN ANY INJURY TO THE SWP OR CVP, THE INTENDED BENEFICIARIES OF TERM 91.

The evidence is crystal clear that substantial water savings result from farming the swamp and overflowed lands in the Delta including the subject lands.

SDWA 3- E which includes Table A-5 of Department of Water Resources Bulletin 168, October 1978, titled Sacramento Valley Water Use Survey 1977, shows the 1976-77 Estimated Crop Et Values for the Delta Service Area. The two highest water consuming crops at issue in this proceeding are Alfalfa and Tomatoes. Riparian Vegetation and Water Surface is the category most representative of swamp and overflowed lands including the subject lands without cultivation and without the related drainage. Table A-5 shows for the water year Oct 76 - Sep 77 Riparian Vegetation and Water Surface used 67.8 inches of water, Alfalfa used 45.8 inches and Tomatoes used 34.3 inches. The annual resulting savings of water in the Delta pool resulting from the subject lands being farmed and drained is 22 inches of water per acre for Alfalfa and 33.5 inches for Tomatoes.

Division of Water Rights Exhibit WR 3-13 shows Vegetative Water Use in the San Joaquin Valley rather than in the Delta as 3.5 feet (42 inches) for Alfalfa and 2.3 feet (27.6 inches) for Tomatoes. No figures were given for Riparian Vegetation and Water Surface.

Regardless of which figures are used, there is no injury and actually a significant benefit resulting from farming the subject lands.

IV. APPLICATION OF TERM 91 TO THE SUBJECT PERMITTEES WITHOUT RECOGNITION OF THE WATER MADE AVAILABLE TO THE DELTA POOL BY THEIR ACTIONS IS UNFAIR.

Division of Water Rights staff explained that enforcement of Term 91 recognizes a credit for water provided from other sources such as groundwater or purchased water. Because the swamp and overflowed lands in the Delta including the subject lands would result in the evapotransporation of more water than with farming and the related drainage, the water savings should be credited in the same manner as water from an independent source.

V. THE CALCULATION OF PENALTY FAILED TO ACCOUNT FOR THE WATER SAVINGS RESULTING FROM PERMITTEES' FARMING AND RELATED DRAINAGE OF THE SUBJECT LANDS.

The penalty assessments herein are based on the estimated consumptive use of the crops during the period of diversion curtailment without a credit for the water savings during the same period. The water savings should be considered in any penalty determination.

VI. THE SUBJECT LANDS AS OVERLYING RIVER FLOW PERCOLATING THEREIN ARE RIPARIAN TO SUCH RIVER FLOW AND PERMITTEES' SUBJECT DIVERSIONS DIRECTLY FROM THE RIVERS ARE APPROPRIATE RIPARIAN DIVERSIONS.

The shallow groundwaters beneath the subject lands are directly connected to the water in the river channels. See SDWA 3 and particularly SDWA 3 - G.

As the California Supreme Court explains in Hudson v. Dailey (1909) 156 Cal. 617, 628:

> The owner of land has a natural right to the reasonable use of the waters percolating therein, although it may be moving through his land into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom. . . . His ownership of the land carries with it all the natural advantages of its situation, and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, '*Sic utere tuo ut alienum non laedas* [i.e., "use your own property in such a manner as not to injure that of another"].' It is upon this principle that the law of riparian rights is founded, giving to each owner the right to use the waters of the stream upon his riparian land, but limiting him to a reasonable share thereof, as against other riparian owners thereon.

The court goes on to explain:

> We think the same application of the principle should be made to the case of *percolating waters feeding the stream and necessary to its continued flow*. There is no rational ground for any distinction between such percolating waters and the waters in the gravels immediately beneath and directly supporting the surface flow, and no reason for applying a different rule to the two classes, with respect to such rights, if, indeed, the two classes can be distinguished at all. Such waters, together with the surface stream supplied by them, 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. (Ibid.) (Emphasis added.)

The right to extract *subsurface* waters which are hydrologically connected to a surface watercourse should contain the right to extract water from "any convenient point" along the *surface* watercourse just as the right to extract water from a *slough* that is hydrologically connected to the main surface watercourse contains the right to extract water from "any convenient point" along the main surface watercourse. (Turner v. James Canal Co. (1909) 155 Cal. 82, 92.) There is no rational ground for any distinction between the two. As the California Supreme Court explains in Turner v. James Canal Co. (1909) 155 Cal. 82, at page 92:

> Inasmuch as the J. G. James Company's lands are riparian to Fresno slough, and the slough is, for a considerable period each year, connected with, and properly a part of, the San Joaquin river, *it follows that, for the irrigation of such lands, it has, during such periods, a right to take its share of the water from the main river at any convenient point thereon*, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land. (Emphasis added.)

Similarly, it also follows that where lands overlie *subsurface* flow which is "connected with and properly a part of" a *surface* watercourse, the landowner overlying this subsurface flow should likewise have the "right to take its share of the water from the main river [i.e., the surface watercourse] at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river . . . ." (Ibid.) Again, there is no rational ground for any distinction between subsurface flow that is connected to the main surface watercourse and a slough that is so connected. Extractions from either affect the flow in the main surface watercourse, and, to the extent riparian landowners abutting upon the main watercourse are not "injuriously affect[ed]," extractions from this "common supply of water" (Hudson v. Dailey (1909) 156 Cal. 617, 628) from "any convenient point" along the main surface watercourse are proper. (Turner v. James Canal Co. (1909) 155 Cal. 82, 92.)

Two years prior to rendering its decision in Turner v. James Canal Co. (1909) 155 Cal. 82, the California Supreme Court rendered its decision in Anaheim Union Water Co. v. Fuller (1907) 150 Cal. 327 which merely held that an owner of lands overlying subsurface flow that is

hydrologically connected to a surface stream cannot divert water from the actual surface water stream *to the extent* such diversion results in "injury [to the] lands which abut upon the proper banks of the surface stream." (Id. at p. 332.) As the Supreme Court explained:

> It is not necessary here to decide what rights to the use of the underground flow of a stream may, by virtue of its position, attach to land which abuts upon, or extends into or over such waters, but does not extend to the surface stream. 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 the 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 within the watershed, such location upon the underground flow does not justify *the [particular] diversion the defendants were making* from the surface stream for use upon that tract. (Ibid., emphasis added.)

In Anaheim the Supreme Court clearly did *not* hold that such diversions could *not* take place if there was *no* injury to the landowners abutting the surface stream. It was not necessary for the Supreme Court to reach that issue and the Supreme Court, accordingly, made no such holding.

VII. HISTORICALLY THE DELTA LOWLANDS INCLUDING THE SUBJECT LANDS HAVE BEEN ASSUMED TO BE RIPARIAN.

The historic assumption that the Delta Lowlands in the 1956 Cooperative Study Program of the Bureau and State have riparian status adds further support to the analysis and argument herein that the subject lands are riparian. See SDWA 2-D

VIII. EVIDENCE OF THE ACTIONS OF THE SWP AND CVP WHICH COULD HAVE CAUSED A PREMATURE APPLICATION OF TERM 91 TO THE SUBJECT PERMITS AND LICENSES WAS WRONGFULLY EXCLUDED AND SHOULD BE RECONSIDERED.

It is fundamentally unfair to allow the SWP and CVP who are the beneficiaries of Term 91 to substantially alter flows into the Delta and degrade the quality of flows into the Delta so as to trigger the Application of Term 91 earlier in the year or in years when it would not otherwise be triggered for the subject permits and licenses. The failure to allow evidence and argument on such matters is a denial of a fair hearing in the proceeding. As an example, Respondents attempted to submit SDWA 2 - B which shows how the CVP decreases Delta inflow.

Reconsideration of such exclusion is hereby requested.

IX. RIPARIAN USE OF NATURAL FLOW IS NOT RESTRICTED AS TO SEASON

The Delta is a mixing zone of the various rivers entering it and tidewater from the ocean via the bays. Under natural conditions adequate quantity would always exist in the channels. See generally Division of Water Rights Exhibit WR 2-20. The impact of changes in natural river flows is basically flushing and quality. The testimony of the Division of Water Rights appeared to indicate that unless the river flow would have been at the riparian property at the exact same time as under so-called "natural flow" conditions, there is no right to such water. Such is not supported in law.

Even among riparian users, use by an upstream riparian will delay and diminish the natural flow. The progression of use will result in the return flow passing down the stream at a later date than would have occurred in a natural state without use. The question as to the relative right to use water in flowing streams has even under English common law been one of reasonableness in terms of the impact on the downstream users. In Lux v. Haggin (1886) 69 Cal.255 at page 401, the Court quotes from Blanchard v. Baker, 8 Me. 253, S. C. 23 Am. Dec. 504, "A riparian proprietor may make reasonable use of the water itself for domestic purposes, for watering his cattle, or even for irrigation; provided it is not unreasonably detained or essentially diminished."

At page 405, the court explains:

> Were it otherwise, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream, without diminution, acceleration or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper proprietor for taking any portion of the stream for any purpose.... (Emphasis in original).

