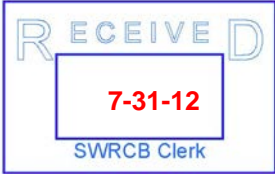


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AGENCY and SOUTH DELTA WATER AGENCY

11 **STATE OF CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**

14 In the Matter of Draft Cease and Desist Order) **COMMENTS TO DRAFT ORDER**
Against Unauthorized Diversions by Woods) **GRANTING RECONSIDERATION BY**
15 Irrigation Company) **WOODS IRRIGATION COMPANY,**
) **CENTRAL DELTA WATER AGENCY,**
16 Order WR 2011-005) **SOUTH DELTA WATER AGENCY**
)

18 The Woods Irrigation Company (“WIC”), the Central Delta Water Agency and the South
19 Delta Water Agency submit the following comments to the State Water Resources Control
20 Board’s Draft Order Granting Reconsideration of WR 2011-0005 (“Draft Order”). To the extent
21 not inconsistent, the same also adopt and incorporate herein the comments submitted by R.D.C.
22 Farms, Inc., Ronald and Janet Del Carlo, Eddie Vierra Farms, LLC. Dianne Young, and Warren
23 P. Schmidt, Trustee of the Schmidt Family Revocable Trust (“Certain WIC Landowners”) (who
24 are landowners within the WIC’s service area).

25 The Draft Order is rife with misstatements and is couched in terms of arguments to
26 support the original CDO, notwithstanding the San Joaquin County Superior Court action which
27 not only voided the CDO, but found the SWRCB lacked jurisdiction to determine or quantify
28 riparian and pre-1914 water rights. Thus, the Draft Order serves no purpose except to continue

1 the wasted, multi-year efforts of the SWRCB to find illegal diverters in the Delta whether they
2 exist or not. As the SWRCB's Watermaster has found and reported, the Delta appears to be no
3 different than any other area of the state with regard to water rights compliance.

4 The following comments will be organized per the numbering set forth in the Draft Order.

5 3.2. Order WR 2011-0005. The Draft Order indicates that the original CDO was not
6 binding upon the WIC' customers. This of course is incorrect. Notwithstanding the Order's
7 language, the Court specifically found that it did indeed affect and bind the Woods' customers,
8 and thus found their due process rights had been violated. Quoting the original CDO does
9 nothing to alter the Court's findings.

10 3.3 Litigation. The Draft Order takes the position that the filing of the appeal of the
11 Superior Court Writ stayed the Writ but not the Order. This is incorrect. As set forth in the
12 comments of the Certain WIC Landowners, (i) the SWRCB lost jurisdiction to rule on the
13 Requests for Reconsideration once the Superior Court ruled, (ii) the Writ was clearly issued to
14 preserve the status quo and the appeal does not stay the effect of the Writ, and (iii) Code of Civil
15 Procedure Section 1094.5(g) specifically provides that the original CDO (the agency action) is
16 stayed.¹

17 WIC, CDWA and SDWA shall request the Court clarify this issue and stay any further
18 action by the SWRCB should it proceed to Reconsider the original CDO.

19 The Draft Order takes the unusual position that acting to Reconsider the original CDO
20 will not interfere with the proceedings in court. Although the SWRCB's re-opening of the
21 hearing will not physically interfere with the court action, it certainly interferes with the court's
22 treatment of the issues at hand as well as causes undue burden on the parties. The Draft Order
23 appears to be an effort to avoid having the court determine the SWRCB's authority in these
24 matters and actually suggests there is no need for the court to rule before the SWRCB acts. Since
25 the SWRCB's authority to act is in issue in the court, there is certainly a need for the court to rule

26
27 ¹ It should be noted that although WIC proceeded to comply in part with the terms and
28 conditions set forth in the original CDO, the SWRCB itself ceased operating under that Order once
the CDO was challenged in the court and was voided. The SWRCB therefore acknowledged by its
actions that it no longer had any authority to act once the court ruled.

1 first; the SWRCB is likely acting beyond its authority and causing financial and property right
2 damage to the parties involved.

3 There is no logic or legal authority associated with the Draft CDO which supports the
4 position that the State Board should re-open the hearing, or take any actions for that matter, in
5 connection with WR0 2011-0005 pending the outcome of the State Board's appeal. The Draft
6 CDO is an attack of the Judge Holland's rulings.

7 4.1 Authority to Evaluate Claims of Riparian or Pre-1914 Appropriative Rights. Here
8 the Draft Order repeats the SWRCB's arguments as to why it does have authority to investigate
9 and issue CDO's against riparian and pre-1914 diverters. However, this issue was already
10 determined by the Superior Court in its ruling. This repetition of the arguments which have
11 already failed in court is troubling. It appears that the SWRCB is trying to "fix" its egregious
12 error of denying some parties even the minimal due process rights to which they are entitled, and
13 at the same time reverse the court's ruling and pack a new order with more justification. Such a
14 plan cannot prevail.

