Jennifer L. Spaletta
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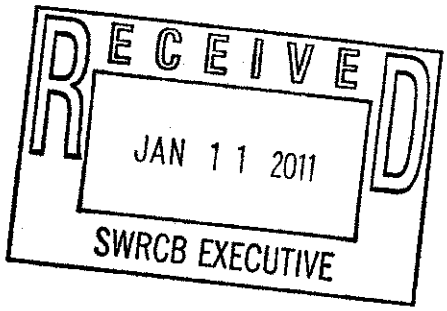
January 11, 2011



VIA ELECTRONIC MAIL: commentletters@waterboards.ca.gov
Confirmation via U.S. Mail

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th floor
Sacramento, CA 95814

Re: **Comment Letter – 01/18/11 Board Workshop: Woods CDO**

To Whom It May Concern:

These comments are submitted on behalf of my clients Eddie Vierra Farms, LLC and RDC Farms, Inc.. My clients own and/or farm property within the Woods Irrigation Company ("Woods") service area and utilize the Woods facilities to exercise their riparian and pre-1914 appropriative water rights. These comments address four issues with the draft decision: (1) Due Process Concerns, (2) Practical Considerations for the CDO, (3) Riparian Rights Analysis as Applied to Delta Lands, and (4) Delta Pool Analysis.

DUE PROCESS CONCERNS

On May 12, 2010 I sent a letter to the State Board, attached hereto as Exhibit A, expressing our concern that any hearing regarding Woods Irrigation Company should not and could not impact the rights of my clients or any other individual landowners utilizing Woods' facilities because these landowners had not received proper notice of the hearing. Counsel for Modesto Irrigation District, the State Water Contractors and San Luis and Delta Mendota Water Authority also wrote to the State Board agreeing that the Woods hearing could not impact the rights of landowners within Woods. (Exhibit B).

The State Board Hearing Officer responded to these letters and stated that "The Woods CDO hearing will not bind non-parties to the hearing." (Exhibit C).

Despite this statement, that is precisely what the current draft decision will do. As written, the decision unconstitutionally violates the due process rights of landowners within Woods service area to exercise their water rights.

The draft decision concludes that there is sufficient evidence of pre-1914 rights to the extent of 77.7 cfs such that the State Board will not issue a CDO that requires Woods to curtail diversions beyond that amount. However, the decision does not determine whether the pre-1914 right is held by Woods or the landowners. Rather, the decision states "that Woods or landowners within the Woods original service area had the intention before 1914 to divert up to 77.7 cfs of water for irrigation..." and "the evidence indicates that the water rights associated with the 77.7 cfs Woods diversion passed with the land as it was subdivided subsequent to the 1911 service contracts executed between Woods and individual landowners." (Draft Decision at 4).

Recognizing that individual landowners within the Woods service area did not present evidence regarding their rights in that proceeding, the decision states: "the CDO accounts for the possibility that additional landowners within Woods service area may provide evidence of valid water rights that would enable them to receive additional water beyond that covered by the 77.7 cfs diversion. The CDO provides for revisions based upon submission of evidence of such rights that satisfies the Deputy Director." (Draft Decision at page 5).

This provision, however, gets the law of due process exactly backwards. Assuming the State Board has the power to issue a CDO which limits riparian or pre-1914 rights in the first place, this power does not allow the State Board to limit the exercise of individual landowners' riparian or pre-1914 rights before proper notice and opportunity to be heard. The CDO cannot require that individual landowners provide additional evidence to the Deputy Director and seek approval before utilizing the Woods facilities to exercise their riparian and pre-1914 rights. Rather, if the State Board wishes to limit the diversion of these individual landowners, it must, at a minimum, proceed to give each and every one of them proper notice and opportunity for hearing before issuing the CDO.

This problem is best illustrated by example. Assume the State Board issues the draft decision and the CDO is in effect in August 2011; Woods' pumps are diverting 77.7 cfs, but my client needs more water to irrigate his crops, and he asks WOODS to increase diversions to fulfill his demands. Woods is acting as my client's agent in my client's exercise of his riparian and pre-1914 water rights – which my client has every right to exercise because the CDO has not been issued against him. Yet, as written, the draft decision precludes Woods from increasing its diversions to provide water to individual landowners.