At pages 408-409, the court concludes:

> It is not to be doubted that the riparian proprietors would settled by convention upon a plan by which each could secure a reasonable use for irrigation purposes; as by authorizing each to stay the flow at recurring periods or otherwise distributing it for their mutual and common benefit.

The reasonableness of use can obviously be facilitated by physical solutions or works. Whether or not there is water in the stream beyond the periods when such water would flow under so-called "natural conditions" is not a constraint. The analysis by the court in Lux vs. Haggin (supra) reflects that even a pattern of use or physical solution which delays flow to another season could be deemed reasonable in a circumstance where all riparian demands are satisfied.

Particularly with the 1928 California Constitutional amendment (Article X, section 2), alteration of natural flow is not prohibited and certainly does not disenfranchise a lower riparian. The concept embraced even in English common law is one of reasonableness with the objective of servicing all riparian demands.

With the typical reservoirs on the tributaries to the Delta, the balance is generally one of allowing the storage of winter and spring flows as a trade for flow in late spring, summer and early fall. The inter-relationship of surface flows and flowing groundwaters of multiple streams with the attendant percolation and accretions and limited historical measurements makes the fair determination of actual "natural flow" in the lower reaches of the Central Valley extremely difficult. For the Delta, which is the pool in which all the tributary watershed surface and groundwater flows collect and intersect the tidal action of the Pacific Ocean, the task is even more complex. Even the capture of flood flows which some would assume are surplus could impair the natural flow of groundwater into the Delta in the late spring and summer and eliminate needed flushing. Flood flows typically increase the flow of groundwater by increasing the head or elevation of water in the streams and other areas contributing to the groundwater flow and by spreading water over a greater area of porous surfaces interconnecting with the groundwater. Channelization and other works greatly minimize the contribution of flowing groundwater to the natural flow reaching the Delta. It is generally recognized that flowing groundwater will move horizontally at a greatly reduced rate when compared to surface flow and without a careful and complete analysis the carryover of natural surface flow from season to season and even wet periods to dry periods by way of groundwater flow is ignored.

Winter and spring natural flushing flows remove degrading salts and other elements from

upstream use and natural sources and also maintain channel capacity which contributes to groundwater recharge.

Even in much less complex systems, the courts have leaned toward the practicality of seeking physical solutions which seek to encourage beneficial use while honoring the priorities of senior water right holders.

California Jurisprudence III Water Section 172 provides:

> **§ –Application to vested rights**
>
> The constitutional amendment of 1928 as applied to water rights established before its adoption, bases the right to water not on reasonable use but on beneficial use, and if the riparian user has been making beneficial use of water he is recompensed therefor on the taking of the water for storage or other use by a subsequent appropriator. Thus, while the court has eliminated the right of a riparian owner to enjoin an appropriation of water that would invade his technical rights to unimpaired flow, but would in fact do him no harm, if the subsequent appropriation deprives the riparian of a beneficial use, the riparian is allowed either a physical solution or he may recover damages for the lost or impaired riparian right, regardless of the reasonableness or wastefulness of the use of water under the right. The United States Supreme Court has also followed the doctrine of beneficial use as a valid use regardless of reasonableness, for which the owner of the riparian right must be reimbursed in case he is deprived of it." (Emphasis added.)

Water Rights Laws In The Nineteen Western States by Wells A. Huchins, J.D., Vol. II at pages 245 and 246 provides:

> **X. PHYSICAL SOLUTION PRINCIPLE REQUIRES PROTECTION OF RIPARIAN NEEDS**
>
> (1) The California constitutional amendment of 1928 compels trial courts in water cases, before issuing a decree entailing a great waste of water in order to safeguard a prior right to a small quantity of water, to ascertain whether there exists a physical solution of the problem that will avoid the waste and at the same time not unreasonably and adversely affect the property right of the paramount holder. If no physical solution is suggested by the parties, it is the duty of the trial court to work out one independently of them. No injunction should be granted if its effect would be to waste water that could be beneficially used.
>
> (2) A Federal court cautioned that the constitutional amendment does not permit an appropriator to disregard the rights of riparian owners and others having prior or paramount rights to the use of all waters of a stream which they can put to reasonable beneficial use under reasonable methods of use. If under such circumstances "one seeks to appropriate the water wasted or not

put to any beneficial use, it is obligatory that he find some physical solution, at his expense, to preserve existing prior rights, or if this cannot be done, and the water is to be appropriated, nonetheless, under the right of eminent domain, the riparian owners, prior appropriators and overlying landowners must be compensated for the value of the rights taken." (Emphasis added.)

Even without statutory mandates such as the Delta Protection Act (WC 12200 et seq.), a Delta riparian has a right to the release of water impounded by an appropriator in reservoirs if such impoundment deprives him of a beneficial use. There is no suggestion in law or logic that the physical solution is limited to providing flow only during the period when "natural flow" would have occurred.

Unless water from another watershed (foreign water) is introduced, all water in the watershed even if it is impounded is detained natural flow.

Water Code section 1201 provides as follows:

§ 1201. Public water of state; appropriation

All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code." (Emphasis added.)

Additionally, it is important to recognize that even "foreign waters" may be part of a physical solution establishing a riparian water user's right to utilize such water.

In Westlands Water District vs. United States (2001) 2001 WL 735764 (E.D.Cal) at page 28 the District Court cited Wolfsen vs. United States 142 Ct.Cl. 383, 162 F.Supp.403 (Ct.Cl. 1958) at page 406 as follows:

Id. at 406. The Court of Claims held:

In the absence of a specific ruling by a California court, *we cannot accept the application of the foreign water doctrine to the exchange waters of the Sacramento flowing down the channels of the San Joaquin from Mendota pool.* These waters of the Sacramento were substituted in consideration of the diversion of the San Joaquin waters. Their substitution was a part of the whole plan proposed by the Secretary of Interior and approved by the President and authorized by Congress. The diversion of San Joaquin waters was authorized only because of the commitment to

substitute water from the Sacramento River. We do not believe that the United States could, with impunity, take away the substituted waters.

The law is crystal clear that water moved from one watershed to another above the confluence of such watersheds is not "foreign water" as to water users at or downstream from the confluence. See Crane v. Stevinson (1936) 5 Cal.2d 387 at page 399. The Delta is the common pool for all the tributary watersheds including the Sacramento River. Under natural conditions, the Pacific Ocean tides ebbing and flooding roughly twice in each 25 hour period mix and disburse the waters of the tributary watersheds throughout the Delta including the southern Delta. The legislature in California Water Code section 12931 dealing with both the Central Valley project and California Water Plan recognized: "For the purposes of this chapter, the Sacramento-San Joaquin Delta shall be deemed to be within the watershed of the Sacramento River."

Even under "natural flow" conditions in its most absolute state, the channels of the Delta being below the level of the sea would always have a supply of water.

Except for the impacts of water export pumping and upstream water development induced sedimentation, it would appear that the connection of the Delta channels to the ocean always would provide an adequate quantity of water even without stream flow. Without stream flow, the quality of course becomes quite salty.

Riparian water rights in the Delta allow for sufficient quantities of water to be diverted for the reasonable beneficial uses served thereby and are not limited to any period.

XI. FILLING OF THE INTERNAL CHANNELS TO IMPROVE FARM ABILITY DOES NOT EVIDENCE ANY INTENT TO FORFEIT OR DIVEST THE RIPARIAN RIGHT.

The evidence shows that the internal channels were used to convey surface water to the subject parcels from at least 1850 until the time that replacement irrigation facilities were installed. Roadways and property lines have been straightened, sloughs have been filled and replaced by ditches and pipelines and floodgates have been removed. Farmers have "squared up" and leveled their fields and mixed the soils to make the farm fields more uniform. (See SDWA 3, page 2.)

All of these actions were in furtherance of irrigated agricultural use of Upper Roberts

Island consistent with the statement in the Daily Evening Herald for June 27, 1879, that:

> Roberts Island is rapidly assuming the appearance of a settled and prosperous community. It requires no stretch of the imagination and no confidence in the improbable, to picture this Island as the most prosperous part of the county, and the very garden spot of the State. (See SDWA 3, pages 3 and 4.)

It is inconceivable that any landowner in the "very garden spot of the State" would intend to forfeit or divest the right or means to irrigate. No evidence has been put forth to support such forfeiture or divestiture.

Although not necessary to the argument, hydraulic connectivity of the subject lands was not destroyed by reason of the filling of the internal channels. Replacement pipelines and ditches, seasonal overflow, seepage and other flow through the levees and flow of river water through the ground continued to provide surface and subirrigation to the subject lands.

Moreover, as discussed above, landowners of parcels that abut sloughs have the "right" to take their "share of the water from the *main* river *at any convenient point thereon* . . . ." (Turner v. James Canal Co. (1909) 155 Cal. 82, 92, emphasis added.) The only caveat is that such diversions must not "injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the [slough at issue]." (Ibid.) Thus, since the landowners of the parcels at issue can take their respective share of the waters from the main channels "at any convenient point thereon," the artificial filling of the natural slough should have *no* effect on the status of their riparian rights to those rivers. Intervening landowners could of course object to their new point of diversion on the grounds that their rights are being injured thereby, but, in the instant proceedings, there are no such objecting landowners and such issues are not before the SWRCB.