15 The State Board was determined to have unequivocally violated the WIC's landowner's
16 due process rights by proceeding with the hearing in their absence. Reopening the hearing now,
17 approximately two years later, will not cure the blatant due process violations, but rather will
18 worsen them. The WIC landowners cannot receive adequate due process by being able
19 "participate" in the hearing now, for the limited purpose of calling their own witnesses and cross
20 examine those witnesses who already testified. Some witnesses may not be available and those
21 that are will be testifying in a completely different setting after having had the opportunity to
22 review all other witness testimony and the Board's rulings. This defeats the entire purpose of
23 live, real time witness testimony and cross examination. The WIC landowners' ability to
24 impeach witness testimony and credibility on cross examination would be so diminished as to be
25 of little of no value.

26 Moreover, the other parties including WIC, CDWA and SDWA, would be required to
27 once again expend significant amounts of limited resources and time to participate in a blatantly
28 flawed reopened hearing process after the superior court has clearly ruled the State Board lacks

1 jurisdiction in the first place. The State Board must recall that WIC, SDWA, and CDWA all
2 argued that the hearing should not have occurred in the first place without the WIC landowners
3 as parties, and that the WIC, SDWA, and CDWA are also real parties to the superior court
4 action. For the State Board to reopen the hearing now for any purpose, is yet another procedural
5 disaster which disregards the clear intent of Amended Judgment issued by the superior court and
6 which disregard all notions of common sense and fairness.

7 Whatever the ultimate ruling by the appellate process, at this time it is clear that the
8 SWRCB may have the jurisdiction to investigate waste and unreasonable use, but not to quantify
9 the specifics of riparian and pre-1914 rights, or issue CDO's against such right holders. The Draft
10 Order labels the petitioners' arguments about authority as "circular" instead of accepting that the
11 court's interpretation of SWRCB authority agrees with those petitioners.

12 4.2 Customers' Notice and Due Process Claims. The Draft Order seeks to rescind
13 that portion of WR 2011-0005 which contains the language under the heading "Order" but not
14 any of the remaining text of the Order. However, the remainder of that Order contained
15 numerous findings, reasoning and evidentiary determinations in which Certain WIC Landowners
16 could not participate. Thus, the landowners within WIC are precluded from providing evidence
17 which might further support the WIC claims, might affect the SWRCB reasoning about its
18 conclusions regarding WIC, or the legal interpretations of the law affecting WIC or those
19 landowners. The Draft order therefore indicates the SWRCB has some strong motivation to
20 make sure that nothing about the WIC matter can or should be changed. In reality, the SWRCB
21 should be concerned about "getting it right" and not covering up or justifying its prior mistakes.
22 We now know that the proceedings were insufficient to protect the landowners within WIC. The
23 concern now should be to correct the error and make sure everything is done properly.

24 As with the jurisdictional issue, the Draft Order similarly attempts to re-argue the due
25 process issue about which it lost in the Superior Court. Nothing is served by the SWRCB trying
26 to put Humpty Dumpty back together again. When you specifically tell someone your process
27 will not adversely affect them, deny them participation and then issue an order which adversely
28 affects them you have violated their due process rights. Depending on how the appeals turn out,

1 the SWRCB may be able to later cure its due process problem. However, arguing issues it has
2 already lost is a waste of everyone's time and efforts.

3 4.3 Legal Issues. Here the SWRCB attempts to preclude later arguments by not just
4 the Certain WIC Landowners, but also the other participants in any future hearing. By stating
5 that those landowner parties' arguments regarding the physical aspects of the nature do not
6 constitute a preservation of riparian rights, the Draft Order severely limits those petitioners'
7 rights to a fair hearing. They are not able to present evidence regarding both intent of transferees
8 and facts about the Delta to support their contention about the riparian character of their lands. It
9 should be noted that the Draft Order's treatment of the difference between flood flows and
10 ordinary flows misses the point of the argument. The record in the WIC matter clearly showed
11 that some areas of the Delta would be underwater at all times absent the levees, some only during
12 high tides, and some only during higher flows. However, all of the lands would be abutting Delta
13 and River flows without the levees which indicates the impossibility of severing any such water
14 right. Whether the flows are "ordinary" or "flood" does not change this physical situation.