This problem is exactly what we envisioned when we wrote to the State Board in May to request that the Board reconsider going to hearing against Woods without proper notice to each and every effected landowner. Woods serves as a collective distribution system to implement the water rights of its landowners. As the draft decision

correctly notes, these rights are appurtenant to the land as a result of the recorded 1911 contracts. (Draft Decision at 4). Thus, a CDO that prohibits Woods from diverting more than 77.7 cfs (see Draft Decision at 60) is meaningless because Woods' right to divert derives only from the rights of the individual landowners who hold the water rights. The State Board has not followed the required procedure to implement a CDO against these landowners.

Issuing this decision as written will violate the due process rights of every landowner in Woods. Enforcing the decision will make the State Board liable for unconstitutional taking as well as any other consequential damages that may result to lands that may not receive sufficient water. No trial court will issue an injunction based on this decision given its constitutional flaws.

As we discuss below, these flaws can be remedied by revising the decision prior to issuance.

PRACTICAL CONSIDERATIONS

In light of the very serious due process problem with the draft decision, we ask that the State Board modify the decision to include more practical and useful enforcement provisions.

First, it is not clear that Woods diverts more than 77.7 cfs when measured with a 30-day accumulation provision. As the draft decision notes, staff measured a 90 cfs diversion rate at one inspection during 2010. The decision should be modified to give Woods and its landowners time to work with staff to develop an appropriate measuring and reporting program so that the diversions can be tracked over several irrigation seasons. Only then will the Board know whether it even needs to proceed with further enforcement action against the individual landowners. Paragraphs 3 and 4 in the draft decision address such a program.

Second, assuming measurement over a proper time period shows that diversions exceed 77.7 cfs using accumulation, the State Board should give individual landowners notice and opportunity to present evidence of riparian and/or pre-1914 rights to substantiate the total diversions. Clearly, it will behoove the landowners to work proactively with staff to provide this evidence so that future hearings can be avoided. However, if the State Board is not satisfied with the evidence presented by landowners, it may then proceed to hearing against individual landowners, following the required statutory procedures.

Then, and only then, may a CDO issue that actually restricts the Woods diversions made on behalf of landowners.

In this regard, we request that the following changes be made to the "Order" section of the draft decision found at pages 60-62:

1. Following "IT IS HEREBY ORDERED THAT pursuant to sections 1831 through 1836 of the Water Code" **delete** the words "within 60 days Woods shall cease and desist from diverting water in excess of 77.7 cfs at any time, unless and until compliance with the following is accepted and approved by the Deputy Director for Water Rights."

2. **Delete** all of paragraph 1 and **replace** with "Woods shall within 60 days of the date of this Order, submit a list of all properties, and the property owners, who receive water from Woods' diversion season."

3. Paragraphs 2 and 5 must be **deleted** in their entirety based on the due process violation explained above.

These requested changes are noted to address the due process violation explained above. The failure of my clients to request other changes to the draft decision is not a waiver of any rights my clients have to challenge any other aspect of the decision in any future proceeding.

Finally, the State Board should understand that while many landowners in Woods still do not even know about these proceedings, others are aware of the proceedings and are investigating alternate water supplies in the event that their riparian and/or pre-1914 rights are curtailed. These other options include transfers, state and federal water supply contracts, and area of origin water right applications. Lands on Roberts Island are within the area of origin and have a right to divert at least natural flow that is prior to the diversion rights of the exports units of the state and federal projects. Given the extreme economic consequences that would result from curtailed diversions on Roberts Island, these landowners should be given the opportunity to pursue these other means prior to issuance or enforcement of a CDO that seeks to curtail diversions.

This is an equitable issue. The landowners on Roberts Island have been diverting water using the same facilities and in the same manner, for a century. As a result, families and entire communities have developed in reliance. The complaining parties in this case have also diverted water for decades, without any complaint about the diversions by landowners served by Woods, until now. To the extent the State Board wants to act to limit diversions, it should, at a minimum, give these landowners time to secure other water rights to prevent irreparable injury. In the end, given their area of origin priority and ability to purchase stored water, they will be diverting the same amount of water, just under different rights. Thus, there is no pressing public policy reason why the State Board needs to issue a CDO now that requires curtailed diversions.