There is in the law the doctrine of "avulsion" which has been defined as "a sudden and perceptible change in the location of a body of water." (State of Cal. ex rel. State Lands Com. V. Superior Court (1995) 11 Cal.4th 50, 63, fn. 1.) It appears that at least one case, i.e., McKissick Cattle Co. v. Alsaga (1919) 41 Cal.App. 380, has consider this doctrines' effect on riparian water rights. That case, however, very clearly and importantly involved "natural" avulsion as opposed to "artificial" or "manmade" avulsion. There the court held:

> [W]hen, *solely by act of Providence*, the channel of riparian waters has been so changed as that such waters cease to flow over and across the lands of a riparian owner–that is to say, when such waters cease *through the operation of some natural force* to pursue their accustomed course and in consequence cease to flow in a portion of that natural channel, which portion of such channel passes or crosses over certain lands–then in that case the owner of such lands loses the role of a riparian owner. (Id. at p. 387-388, emphasis added.)

The rationale for the holding was that riparian rights "'draw their support from the laws of nature, but they do not rise superior to those laws. When, *by their operation*, the flow is lost, the right is lost with it.'" (Id. at p. 388, emphasis added.) The court continues:

> Otherwise a riparian proprietor would hold all lands above him in an extraordinary and perpetual servitude. If, *by the forces of nature*, the stream should change its course at a point miles above him, he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very fountainhead of the stream. Such a doctrine could not be tolerated. (Ibid., emphasis added.)

It can be seen, that where a channel is changed, *not* by nature, but by *artificial*, *manmade* means as was the case in the instant action, this rationale has no application. When a natural slough is *artificially* "removed" and "replaced" by an alternative channel to the river that is consented to by the affected landowners and causes no injury to them, it cannot by any means be said that riparian rights are "ris[ing] superior to [the laws of nature]." (Ibid.) The diverters are merely taking the same amount of water they were entitled to take via the natural watercourse from a more "convenient point [along the main river channel]" which they are fully authorized to do pursuant to Turner v. James Canal Co., supra, 155 Cal. 82, 92.

Moreover, even when a channel changes course as a result of *natural* forces, the affected landowners are nevertheless authorized, within "a reasonable time," to physically "ditch the water back to its original channel," so long as they do not "disturb the rights of [existing] appropriators, nor [enter] the lands of others, without their consent or acquiescence . . . ." (McKissick Cattle Co. v. Alsaga, supra, 41 Cal.App.380, 388.) In the instant action, there is *no* allegation that any *then-existing* appropriators have been injured by the change in point of diversion nor are any adjoining landowners complaining about the change. Accordingly, a

finding that the *artificial* filling of the natural watercourses and substitution of alternative points of diversion from the main channels in the instant action somehow result in the total loss of the affected parcels' riparian rights to those channels has no support in the law or in reason, and, thus, should be rejected and avoided.

XII. AT THE TIME RESPONDENTS' PARCELS WERE SEVERED FROM THE MAIN CHANNELS IN THE DELTA, THE EVIDENCE SUPPORTS THAT THE OWNERS INTENDED TO RETAIN RIPARIAN RIGHTS.

A. Silva Property. Through 1911, the Silva property was part of larger pieces of land transferred by Deed and patent, each time being connected to Middle River (and the San Joaquin River near Rough and Ready Island). By way of Deed dated December 26, 1911, recorded on December 28, the Silva parcel (and one other) were severed from Middle River. (SDWA 3-M).

In the same year, but prior to the severance, the property was the subject of two agreements, each dated September 29, 1911. These agreements provided that irrigation and drainage canals would be available for use, and that water would be supplied to the property. On the last page of the second agreement, under paragraph FOURTH, it states:

> . . . then in the case of subdivision of a tract and a sale of a part thereof, the guarantor shall provide means for the supply of irrigation waters and the drainage of the tract so subdivided.

We see then that in the months prior to the severance, the landowner specifically reserved the ability to divert water from Middle River to the property in the case of severance. This constitutes a clear indication that the owner intended to maintain the property's riparian character notwithstanding any allegations of use at that time. It also supports the argument of pre-1914 rights dealt with later herein.

B. Ratto Property. Through 1891, the Ratto property was also a part of larger pieces connected to Middle River. By way of Deed dated June 5, 1891, the Ratto parcel (approximately 55 acres) was severed from its connection to Middle River.

A number of documents indicate the ability to divert water from Middle River or Old River was in existence at the time of the severance. The first is a map (SDWA 3-Q) which shows a major slough running north from Old River up through the Ratto property in

approximately 1879. The record indicates this slough had a flood gate, and the slough was later converted to an irrigation ditch (SDWA 3-R). The testimony of Chris Neudeck concludes this matches the irrigation practices of the day, the use of tidal action in old sloughs for irrigation and drainage purposes. (SDWA 3).

An illustration from 1879 shows another slough running east-west from Middle River and farming on the Ratto property (SDWA 3-Q). A slightly later newspaper article describes a "dam" on this east-west slough again indicating the use of tidal action in the slough for irrigation purposes (SDWA 3-S). In addition, when the owner at the time the severance died, his estate (1901) included many farming implements (SDWA 3-T). Clearly, he had other property, but the testimony and evidence confirms ownership of the property was for farming purposes.

Hence, we see that immediately prior to severance, the owners of the property had operable means of providing water to the property from Middle River and Old River and farmed the property. There is no contrary evidence suggesting the owner at severance gave up any ability to divert water from the neighboring channels.

C. Conn Property. The Conn property consists of two pieces, a 41-acre parcel and a 120-acre parcel. The 41-acre parcel was originally part of an 1876 patent which connected it with Middle River and the San Joaquin River (SDWA 3, page 9). This 41-acre parcel was severed by way of a Deed dated 1889 (SDWA 3-X, page 5). The 120-acre parcel was the subject of a separate patent dated 1887 (SDWA 3, page 9). No concurrent documents describe any method by which water was supplied from neighboring channels at the time of severance.

However, the record contains two pieces of evidence indicating the use of water on the parcel. First is the testimony of Chris Neudeck which places an internal island slough through the property (SDWA 3, page 10, and SDWA 3-D). Mr. Neudeck also concluded that there was no use for the property in the 1880's except for agricultural and animal husbandry, both of which need water, and that the typical practice of the day was to use these interior island sloughs for such purposes.

Second is an April 26, 1887, Deed wherein the grantor reserves one-half of the crop now growing on the land (SDWA 3-Z). Taken together, these pieces of evidence indicate the owner

used the land for farming and had access to water at the time of severance. It is therefore more likely than not that at severance, the parties intended to maintain the ability to get water from the main channels via the interior sloughs.

D. Phelps Property. The Phelps' property consists of three parcels. These parcels too are part of larger pieces in their original patents. Two of the parcels were deeded prior to patenting in 1874. The 1874 patents severed the parcels from any current channel (SDWA 3-CC, page 2). The third parcel was part of one of the larger patents wherein it was connected to Middle River and the San Joaquin River (SDWA 3-CC, page 3A). It was severed from the main channels in 1878 by way of deed (SDWA 3, page 11).

Mr. Neudeck places the property directly on at least two of the interior island sloughs, and identifies the current remnants of a brick pipe through one of the levees which could have also supplied the sloughs (SDWA 3, page 12).

Staff's exhibit WR 3-33 is an Inspection Report for one of the Phelps parcels (Application No. 20957). That report states that the (then) applicant "claims all of this land was irrigated by gravity many years ago." (Transcript page 401:4-13). Contrary to Staff's witnesses musing later in the transcript, the only reasonable meaning of gravity irrigation would be the application of water without pumps or syphons. This can only mean that the property actually did receive the water and without mechanical help, the water irrigated the land. Any other explanation is simply unsupported speculation.

SDWA 7 is the 1937 aerial photo of the property which clearly indicates that virtually all of the Phelps' properties under cultivation. This information when combined with Mr. Neudeck's testimony indicate that from before and after the property's connection to the interior island sloughs, the owners intended to maintain the ability to divert water for irrigation purposes and in fact did; thus preserving their riparian right.

XIII. PRE-PATENT WATER USES SUPPORT A RIPARIAN WATER RIGHT

It is well established that the date of the formal issuance of a state or federal patent to a private party is *not* the starting point for determining the riparian status of a parcel. As explained in Hutchins, Water Rights Laws in the Nineteen Western States (1976) vol. 2 at page 16, "Lands

held in Spanish and Mexican grants contiguous to streams in California are recognized as having riparian rights . . . ." Thus, water uses taking place on such lands prior to any subsequent state or federal patent of such lands to a private party indeed can, and do, support riparian water rights.