15 The Draft Order makes reference (on page 7 therein) that the parties asserted certain
16 changes in the point of diversion by riparian and/or pre-1914 diverters are allowed so long as
17 he/she do not injure another right holder. The Draft Order then states this assertion was made
18 "without citation." Although there may be some portions of WIC/CDWA/SDWA briefs which
19 do not cite such authority, those briefs contain *numerous* citations to *Turner v. James Canal*
20 (1909) 155 Cal. 82, 84-85, 91-92 (see Brief at pages 24, 44, 46, 53, 57-58, 67). This case and
21 those later cases relying on it make this holding about changes in diversion points. It is unclear
22 why the SWRCB would attempt in this Draft Order to suggest that this case law is somehow
23 non-existent or unclear.

24 By not allowing the Certain WIC Landowners to given evidence or make legal arguments
25 regarding all possible methods by which their lands may have retained riparian rights is simply
26 unjustifiable. Again, the Draft Order is couched in terms of making sure that nothing changes its
27 prior (incorrect) rulings on WIC and the arguments WIC presented. For the record, WIC was the
28 only party to put on engineers as witnesses for this issue and their conclusions were that changes

1 in points of diversion had no effect on the hydrodynamics of the system.

2 5.0. Petition of Woods, The South Delta Water Agency, and The Central Delta Water
3 Agency.

4 5.1 Procedural Issues. The Draft Order here continues the approach that the SWRCB
5 should not consider anything which might affect its original conclusions about WIC. The Draft
6 Order incorrectly describes the issue of Duck Slough, suggesting that the only real issue was
7 whether it connected to Middle River or it did not. This of course was not the main issue. WIC
8 and others did assert that Duck Slough originally connected to Middle River, but such connection
9 was not the precondition to the preservation of any water rights.

10 It was argued and witnesses testified to the fact that whether Duck Slough connected to
11 Middle River, Turner Cut, or remained as remnants of a slough which previously connected to
12 other channels, it provided a supply of water from which a riparian right arose and continued.
13 Shifting the point of diversion from the slough to a main channel had no effect on the amount of
14 water in the Delta as a whole and did not adversely affect any other diverter.

15 Although the SWRCB found against WIC and others on this issue, that decision was
16 based on a refusal to consider all the evidence. We note here that as other processes continue,
17 additional evidence is being discovered. Attached hereto as Exhibit "A" is a deed from Joseph
18 Vasquez to I. N. Robinson, et al., Trustees of Kingston School District of San Joaquin County,
19 which calls out Duck Slough as a boundary to the (currently) Mussi property. This deed
20 confirms the slough's existence in a place where the MID et. al., "expert" claimed it never was.
21 If the SWRCB wanted to make sure that it did not improperly divest parties of valid water rights,
22 it would consider such evidence as it arises.

23 5.2 Rate of Diversion. The Draft Order misstates the issue of the diversion rate of
24 77.7 cfs. The parties did not argue that since most other appropriative rights allow an averaging
25 of the diversion rate that therefore the pre-1914 right of WIC *must* also have such averaging.
26 They did argue that since most all other appropriative rights include this averaging, as a
27 recognition of the simple fact of how agricultural irrigation occurs, there was no reason to limit
28 WIC in such a restrictive and inexplicable way. In addition, the evidenced showed that diversion

1 rates in the Delta constantly vary due to inflows and especially tides; making it impossible to
2 hold a steady diversion rate. When this is combined with the (undisputed) facts that the original
3 WIC agreements to supply water were to support approximately 8,000 acres of land while the
4 current service area of approximately 6,000 acres and the fact that the WIC lands are being
5 continually drained to remove naturally occurring shallow groundwater, the limitations on
6 WIC's diversion put forth in the original CDO make no sense.

7 The Draft Order again misstates the WIC and others' position regarding how the SWRCB
8 should view the evidence in cases such as this where facts 100+ years in the past are being
9 reviewed. WIC and other do not claim the SWRCB "was required to make findings in agreement
10 with the evidence Woods offered . . ." As argued by WIC and others, and as ignored by the
11 SWRCB, the *Cal-Am* case was the SWRCB's own statement on how it should view such old and
12 difficult to determine facts. That case required the SWRCB to view evidence in a light most
13 favorable to WIC. Instead, the SWRCB made *every* evidentiary determination against WIC,
14 which of course results in no facts in the record supportive of WIC. For example, when the
15 Woods Brothers entered into agreements to provide water for all of their land, the SWRCB
16 interpreted this as them only agreeing to provide water which was in addition to that lands
17 existing water rights. This nonsensical conclusion is not supported by any facts and interprets the
18 evidence in the *worst light* to WIC. Similarly, when WIC shows that (and MID's expert was
19 forced to admit) even the small version of Duck Slough as described by MID would have natural
20 seepage which would flow down to the flood gates at Turner Cut, thus indicating a flowing
21 stream, the SWRCB concluded that Duck Slough could not confer any riparian right to any WIC
22 lands; again interpreting the evidence in the *worst light* for WIC.