RIPARIAN RIGHTS ANALYSIS AS APPLIED TO DELTA LANDS

Page 40 of the draft decision includes the statement "land does not become riparian by virtue of its having been flooded or swamp land, *as riparian rights do not attach to land that is under water.*" This is an over-simplification of the law and the facts that is not supported by the citations provided in the draft order. The California Supreme Court has expressly recognized riparian rights to lands located in Delta regions in which water spreads out from the main channel.

Prior to reclamation, the interior of Roberts Island, including the Home Ranch property, included more water than it does today as a result of the fact that the rivers that flowed into and through the delta in this region were not naturally confined to the definite channels in which they flow today. Rather, as the term "Delta" explains, these rivers, upon reaching this portion of the valley floor, often spread out, flowing through "fingers" of sloughs and swamp-like swath areas, making their way out to the Pacific Ocean, and influenced by the tide. Obviously, the extent of this natural dispersement of water, and the length of the various sloughs and swaths it generated, were not static. Rather, they would change from year to year and even from season to season within a year based on the conditions at the time.

This "delta" concept is not the same thing as "flood" waters or "diffused surface waters" as page 40 of the draft decision implies, and the law has historically treated these different types of waters differently.

"Diffused surface waters" consist of drainage falling upon and naturally flowing from and over land before such waters have found their way into a natural watercourse. Hutchins at 27, 372. "Flood waters" are waters that were once part of a watercourse, but have broken away from the watercourse. Flood waters include the element of abnormality. Hutchins at 27, 372.

Neither of these types of waters describes the type of water that regularly traversed Roberts Island, and the rest of the Sacramento-San Joaquin Delta, prior to completion of reclamation efforts. Rather, the water that ran over and through Roberts Island prior to reclamation is best described as "overflows not separated from the stream." *See* Hutchins at 26:

> It is well determined by the authorities that waters flowing under circumstances such as these, notwithstanding that they may consist of a large expanse of water on either side of the main channel, constitute but a single watercourse **and that riparian rights pertain to the whole of it.**

Hutchins at 26, citing *Miller & Lux v. Madera Canal & Irr. Co.*, 155 Cal. 59, 77 (1907, 1909). A review of the actual factual discussion in this case is helpful to illustrate the similarities

between way in which the Fresno River made its way to the San Joaquin River and the way in which the water in the various delta channels made their way to the Pacific Ocean:

> The matter was practically heard upon affidavits, a large number of which were filed on either side, and those upon the part of plaintiff, made by persons who had observed conditions on said Fresno River for twenty and thirty years, show that practically in every year during the winter and early spring months, on account of rainfall and the melting of the snows in the watershed of the stream, the Fresno River carries a large volume of water; that this entire volume of water, if not interfered with, is carried in the channel of the river past the point where the water is diverted from the river into the reservoirs of appellant complained of, and for some distance west of the town of Madera, **when the river divides into two or more channels which diverge and flow in the same general direction as the main channel of the river and further on unite with it; that when the volume of water flowing in the river reaches the higher stages a portion of the water flows into these branch channels; that at the highest stages of the flow the water overflows the main and branch channels of the river at various points and spreads over the low-lying lands adjacent thereto; that the main and branch channels of the *76 river and the lands subject to overflow lie in a trough or basin running parallel with the river for a distance of about eighteen miles; that all of the water which so overflows flows on with the water confined in the lower banks of the main and branch channels of the river in a westerly direction and in a continuous body down to Lone Willow slough and finally into the main channel of the San Joaquin River; that none of the water which overflows is vagrant or becomes lost or wasted, but flows in a continuous body, as above stated, within a clearly defined channel, and so continues until the volume of water coming down the stream commences to lower, when the overflow waters recede back into the main channel of the river and flow on with the rest of the water; that this overflow is practically of annual occurrence,** and may be and is anticipated in every season of ordinary rainfall within the watershed of the Fresno River and fails to occur only in seasons of drouth or exceptionally light rainfall.
>
> Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur; they are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno River has its source are usually expected to occur, do occur, and only fail

to do so when ordinary climatic conditions are extraordinary-when a season of drouth prevails.