Moreover, it is also well established that *equitable* title to lands, including the riparian rights incidental thereto, that are ultimately patented from the state or federal governments to private parties is acquired upon the date of *original entry or settlement on the land*, and *not* the date of formal issuance of the patent. (See Lux v. Haggin (1884) 69 Cal. 255, 429 and Pabst v. Finmand (1922) 190 Cal. 124, 131.) Thus, water uses on such lands subsequent to such entry or settlement yet prior to the formal issuance of such patents can, and do, support riparian water rights.

In this case and for the purpose of this issue, one of the Conn parcels and two of the Phelps parcels were the subject of occupation and ownership prior to patenting but were patented separate from the main channels. The relevant Conn parcel was transferred pre-patent in an instrument dated April 1, 1872 from Roberts to Cuperton, et al. The instrument transfers the Certificate of Purchase (SDWA 1- B; Conn title documents).

For the two Phelps parcels, the May 7, 1873 Indenture (Deed) between Perry and Kidd states at the very end, after describing the transfer, "subject however to the balance due the State of California" (SDWA 1- E; Phelps title documents), also suggesting an earlier Certificate of Purchase from the State.

Thus, for the parcels not contiguous at the time of patenting, a riparian right can arise at the time of entry and settlement.

XIV. THE EVIDENCE SUPPORTS THE APPLICATION OF WATER TO RESPONDENTS' PROPERTIES PRIOR TO 1914 THUS CREATING PRE-1914 RIGHTS.

A. Elements Necessary to Establish a Pre-1914 Water Right. "Appropriate rights initiated prior to the 1914 [enactment of the 'Water Commission Act"] are commonly referred to as 'pre-1914 rights.'" (People v. Murrison (2002) 101 Cal.App.4th 349, 359, fn. 6.) Such pre-1914 rights were "available by simply diverting water and putting it to use." (Id. at p. 361.) With regard to the *quantity* of water secured by a pre-1914 water right holder:

An appropriator, as against subsequent appropriators, is entitled to the continued flow to the head of his ditch of the amount of water that he, in the past, whenever that quantity was present, has diverted for beneficial purposes, plus a reasonable conveyance loss, subject to the limitation that the amount be not more than is reasonable necessary, under reasonable methods of diversion, to supply the area of land theretofore served by his ditch. (Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. (1935) 3 Cal.2d 489, 546-547.)

As the court in Erickson v. Queen Valley Ranch Company (1971) 22 Cal.App.3d 578, further explains at page 584, the maximum quantity of water secured by a pre- (or post-)1914 appropriative right is measured by the maximum amount of water "'devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser.'" (Erickson v. Queen Valley Ranch Company (1971) 22 Cal.App.3d 578, 584.) Since complete or partial forfeiture of a pre-1914 water right requires nonuse for five years (id. at p. 582), the maximum amount of water diverted to a beneficial use within the five year period immediately prior to the 1914 enactment of the Water Commission Act would appear to be the *maximum* quantity of water secured by the pre-1914 permit. (*Expansion*s of that maximum quantity *after* 1914 would appear to be governed by the rules set forth in the 1914 Water Commission Act.)

B. Initial Burden of Proof to Show Prima Facie Case. In establishing the nature and extent of their pre-1914 rights in this proceeding, Respondents must show such rights by the "preponderance of the evidence" standard. (Evid. Code, § 115.) That standard requires a showing that Respondents' version of a fact is "more likely than not" or, stated another way, "that the existence of a particular fact more probable than its nonexistence . . . ." (Beck Development Co., Inc. v. Southern Pacific Transportation Co. (1996) 44 Cal.App.4th 1160, 1205.)

C. The Evidence Presented Constitutes a Prima Facie Case That the Conn Property has Pre-1914 Rights. The Conn property has a number of historical references to farming on the land and the application of water thereto. First, as previously noted, a Deed dated April 26, 1887, provides:

The said parties of the first part reserve one-half of the crop now growing on the within described land, and the said party of the second part hereby agrees to harvest said one half of the crop and deliver it to the said parties of the first part at the machine in the field free of all costs to the parties of the first part (illegible) crop

to be delivered in the sack. (SDWA 3-Z.)

Given the month of the Deed (April), we would then have to conclude the crop is one which would be "in the sack" upon harvest. Using Staff's WR2-22 (page 3 thereof), the potential crops that might be sacked are beans, corn, grain, onions, potatoes, or "seed." Other evidence describes pasture or alfalfa as a typical crop. The diversion seasons for these crops run from March through October (also per WR2-22). The Conn property also is the subject of the Peter Ohm Declaration submitted as SDWA 2-Y. This Declaration unequivocally states that both Conn parcels continuously received water from the San Joaquin River via a floodgate and terra cotta pipe beginning prior to 1914. No evidence exists which suggests any different range of crops has been farmed on the property since the 1887 Deed although Mr. Neudeck's testimony adds to the range by including alfalfa and some others. Pursuant to Table 5 1996-77 Estimated Crop Ex Values from the Sacramento Valley Water Use Survey dated 1977 (SDWA 2-E) (hereinafter "Water Use Chart") we can calculate a water use for the acreage. The calculation would be: 29.5 inches (beans) - 46.0 inches (alfalfa) per year on 120 plus 40 acres; or 2.45 feet - 3.83 feet X 160 acres or 392 acre-feet - 612.8 acre-feet.

Respondents therefore conclude a valid pre-1914 right has been shown as described above covering the time frame when Tem 91 is generally applied.

D. <u>The Evidence Presented Constitutes a Prima Facie Case That the Silva Property has Pre-1914 Rights</u>. The evidence for a pre-1914 right on the Silva property is similar to that which indicated the preservation of a riparian right described above.

In addition, Mr. Neudeck identifies portions of the interior island slough system connecting to this property (SDWA 3, page 5 and SDWA 3-D) as well as the remnants of a floodgate in the same area. Mr. Neudeck also noted that one of the Deeds for the property had a price of $22,000 which confirms to him that there was farming on the property (SDWA 3, page 5).

One of the 1911 agreements relating to this property and which generally describes the ability and right to receive water from the Woods Irrigation District confirms that a portion of the land is "high ground" which can be supplied and watered through subirrigation (SDWA 3, page

6). Mr. Neudeck concludes this shows both the existence of the old sloughs (the high grounds are the remnants of the heavier soils deposited by the sloughs) and the practice of flooding that which can be flooded and subirrigating the rest.

Use of the water included animal husbandry and various crops including alfalfa, grain, tomatoes, etc. (SDWA 3, pages 5-7). Again, using the Water Use Chart attached to Mr. Hildebrand's testimony, we can calculate the water use. 24.7 inches (grain) to 46.0 inches (alfalfa) on 169 acres; or 2.06 feet to 3.83 feet X 169 acres or 348.14 acre-feet to 647.27 acre-feet. If we assume perhaps a 10 percent factor for lands which might not have been benefitted from direct or subirrigation, we come up with a pre-1914 water right range of 313.34 acre-feet to 582.57 acre-feet.

E. The Evidence Presented Constitutes a Prima Facie Case that the Ratto Property has Pre-1914 Rights. The evidence supporting a pre-1914 right for the Ratto property also includes that set forth above regarding the reservation of a riparian right to the property. In addition, Mr. Neudeck points out that two different sloughs appear to provide a source of water to the property well before 1914, and that one slough had a dam and the other a floodgate; confirming that the farmers were controlling the flow of water for use on the land (SDWA 3, pages 7-8). The 1879 illustration of the land confirms the farming of grain or wheat, and a subsequent estate document dated May 31, 1901 (SDWA 1, Estate of George Small recording) of one owner confirms continued farming (SDWA 3, page 8).

Finally, in the title documents for the Ratto property (SDWA 1 - D), an October 3, 1889, deed from Ratto (not the Respondent) to Rodgers states: *When the slough running through the Grantors land is full of water at anytime the Grantee shall have the right to use the water but not otherwise." A clear confirmation of irrigation via interior island sloughs.

Using grain, wheat, pasture and alfalfa as the likely crop since before and after 1914, we calculate a water use. 24.7 inches (grain) to 46.0 inches (alfalfa) on 55 acres; or 2.06 feet to 3.83 feet X 55 acres or 113.3 acre-feet to 210.65 acre-feet as the amount of a pre-1914 right for the Ratto property.

F. The Evidence Presented Constitutes a Prima Facie Case that the Phelps Property

has a Pre-1914 Rights. The information supporting a pre-1914 right for the Phelps property also includes that which supported a preservation of a riparian right to the property set forth above. In addition, there are few documents that contain compelling evidence.

First, Mr. Neudeck places the property directly on at least two of the interior island sloughs, and identifies the current remnants of a brick pipe through one of the levees which could have also supplied the sloughs (SDWA 3, page 12).

Second, Staff's exhibit WR 3-33 is an Inspection Report for one of the Phelps parcels (Application No. 20957). That report states that the (then) applicant "claims all of this land was irrigated by gravity many years ago." (Transcript page 401:4-13). Contrary to Staff's witnesses musing later in the transcript, the only reasonable meaning of gravity irrigation would be the application of water without pumps or syphons. This can only mean that the property actually did receive the water and without mechanical help, the water irrigated the land. Any other explanation is simply unsupported speculation.