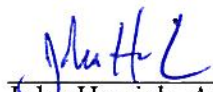
23 One would be hard pressed to find any factual determinations in the original CDO which
24 were made in WIC's favor. The Draft Order also repeats its earlier misstatement that the issue
25 regarding Duck Slough was focused on whether or not it connected to Middle River (thus
26 ignoring all the other relevant issue regarding that waterway). Regardless of the Draft Order's
27 attempt to further interpret Cal-Am away, the SWRCB chose to make all its rulings in a light
28 most unfavorable to WIC.

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CONCLUSION

The SWRCB is without jurisdiction to Reconsider its WR 2011-0005. The Draft Order to authorize such Reconsideration is improper and should not be adopted. The Draft Order also misstates, misconstrues and attempts to justify an attempt to avoid a court order voiding the original CDO, and improperly deals with the issues raised by those who originally sought Reconsideration.

Dated: July 31, 2012



John Herrick, Attorney for Woods Irrigation
Company

DEED.

Joseph Vaquez

TO

J. M. Robinson et al

Dated June 2nd 1892

Recorded at the Request of

J. M. Robinson

25th day of June 1892

at 16 minutes past 2. P. M.

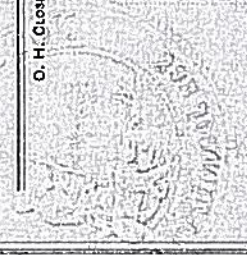
in Book "A," Vol. 75

of Deeds, page 445. San Joaquin Co Records

J. F. Moselen, Recorder.

By Geo. C. Haskins Deputy Recorder.

O. H. Close, STATIONER, STOCKTON.



\$175 Paid

formed by the parties of the first part,
and J. W. Robinson, W. J. Thompson and H. Fish, trustees
of Kingston School District of San Joaquin County, of
the County and State aforesaid the parties of the second part,

Witnesseth, That the said parties of the first part, for and in con-
sideration of the sum of Fifty Dollars,

Gold Coin of the United States of America, to
him in hand paid by the said parties of the second

part, the receipt whereof is hereby acknowledged, does by these presents
grant, bargain, sell, convey, and confirm unto the said parties of the
second part, and to their heirs and assigns forever, all that

_____ certain lot, piece, or parcel of
land, situate, lying and being in ~~the~~ Roberts Island in the
County of San Joaquin, State of California
and bounded and particularly described as follows, to-wit:

Commencing at the point of intersection of the $\{1/4\}$
Section line between the $\{E 1/2\}$ and $\{W 1/2\}$ of sections
 $\{27\}$ $\{5\}$ $\{1\}$ $\{N R\}$ $\{5\}$ $\{E M\}$ $\{10\}$ $\{B\}$ and $\{M\}$ with the center line of
the top of the cross levee between Middle and Lower
Divisions of Roberts Island and running thence south-
westerly along the center line of the top of said levee $\{366\}$
feet to the point of beginning; thence south along a fence
 $\{250\}$ feet to the north bank of Duck Slough; thence westerly
along the north bank of said slough $\{40\}$ feet; thence
northwesterly $\{240\}$ feet to the center line of the top of
said cross levee; thence northeasterly along the
center line of the top of said cross levee $\{20\}$ feet
to the point of beginning and containing
one half acre more or less all of said land
herin described being situate within said sec-
tion $\{27\}$ $\{5\}$ $\{1\}$ $\{N R\}$ $\{5\}$ $\{E M\}$ $\{10\}$ $\{B\}$ and $\{M\}$.

Together with all and singular the tenements, hereditaments, and appurtenances therunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

[This deed is made and executed for the express purpose of correcting the description of the land intended to be conveyed by deed of date April 15th 1872 between the parties herein.]

To Have and to Hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part,

and to their heirs and assigns forever upon the following conditions, viz: That said premises be used for school purposes; provided however and as a further condition that should the grantors or assigns determine to convey and grant said premises they must grant and receive to the grantee and no one else, with premises for the consideration herein contained, to wit: \$50.00, these considerations to remain in full force and effect only so long as said grantee is served in fee of the lands, other than said premises, and not held in fee by him within said section 27, 27, N.E. 37th P.M. 10. B. 1st.

In Witness Whereof, the said parties of the first part has hereunto set her hand and seal the day and year first above written.

Signed, Sealed and Delivered in the Presence of

.....
.....

Joseph Vasquez
Rosario V de Vasquez

SEAL
SEAL

State of California, }
COUNTY OF SAN JOAQUIN. } ss.

On this 21st day of

June A. D., eighteen hundred and ninety two before
me, C. P. Rendon, a Notary Public in and for said County, personally appeared

Joseph Vasquez
known to me to be the person whose name is subscribed to the within instrument, and he
acknowledged to me that he executed the same

IN WITNESS WHEREOF, I have hereunto set my hand
and official seal.

C. P. Rendon
Notary Public.