As to such waters, it is said in Gould on Waters, section 211, "Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence floods and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that 'freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years though at no regular intervals.' " (*Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, [7 Am. St. Rep. 183, 17 Pac. 535]; *77 *Cairo Railway Co. v. Brevoort*, 62 Fed. 129; *California T. & A. Co. v. Enterprise C. & L. Co.*, 127 Fed. 741.)

And when such usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low-water mark of dry seasons and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well-defined boundaries, they constitute a single natural watercourse. It is immaterial that the boundaries of such stream vary with the seasons or that they do not consist of visible banks. It is only necessary that there be natural and accustomed limits to the channel. If within these limits or boundaries **nature has devised an accustomed channel for the limited flow of the waters therein during the dry season, and an accustomed but extended channel for their flow when the volume is increased by annual flood waters, and all flow in one continuous stream between these boundaries and are naturally confined thereto, and when the waters lower the overflow recedes into the main channel, this constitutes one natural watercourse for all such waters and the rights of a riparian owner thereto cannot be invaded or interfered with to his injury.** This is the character of the waters of the Fresno River, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted; they flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin River, and while they spread over the bottom lands, or low places bordering on the main channel of the Fresno River as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases.

It is well determined by the authorities that waters flowing under circumstances such as these, notwithstanding they may consist of a large expanse of water on either side of the main channel, constitute but a single watercourse and that riparian rights pertain to the whole of it. As is said in *Lux v. Haggin*, 69 Cal. 418, [10 Pac. 674], "it is not essential to a watercourse that the banks shall be

unchangeable or that there shall everywhere a visible change in the angle of ascent marking the line between bed and banks. ... We can conceive that in the course of a stream there may be shallow places where the water spreads and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on either side. In such case if water flowed periodically at the portion of the depression it flowed in a channel ..." In *Crawford v. Rambo*, 44 Ohio St. 279, 282, [7 N. E. 429, 431], the court says: "It is difficult to see upon what principle the flood waters of a river can be likened to surface waters. When it is said that a river is out of its banks no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel; so that when, swollen by rains and melting snows it extends and flows over the bottom in its course, that is its flood channel, and when by drouths it is reduced to its minimum, that is its low water channel."

So in *O'Connell v. East Tennessee Ry Co.*, 87 Ga., 246, [27 Am. St. Rep. 246, 13 S. E. 489, 491], "If the flood water forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, as by the recession of the waters, it is to be regarded as still a part of the river ... The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds without well-defined banks or channels so long as they form with it one body of water eventually to be discharged through the proper channel." To the same effect are *Chicago etc. Ry. Co. v. Emmert*, 53 Neb. 237, [68 Am. St. Rep. 602, 73 N. W. 540]; *Fordham v. Northern Pacific Ry. Co.*, 30 Mont. 421, [104 Am. St. Rep. 729, 76 Pac. 1040]; *Jones v. Seaboard etc. Ry. Co.*, 67 S. C. 181, [45 S. E. 188]; *New York etc. Ry. Co. v. Hamlet Hay Co.*, 149 Ind. 344, [47 N. E. 1060, 49 N. E. 269]; *Cairo etc. Ry. Co. v. Brevoort*, 62 Fed. 129.

And where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks does not affect its character as a watercourse. (*Macomber v. Godfrey*, 108 Mass. 219, [11 Am. Rep. 340]; *West v. Taylor*, 16 Or. 165, [13 Pac. 665].)

Miller & Lux v. Madera Canal & Irrigation Co. 155 Cal. 59, 75 -78 (Cal. 1909). Similarly, the lands on Roberts Island likely experienced regular seasonal inundation and/or surrounding by intermittent sloughs and swaths prior to the completion of reclamation efforts that served to keep these waters confined to the main channels. Clearly, the efforts of these landowners to control these waters, and meter their use, does not evidence an intent to forego riparian rights which they clearly had prior to reclamation. Rather, it is more logical, and consistent with public policy, to view these efforts as efforts to comply with the constitutional amendment of 1928 which limited all water use

in the state to that which is both reasonable and beneficial. This amendment was specifically triggered by court decisions, such as the *Miller* decision noted above, which upheld a riparian's right to utilize the entire overflow of a stream without regard for the rights of appropriators who desired to dam and control the regular seasonal overflow so as to maximize use of the water.