Third and last, SDWA 7 is the 1937 aerial photo of the property which clearly indicates that virtually all of the Phelps' properties under cultivation. Using the crops referenced in Mr. Neudeck's testimony (SDWA 3, page 12) and the Water Use Chart as before, we can calculate a water use. 29.5 inches (beans) to 46.0 inches (alfalfa) on 392 acres or 2.45 feet to 3.83 feet X 392 or 960.4 acre-feet to 1,501.36 acre-feet as a pre-1914 water right for the Phelps' property.

G. Valid Reasons Exist to Apply for Permit When Other Rights Are Present.

Finally, with regard to the pre-1914 rights, the hearing officer asked why someone with a valid pre-1914 right would apply for a permit and license. The answer to this cannot be specifically made as the underlying thoughts of the applicants (who are predecessors in interest to the Respondents herein) are not recorded.

We do know that some of those applicants believed from the very beginning that they had riparian rights (see below) and yet still applied for permits. Two possible explanations present themselves. The first is set forth in a letter from the USBR to the Board and contained in the Board's file for Application 22598. In that February 16, 1967 letter, the Bureau states:

/// ///

> An existing valid riparian right will neither be strengthened nor impaired by a permit to appropriate water issued to the owner of such right. However, an application to appropriate water may be filed by such owner in the following instances: (1) to establish a new right to water already in use by the applicant, where the validity of the existing right is in doubt or has not been adjudicated . . .

This was during a decade when the CVP began making full deliveries and the SWP was starting up. It is reasonable to conclude a Delta diverter, seeing the threat to his diversions presented by the projects, might seek to also obtain a permit until the water rights of the area were finally determined.

Second and similarly, there were times in recent history when state officials proposed an end to riparian rights. Such a threat could also induce someone to file an application "just in case." It should be remembered that at the time of these applications, the diverters were assured that they were riparian and so took no action to document either the preservation of the riparian right or existence of a pre-1914 right.

H. Shift of Burden. Subsequent to Respondents' showing of pre-1914 rights, the burden shifts to the Staff to show that the pre-1914 right was lost or abandoned.

> If the defendants sought to defeat plaintiffs' rights by abandonment, nonuser, or otherwise, in view of the prima facie showing of title on the part of the plaintiffs, the burden was on the defendants to show such loss of rights. (Lema v. Ferrari (1938) 27 Cal.App.2d 65, 72-73.)

> A party who bases his right on prescription or adverse possession, or on the abandonment or forfeiture of prior rights, has the burden of proof as to such matters. (Lema v. Ferrari (1938) 27 Cal.App.2d 65, 73.)

> Defendants, who base their claim on the forfeiture of a preexisting right, had the burden of proving facts constituting a forfeiture. [Citations.] (Erickson v. Queen Valley Ranch Company (1971) 22 Cal.App.3d 578, 582.)

> Since John Pedro's appropriative right had been established before 1914, forfeiture required nonuse for five rather than three years. [Citations.] (Erickson v. Queen Valley Ranch Company (1971) 22 Cal.App.3d 578, 582.)

The Staff's rebuttal evidence provided no specific showing of any period of time after 1914 during which water use on any of the subject lands was suspended. The Staff's only

evidence on this issue was contained in a few documents which suggested that less than the entire acreage of Upper Roberts Island was irrigated for the years 1924-1928. [WR 2-22 and 2-23.]

Therefore, if the Board finds that a prima facie case for pre-1914 rights was made, the record lacks the evidence to thereafter find such rights were lost through non-use.

I.. Conclusion. Respondents have presented testimony, contemporary evidence and other documentary evidence indicating it is more likely than not that the above lands were irrigated by the above amounts before 1914 and continuing through the present. They have therefore established a prima facie case for pre-1914 rights.

With regard to the evidence supporting pre-1914 rights, the difference between the Staff's theory/evidence and the Respondents' must be noted. Respondents' witnesses and evidence described actual farming practices, the use of interior island sloughs, floodgates, direct and subirrigation. Besides being supported by the submitted evidence and testimony, this description of agricultural practices makes sense in that the only reason to have property on Upper Roberts Island is for farming and to maximize that activity. There is no reason why such farmers would not take advantage of the sloughs, control flows and tides with floodgates, and irrigate every chance they could in order to maximize their crop yield.

Staff's theory is that large portions of the island were bought and sold for nearly 100 years and yet were barren and unused or farmed without the use of applied water. Not only does such a theory fly in the face of the identified remnants of the slough system and floodgates, but it also makes absolutely no sense from a farming perspective in the Delta.

XV. CHANGES IN POINTS OF DIVERSION DO NOT AFFECT PRE-1914 RIGHTS.

Staff argued that some of the pre-1914 diversions by the Respondents were at locations other than the current points of diversion. Staff concluded this interrupted or precluded a continuation of the pre-1914 right. Such, however, is not the law.

City of San Bernardino v. City of Riverside (1921) 186 Cal. 7, 28-29:

> It has long been settled in this state with regard to water rights by appropriation that the appropriator may charge the place of use thereof, or the character of the use, without affecting his

> right to take it, and that other persons interested in the source from which it comes have no right to object to such changes. [Citations.] It is also settled that such appropriator may change the place from whence the water is taken out of the source, provided others are not injured by such change. [Citations.]

The court continued with the following at page 29:

> In Barton v. Riverside [155 Cal. 517], this doctrine was applied to the waters of this artesian basin. The reasons for the right to make the above changes are that, by his taking and devoting water to a beneficial use, the appropriator has acquired the right to take the quantity which he beneficially uses, as against others having no superior rights in the source, and that neither the particular place of use, the character of the use, nor the place of taking is a necessary factor in such acquisition. The change of place of taking becomes wrongful only in the event that others are injured thereby. These reasons are as well applicable to the taking of underground waters of any kind as to diversions from a surface stream, and we perceive no reason why the same rule should not apply equally to both.

XVI. STAFF'S REBUTTAL CASE FAILED TO PROVIDE CREDIBLE EVIDENCE TO CONTRADICT RESPONDENTS' TESTIMONY AND EVIDENCE.

The Staff's rebuttal case covered a number of issues in which it attempted to challenge the findings, opinions, and evidence presented by Respondents' witness Chris Neudeck. None of the rebuttal case stands up to scrutiny.

A. Interior Island Sloughs. The Staff's case in chief clearly stated there were no interior island sloughs on Upper Roberts Island, but the Staff's witness admitted the contrary on cross-examination.

> Mr. Nomellini: Do you now agree, based on your rebuttal exhibits, that channels existed in the area of Upper Roberts Island?
>
> Mr. Wilcox: Based on the 1912 topo map, which I think is really the best evidence that we have in the Record, I would not deny that there were channels in Upper Roberts Island. (Transcript February 26, 2003, pages 385: 23-386: 4.)

In spite of this evidence, the Board then attempted to show that the interior island sloughs identified did not connect to the main channels. WR 2-06 highlighted (circled) the supposed junctions of the sloughs to the main channels, and the witness then concluded that since the 1912 topo map did not show the sloughs touching the channels, there was no connection. This conclusion not only ignores Respondents' evidence but shows an utter lack of understanding of

Upper Roberts Island and the Delta.

The testimony by Chris Neudeck was that as reclamation of the island progressed, floodgates or dams were installed to allow control of the water entering or exiting the sloughs (SDWA 3, pages 1-2). Thus, the farmers along the slough could manipulate the water either for irrigation or drainage. Mr. Neudeck identified three of these structures specifically (SDWA 3-J, SDWA 3-S, SDWA 3, page 12, see also SDWA 3-C).

More importantly, the island was and is bordered by a levee pursuant to reclamation. Hence, a topo map (i.e., an aerial view) would show the levees ***and not show the pipes or floodgates going through the levee***. Of course the aerial drawing does not show the slough connections; they are buried. WR 2-06 has no probative value to the question presented and therefore does not contradict the testimony of Chris Neudeck.

The Board also questioned the specific existence of sloughs identified by Mr. Neudeck, but apparently confused the facts. Mr. Neudeck identified two sloughs which he concluded connected the Ratto parcel to main channels. The first one identified was in SDWA 3-Q, page 9). This slough was shown on a map and ran north from Old River through Section 18. The second was identified as "Willow Slough" on an 1879 drawing (SDWA 3-Q, pages 10-11) and in a newspaper article (SDWA 3-S) and ran easterly from Middle River.

The Staff attempted to argue that the north-south slough must be a mistake and not have existed because it did not appear on its own exhibit (Transcript 2/26/03, pages 356-357). Such reasoning is unsupported. Mr. Neudeck confirmed the remnants of the north-south slough through a survey map (SDWA 3-R). The best that could be said for the Staff's rebuttal is that each of the various maps and drawings from the late 1800's and early 1900's fail to include every feature of the land. [It is important to note that Mr. Neudeck specifically identified a prior floodgate on the north south slough which therefore confirms the use of water by the farmer bordering the slough.]

