



O'Laughlin & Paris LLP

Public Comment
Woods Irrigation Company
Deadline: 7/31/12 by 12 noon

Attorneys at Law

SENT VIA E-MAIL

July 31, 2012



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
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commentletters@waterboards.ca.gov

Re: COMMENT LETTER – 8/07/12 BOARD MEETING: WRO 2011-0005 Reconsideration

Dear Ms. Townsend:

On July 17, 2012, the State Water Resources Control Board (“State Water Board”) issued a draft Order Granting Reconsideration pursuant to Order 2011-0005 (“Draft Order”). The Modesto Irrigation District (“MID”) participated as an interested party at the hearing leading up to the issuance of Order 2011-0005, and filed a Complaint and Writ of Mandate challenging the order in Sacramento Superior Court. The Draft Order grants reconsideration to allow Woods Irrigation Company (“WIC”) landowners to reopen the hearing to enter evidence of water rights held by WIC landowners, but otherwise denies all other requests for reconsideration. The Draft Order is flawed because it attempts to further extend the breadth of Order 2011-0005, rather than resolving the exclusion of WIC landowners by revising Order 2011-0005 to apply only to the water rights held by WIC. In addition, the Draft Order includes several procedural problems that should be addressed and corrected in any final reconsideration order the State Water Board issues.

A. Reconsideration Should be Addressed by Amending Order 2011-0005, Not Reopening the Hearing.

One of the most fundamental issues with Order 2011-0005 was that the Draft Cease and Desist Order “inferred” a pre-1914 water right of 77.7 cubic feet per second (“cfs”) existed. In order to establish a pre-1914 water right, there must be evidence of intent and beneficial use prior to 1914. (*Simmons v. Inyo Cerro Gordo Min. & Power Co.* (1920) 48 Cal.App. 524, 537; *Thompson v. Lee* (1857) 8 Cal.

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275, 280.) The original issuance of the Draft CDO was unlawful because the State Water Board inferred a pre-1914 water right existed without sufficient evidentiary support. Furthermore, throughout the hearing, WIC was unable to provide any evidence to substantiate the inferred right to 77.7 cfs. For this reason, the State Water Board should have issued a cease and desist order prohibiting WIC from diverting any water based upon a water right held by WIC.

In addition to the problem of lack of evidence, the question of whether WIC or its landowners held a water right is a fundamental issue that was not resolved by Order 2011-0005. In the hearing leading up to Order 2011-0005, WIC argued both that it held a water right and, to the extent the State Water Board found WIC did not hold a water right, WIC lawfully provided water pursuant to water rights held by its landowners. Order 2011-0005 failed to resolve the issue of ownership and refused to determine whether it was WIC or its landowners that held the inferred water right of 77.7 cfs.

MID, along with other interested parties, urged the State Water Board to issue a narrow order determining that WIC does not hold a pre-1914 water right and not attempt to limit WIC's diversions pursuant to its landowners' water rights. (*See* MSS Closing Brief.) Such an order would provide certainty regarding water rights held by WIC and not affect the rights of the WIC landowners who were not parties to the hearing. The State Water Board declined to issue such an order.

As currently drafted, the Draft Order would reopen the hearing and allow the WIC landowners to enter evidence of water rights. MID again requests that the State Water Board take a more narrow and defensible position by amending Order 2011-0005, to determine that WIC does not hold a water right and issue an amended order requiring WIC to cease and desist diversions of water pursuant to its own rights. This approach is supported by the existing administrative record, will avoid reopening the hearing, and resolve any potential due process issues of the WIC landowners.

B. The Draft Order Fails to Address Procedural Issues.

The Draft Order states that the "State Water Board will re-open the hearing to allow the Woods' customers to present evidence, cross-examine witnesses who have already testified, and present arguments." (Draft Order, at 6.) However, the State Water Board fails to address several procedural issues with reopening the entire hearing.

1. *Inclusion of All WIC Landowners.*

The State Water Board states it will reopen the hearing to allow the WIC landowners that petitioned for reconsideration to participate in the hearing. However, in order to insulate a future decision from a similar challenge by other WIC landowners, the State Water Board must make sure that all WIC landowners participate and are adequately represented. The Draft Order should be amended to set forth a process in which all WIC landowners will be included.

2. *Unfounded Assumption Witnesses Will Be Available.*

The Draft Order presupposes that all witnesses will be made available for the reopening of the hearing. This presupposition is unfounded. At least one of the State Water Board witnesses has since retired. In addition, MID participated as an interested party in the original hearing and, along with other parties, submitted substantial expert witness testimony and rebuttal. However, MID has since challenged Order

2011-0005 at the superior court level and has not yet determined whether it will participate or make its experts available to participate in the reopened hearing at the State Water Board. The Draft Order should be amended to account for the possibility that not all witnesses will be made available for the reopened hearing.

3. *No Process for Testing Evidence.*

The Draft Order states that WIC landowners will be able to present evidence and arguments. The Draft Order should be amended to more clearly set forth a complete process that would allow for participating parties to test the presented evidence and arguments through the submission of rebuttal testimony and evidence.

4. *Limitation of Proceeding.*

The Draft Order grants reconsideration based upon inclusion of WIC landowners to “supplement the evidentiary record with evidence of water rights held by the Woods’ customers.” (Draft Order, at 13.) However, the Draft Order denies reconsideration requested on several legal and procedural issues. (Draft Order, at 7-13.) The Draft Order should be amended to make clear that the inclusion of WIC landowners and the reopening of the hearing are limited and the reopening of the hearing shall not include the provision of evidence on the issues for which reconsideration was denied.

Thank you for allowing MID the opportunity to comment regarding Order 2011-0005.

Very truly yours,

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MODESTO IRRIGATION DISTRICT

VCK/tlb