B. Accuracy of Farming Surveys. The Staff's next rebuttal issue was that although it had to admit there were interior island sloughs and that those sloughs were used for irrigation, they probably did not include the Respondents' property. Mr. Wilcox admitted to the slough's

existence (see, for example, Transcript 2/26/03, pages 356-357 and 386). He admitted that farmers on the island flooded acreage in the fall either for general improvement or for prepatory for the next season (Transcript 2/26/03, pages 355: 3-7). He also admitted there was direct irrigation in subsurface irrigation on Upper Roberts Island (Transcript 2/26/03, page 382).

Staff submitted WR2-22 and 2-23 as evidence that portions of Upper Roberts Island were not irrigated during certain years in the early 1900's (1924 - 1928). The documents do contain summaries of cropping, but contain significant limiting cautions. WR 2-22 includes Table 210 which gives us Delta acreage for 1924 - 1928, but only the year 1924 segregates out "nonirrigated" lands. It also includes some pasture within a labeled "nonirrigated" category. Table 211 of the exhibit then gives us an irrigation season for pasture of July through November with a footnote that states, "There is also a certain amount of winter irrigation for pasture."

Tables 213, 214, and 217 (also from WR2-22) purport to show irrigated lands for various areas including Upper Roberts Island. The footnotes for the Tables include the following:

> 3. Changes in total acreage figures from those as given in the 1924 report were made on a basis of more accurate information obtained in 1925. In the majority of cases the total acreage figures given in the 1924 report were those taken from general Delta, county or project maps and figures shown for the same tract on the various maps at considerable variance. (Table 214).
>
> 1. In the Delta census, it has been difficult to get the correct segregation between irrigated and nonirrigated grain and pasture. Included in the grain and pasture columns are the acreages known to have been irrigated directly or those estimated to receive direct benefit through subirrigation. Acreages flooded in the fall either for general improvement or prepatory to the next season's grain crop are also included. Grain and pasture acreages considered as nonirrigated are shown in a separate column. (Table 217).
>
> 2. Except as noted, these figures represent gross areas, i.e, include roads, canals, etc., and entire area within levees. (Table 217).

WR 2-23 Table 45 includes a similar footnote:

> 1. In the Delta census it has been difficult to get the correct segregation between irrigated and nonirrigated grain and pasture. Included in columns (9) and (12) are the acreages known to have been irrigated directly or those estimated to have received direct benefit through subirrigation. Acreages flooded in the fall either for general improvement or prepatory to the next season's grain

crop are also included. Grain and pasture acreages considered as nonirrigated are shown in column (17).

We see from the documents themselves there is much uncertainty in the number of acres and whether pasture and grain in any particular instance are irrigated. We don't know when the data was collected. We don't know if "nonirrigated" acreage was indeed flooded or irrigated at some other time during the year. We don't know how the data was collected, whether through official reporting or on site visits or a combination of both.

What we do know is that there was "uncertainty" and the acreages listed changed over the limited times given. Table 213 (1924) of WR 2-22 shows a total of 8,900 total acres with 3,300 acres as irrigated for Upper Roberts Island. Table 214 (1925) shows 8,900 total acres with 1,615 as irrigated. Table 217 (1928) (which includes the footnote that states, "It has been difficult to get the correct segregation . . .") shows 7,480 total acres with 3,500 acres not irrigated and 3,811 acres irrigated. The records show Upper Roberts shrinking by 1,420 acres.

Use of the data is therefore limited. As crops might vary from year to year, so did the acreage listed in the tables. Differentiating between irrigated and nonirrigated lands was difficult. The gross acreage of Upper Roberts Island "changed" over time decreasing from 8,900 acres to 7,480 acres. Whatever level of confidence we can give these reports, they do not allow us to make any conclusion regarding the specific use of water on the Respondents' lands. We do see that as the footnotes reference flooding of the lands for preparation for the next season's crop would seem to confirm the Respondents' position herein that use of the interior island sloughs facilitated agriculture.

C. Applications and Board Files as Evidence of Prior Use. We need not spend much time on the rebuttal testimony of Mr. O'Hagan wherein he read from the original applications and some statements of use from the SWRCB files for each Respondent herein. His testimony initially purported to contradict water use on the parcels prior to the applications. However, on cross-examination, it became clear that the references in these documents did not disclose anything about prior use of water or delivery of water on the parcels. For example, with regard to Application 22638 for Mr. Avila, the following discourse occurred:

Mr. Herrick: On this particular application, which is 22638, you reference the dates when the construction work was to begin and completed; is that correct?

Mr. O'Hagan: Yes. Item 10 is construction work will begin on or before, and "B" is the construction work will be completed on or before.

Mr. Herrick: That relates to the construction work associated with this application, correct?

Mr. O'Hagan: Yes, sir.

Mr. Herrick: That has nothing to do with any prior delivery system of water that existed or if it did not exist; is that correct?

Mr. O'Hagan: I believe it would exist for this project; that is correct.

Mr. Herrick: It wouldn't have to do with any prior system which might have fed water into that property?

Mr. O'Hagan: I wouldn't know if there was a prior system, sir.

(Transcript 2/26/03, pages 391:14 - 392:8.

The files actually suggest prior use. For example, the Silva Application (Avila and Conn) lists under "Other Rights" both prescriptive and riparian rights (Transcript 2/26/03, pages 392:17 - 393:14). We have no explanation for what was meant by the reference to "prescriptive rights," but the reference to riparian seems to confirm the prior reservation of riparian rights discussed herein; rights not affected by use.

Mr O'Hagan was presented with an aerial photo of the Phelps' property. He had previously testified that the applications for Phelps and neighboring property indicated no use of the land for farming purposes prior to the applications in the early 1960's. SDWA 7 was a 1937 aerial photo which clearly showed ongoing farming of the Phelps' property. When presented with this unequivocal proof of farming, Mr. O'Hagan noted that he saw "lines" on the photo but said, "I don't know what they're (the lines) an indication of . . ." (Transcript 2/26/03, page 400:6-10).

Staff attempted to argue that the records indicate not only less than all of Upper Roberts Island was farmed early in the last century, but that much of this was "dry farming" and thus did

not involve irrigation. Taking the latter first, the staff apparently were relying on Mr. Wilcox as an expert in early farming practices in the Delta. Such a proposition is interesting but clearly has no basis in light of his Resume submitted as WR2-01 which includes no references to farming.

Another staff exhibit was WR 3-33, a field investigation report which relates to one of the Phelps' parcels. The document indicated that the owner at the time "claims all of this land was irrigated by gravity many years ago." (Transcript 2/26/03, pages 401:11-13). Such evidence only confirms the Respondents' assertions of prior use via interior island sloughs. There is nothing to support the notion that irrigation by gravity would refer to anything else.

Absent from Staff's presentation of documents from the various files were quotes from other documents which specifically contradict their position. In the Board file for the Ratto Application No. 22598, the 10/3/86 Report of Inspection filled out by the Board's staff notes under "Other Rights" "Riparian-Delta lowlands." On the 12/4/84 document entitled, "Issuance of Water Right Permit" the senior engineer checked the box next to the statement, "Applicant has provided assurance of supplemental water right during summer" and wrote next to it, "Riparian right." On the 12/3/84 "Check for Permit" form, the Board staff wrote next to category "Summer Supply," the following, "When Term 91 is implemented, applicant may use riparian right since project is in Delta Lowlands." On the original Application, the (then) owner noted under other rights, "Riparian."

In a July 1997 Contact Report, the Staff person recounts the Applicant asserting a riparian right under Delta Lowlands principle, mentions discussion amongst Board staff regarding this issue, and then notes ". . . we are apparently accepting the claims of riparian rights pending any adjudication in the area." The author then noted on the Report that this information was left on the applicant's message machine.

Finally, when Mr. Wilcox and two others inspected the property in August of 2000, Mr. Wilcox stated in his Field Inspection Report that Mr. Ratto claimed a riparian right, but that if he could not substantiate it, the Board may have to impose a penalty, "though for this year the penalties would not likely exceed $500."

Similar documents are in the other files. SWRCB File Application No. 27638 (Phelps)

contains a 5/19/88 "Report of Inspection" which states on page 2 under "Comments" the following: . . . because of their location in the "Delta Lowlands" their claim of riparian rights appear valid." File Application No. 21162 (Phelps) contains a 6/2/88 "Report of Inspection: which similarly states: "The place of use can be said to be riparian to the source since it is located on Roberts Island in the Delta." File Application No. 20957 (Phelps) contains a 1/19/96 "Check for License" which states the inspection report should better explain "A) Why no alternate supply is necessary for periods when Term 91 cuts off diversions under this permit. Located on Roberts Island in Delta, can claim riparian."

We see from this chain of documents going back to the very beginning of the application process that not only did the applicants believe they had riparian rights, but the Board staff also believed they had riparian rights pursuant to the principles set forth in the Delta Lowlands Report. Even after the issue arose later on, Board staff noted that it was the Board's position to accept such rights unless and until there was an adjudication of water rights in the area. It was only recently that Board staff changed this position, but even then stated that the maximum penalty for the "violation" would only be $500 for the summer.

D. Tides Naturally Fill Interior Sloughs. The State also tried to suggest that the use of tidal waters in interior island sloughs would not be practical due to the low height of the tides. In support of this, they presented WR2-20. This exhibit showed "typical range of water levels over 25-hour tidal cycle in summer conditions" (see exhibit). On cross-examination, Mr. Wilcox admitted that the height of the water levels would also depend on inflow (Transcript 2/26/03, pages 38:20-388:6), and that one would have to know the slough bottom levels to determine how much or if the sloughs would fill (Transcript 2/26/03, page 389:14-25). Mr. Wilcox "admitted" that, "We have no idea of what those slough bottom elevations were." (Transcript 2/26/03, page 390:7-8).

We do know that Mr. Neudeck testified that one such slough was 25 feet deep (Transcript 2/25/03, pages 180:7-17). This certainly confirms the Respondents' position and contradicts the Staff's attempt to question the use of those old sloughs. As the Staff are well aware, the tidal barriers in the South Delta do this very thing; trap high tides to assist local diverters.

Staff suggested that no use of water on the Respondents' property before the applications was indicated by the lack of any earlier filings of Statements of Water Use pursuant to Water Code Section 5100 et seq. However, staff was apparently unfamiliar with one of the exclusions for such reporting set forth in Section 5101(f) which states that no statement need be filed if the diversion is any of the following: ". . . included in the consumptive use data for the Delta lowlands published by the department in its hydrologic data bulletins." That is to say, the Delta is excluded.

XVII. THE STATE IS ESTOPPED FROM SEEKING ANY LIABILITY AGAINST THE RESPONDENTS.

People v. Gustafson (1942) 53 Cal.App.2d 230, 242-243:

> A state, as well as an individual, may be estopped where the necessary elements or grounds of estoppel are present [citation]; it may be estopped when acting in its proprietary capacity as distinguished from its governmental capacity [citation]; and it may be estopped by the acts of its public officials done in the exercise of powers expressly conferred by law, and by their acts or omissions when acting within the scope of their authority. [Citation.]

DeYoung v. Del Mar Thoroughbred Club (1984) 159 Cal.App.3d 858, 862:

> To be entitled to relief by estoppel, [one] must establish it by a preponderance of the evidence. [Citation.] Four elements must be present to apply the doctrine of estoppel against the State: '. . . "(1) [it] must be apprized of the facts; (2) [it] must intend that [its] conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) ... must rely upon the conduct to his injury . . . ." [Citations.]

We see therefore that all of the elements of estoppel are present. The State knew of the Delta Lowlands Report assumptions; assured the diverters they were entitled to riparian rights based on that Report; the diverters did not know their rights would in fact be challenged outside of an adjudication; and the diverters relied on the assertions of the State in continuously irrigating their lands.

/// ///

/// ///

/// ///

XVIII. APPLICATION OF TERM 91 TO DELTA LANDS IS DIRECTLY CONTRARY TO THE LANGUAGE IN THE DELTA PROTECTION ACT.

The Delta Protection Act is contained in Water Code Sections 12200-12205. Section 12201 states that it is necessary to provide an adequate supply of water to maintain and expand agriculture in the Delta. Section 12202 states:

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

Section 12205 states:

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

If the release of stored water for export must be coordinated (integrated) to meet salinity and water supply needs in the Delta, how can storage releases then trigger Term 91 application to Delta diverters? If Delta agriculture is supposed to receive a benefit from the coordination of project releases for exports, how can such Delta agriculture be precluded from using the water supposedly released to benefit them? If the Delta diverter can only use water they purchase from the projects rather than that released for export, there is no issue of coordination or integration of releases; in that event there is nothing to coordinate. It is only the project export water that can be coordinated to meet Delta needs, and thus Term 91 cannot apply to in-Delta users. Application of Term 91 to Delta diverters is directly contrary to the clear language of Section 12205 and thus cannot legally be implemented.

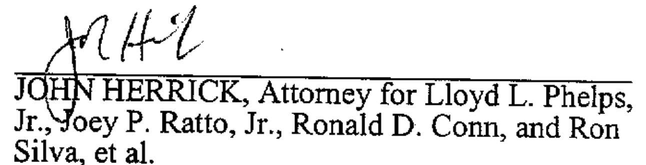
/// ///

/// ///

XIX. CONCLUSION

Respondents' testimony, evidence, and legal argument clearly indicate that due to the location of the Respondents' lands, each is entitled to exercise riparian rights on the land by diverting amounts of water sufficient for reasonable beneficial uses. In addition, the Respondents' practices would in the absence of a riparian right have established a pre-1914 appropriative right based on use since that time. Finally, the State should be estopped from applying Term 91 to these diverters due to its prior actions and representations. The State should allow evidence and fair hearing on the issue of whether or not the actions of the SWP and CVP can unfairly affect the triggering of Term 91. Finally, if the Board finds that penalties are appropriate in this case, its calculation thereof should take into account the water savings resulting from the farming on the subject properties and therefore result in no actual penalty.

Dated: April 18, 2003



JOHN HERRICK, Attorney for Lloyd L. Phelps, Jr., Joey P. Ratto, Jr., Ronald D. Conn, and Ron Silva, et al.

PROOF OF PERSONAL SERVICE

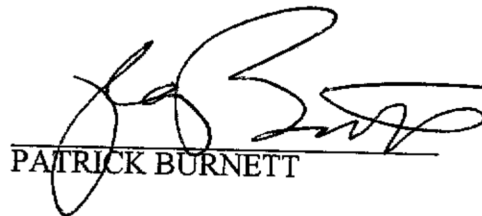
STATE OF CALIFORNIA)
ss.
County of San Joaquin)

I am a citizen of the United States and a resident of the County of San Joaquin. My business name is Service First and my business address is Post Office Box 2257, Stockton, California, 95202. I am over the age of eighteen years and not a party to the within entitled action.

On Friday, April 18, 2003, I hand delivered **CLOSING BRIEF OF LLOYD L. PHELPS, JR., JOEY P. RATTO, JR., RONALD D. CONN, RON SILVA, ET AL., SOUTH DELTA WATER AGENCY, AND CENTRAL DELTA WATER** AGENCY on Mr. Ruben Mora of the State Water Resources Control Board, Division of Water Rights, 1001 I Street, 14th Floor, and Samantha K Olson, Esq., Office of the Chief Counsel also located at the State Water Resources Control Board, 1001 I Street, 22nd Floor, by hand delivering true copies thereof to the person at the front desk of the SWRCB at approximately _____ p.m.

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

EXECUTED on April 18, 2003, at Stockton, California.



PATRICK BURNETT

PROOF OF TRANSMISSION/SERVICE BY FAX

Code of Civil Procedure Section 1012.5, 1013a, and 2015.5
California Rules of Court Rule 2008

I declare as follows:

I am over 18 years of age and not a party to the within action; my business address is 4255 Pacific Avenue, Suite 2, Stockton, California.

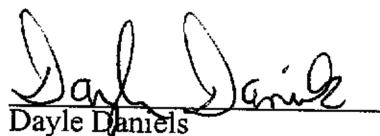
I am employed in San Joaquin County, California.

On April 18, 2003, at 12:45 p.m., by use of facsimile machine telephone number (209) 956-0154, I served a copy of **CLOSING BRIEF OF LLOYD L. PHELPS, JR., JOEY P. RATTO, JR., RONALD D. CONN, RON SILVA, ET AL., SOUTH DELTA WATER AGENCY, AND CENTRAL DELTA WATER AGENCY** on the following interested parties in the within action by transmitting by facsimile machine to the following:

Name:	**Fax No.:**
Ruben Mora, DWR	**(916) 341-5400**
Samantha K. Olson, Esq.	**(916) 341 5199**
Tim O'Laughlin, Esq.	**(530) 899 1367**

The facsimile machine I used complied with California Rules of Court, Rule 2003(3), and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2008(e), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 18, 2003.



Dayle Daniels

(Attachment: Transmission Records)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
ss.
County of San Joaquin)

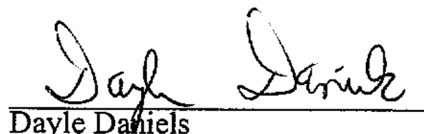
I am a citizen of the United States and a resident of the County of San Joaquin. My business address is 4255 Pacific Avenue, Suite 2, Stockton, California 95207. I am over the age of eighteen years and not a party to the within entitled action. I am readily familiar with the practice of the Law Office of John Herrick for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business of the Law Office of John Herrick, correspondence is deposited with the United States Postal Service the same day as it is collected and processed.

On April 18, 2003, I served the within **CLOSING BRIEF OF LLOYD L. PHELPS, JR., JOEY P. RATTO, JR., RONALD D. CONN, RON SILVA, ET AL., SOUTH DELTA WATER AGENCY, AND CENTRAL DELTA WATER AGENCY** on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, and placed for collection and mailing on said date to be deposited with the United States Postal Service following ordinary business practices at Stockton, California, addressed as follows:

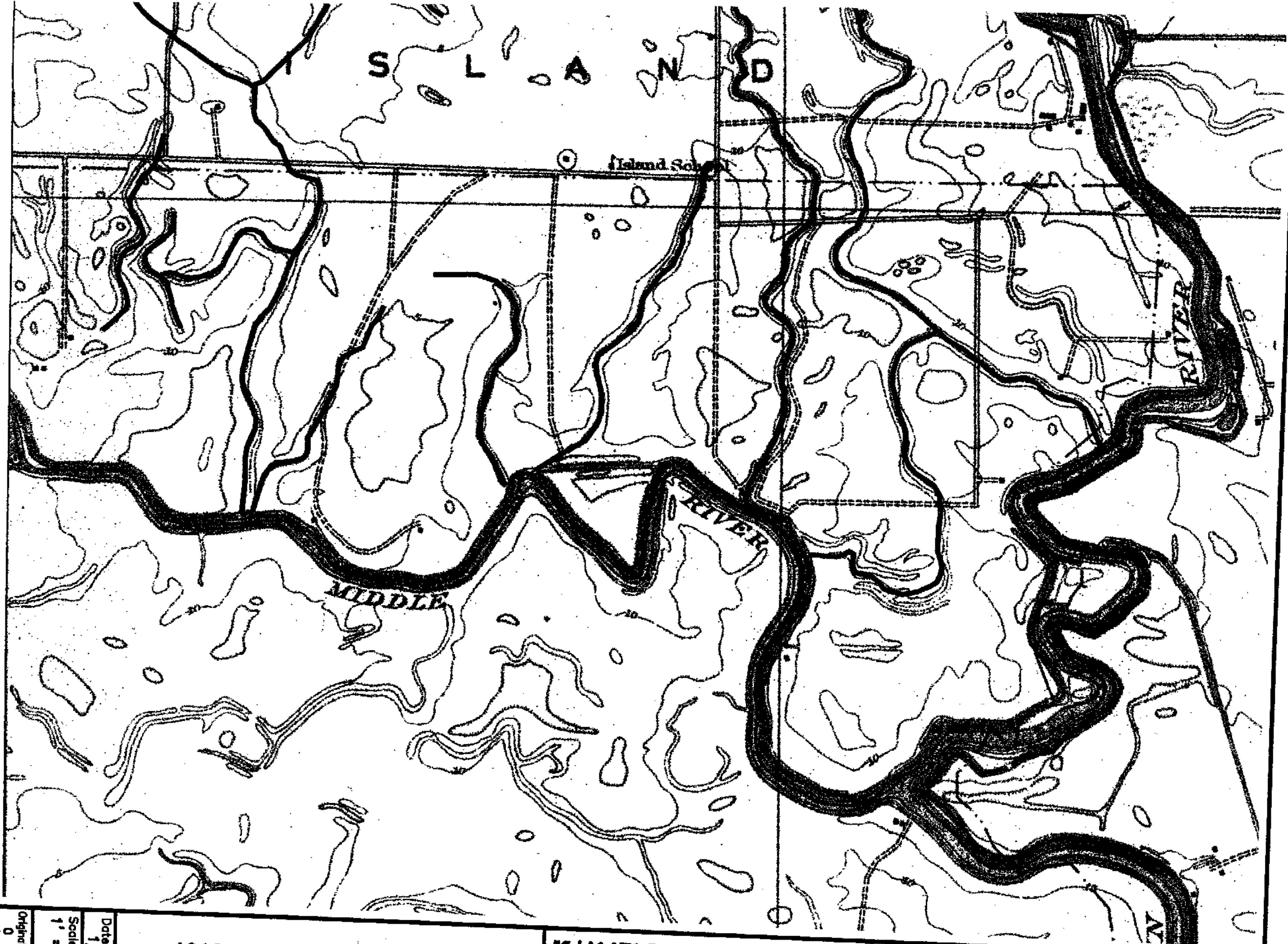
Tim O'Laughlin, Esq.
O'Laughlin & Paris, LLP
2571 California Park Drive, #210
Chico, CA 95928

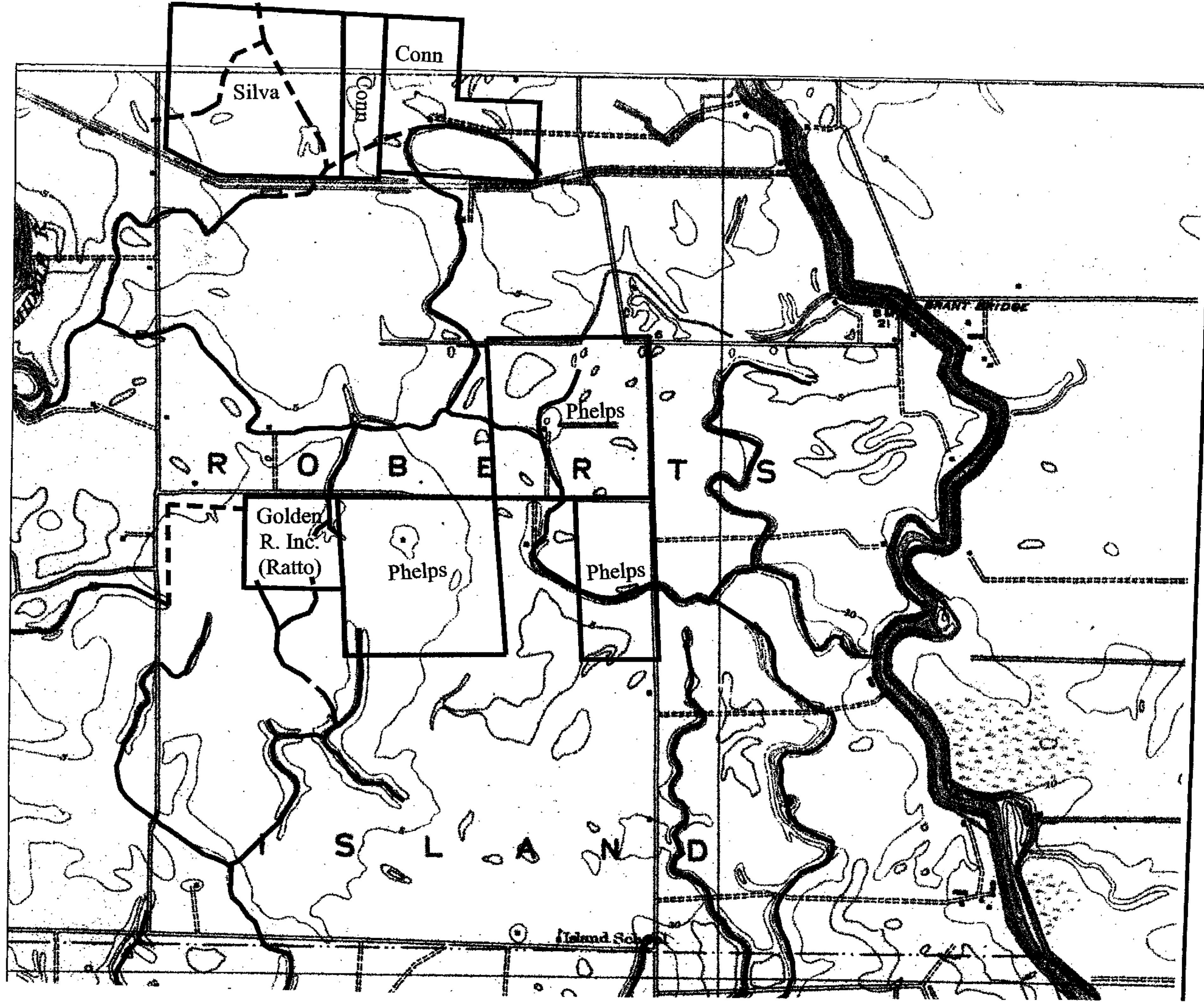
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on April 18, 2003, at Stockton, California.



Dayle Daniels


I S L A N D
Island Sch.
MIDDLE
RIVER
RIVER
N
Date 1/23/03
Scale 1" = 2000FT.
Original Drawing Scale 0 ¼" ½"
Sheet Number 1 Of 1
1912 USGS TOPOGRAPHY MAP
PARCEL LINES AND WATERCOURSES
UPPER ROBERTS ISLAND
KSN INC.
KJELDSEN SINNOCK NEUDECK
Consulting Engineers and Land Surveyors
Post Office Box 844
711 N. Pershing Avenue
Stockton, CA 95201-0844
Office: (209) 946-0268
Faxes: (209) 946-0296
E-mail: KSN@ksninc.com
Revisions
No. Description Date By Apprvd. By
Check CHN
Drawn SLB
Design


Conn
Silva
Conn
ROBERTS
Phelps
Golden
R. Inc.
(Ratto)
Phelps
Phelps
ISLAND
Island School