The California Supreme Court had occasion to address the rights of riparian right holders on delta lands in the nearby Suisun Bay in 1934, a few years after the constitutional amendment. *See Peabody v. City of Vallejo,* 2 Cal.2d 351, 369, 40 P.2d 486, 492 (CA.1935). In *Peabody*, the high court did not question the riparian rights of the delta landowner, but rather, clarified that the constitutional amendment limited the riparian right such that the owner no longer had the right to use the full flow of the stream over his lands in the same manner as had been previously upheld in the Miller decision.

While this is a lengthy explanation, it is necessary to correct the over-simplification of the law set forth on page 40 of the draft decision. These properties are not claiming riparian rights based on abnormal flood events or diffused surface water flow that has yet to reach a watercourse. Rather, their riparian rights derive from the very "delta" nature of the properties and the watercourses, which naturally fanned out over the properties in numerous smaller channels and swaths as they made their way to the ocean. The California Supreme Court, since at least 1909, has specifically held that such land is riparian.

DELTA POOL ANALYSIS

Section 4.4.1 of the draft decision rejects Woods' argument that the channels surrounding Roberts Island are all part of a "Delta Pool" and thus lands that maintained a riparian connection to any natural water body in the Delta may draw from Middle River. In so doing, it appears that the State Board has misunderstood the hydrologic basis for this argument and ignored many of its own prior decisions which rely on the very same concept to approve diversions from the Delta. Here, we discuss the "Delta Pool" concept as it relates to the various inter-connected channels of surface water in the Delta.

In reviewing water right applications, the State Board must evaluate water availability and possible injury to other right holders. To do this, the board looks at the point of diversion, where the water that flows by that point of diversion originates and where it goes, so that the board can properly determine the impact of the diversion. In the Delta, the water originates from almost every direction. The precise mix of fresh and saline water depends on the year and the season and the tide. The hydrologic reality in the Delta is that a diversion from one channel has virtually the same impact as diversion of a like amount of water from another channel.

The draft decision appears to reject the concept that lands that were riparian to Burns Cut-off, for example, could divert water from Middle River. This is error. A riparian or pre-1914 right holder can change her point of diversion so long as the change does not injure another right holder. Whether a landowner diverts from Burns-Cut-off, or Middle River, the effect is the same due to the nature of the hydrologically connected Delta Channels.

This very concept was relied on by the complaining parties in this case as the basis for their complaint and standing to participate in the hearing. The complaining parties have lodged similar complaints against diverters from a variety of Delta channels – not just Middle River – on the basis that any unauthorized diversion from any Delta Channel adversely impacts them.

This is logical given that the very permitted diversion rights of the state and federal projects treat the Delta Channels as one source. In Decision 990, approving the water rights for the federal Central Valley Project for diversion from Sacramento River, Rock Slough, Old River and "Channels of the Sacramento-San Joaquin Delta," the State Board described the Delta:

> "The Delta covers about 700 square miles of rich fertile lands between the City of Sacramento on the north, the City of Tracy on the south, the City of Stockton on the east and the City of Pittsburg on the west. It contains over 50 reclaimed islands (DWR 70A) interlaced by about 550 miles of open channels (DWR 5, p. 18). **Water levels in these channels, all at or near sea level, are hydraulically connected and aggregate an open water area of about 38,000 acres** (60 square miles)..." Water Rights Decision 990 at 43.

Similarly, when issuing the water rights for the State Water Project for diversion from the Feather River and the "Sacramento San Joaquin Delta" the State Board considered water availability from the Delta only in the aggregate. See e.g. Water Rights Decision 1275 at pages 6, 16-20, 26-29. The State's Application A14443 actually sought to divert 6,185 cfs from "Delta Channels."

While the test for approving a new water right application and the test for riparian rights are not exact in all respects, they are the same when it comes to evaluating the source of supply. For the same reasons that the State Board can approve diversions from the "Delta" in general for the SWP and CVP, it can find that a land with riparian rights to Burns Cut-off can exercise those riparian rights by diverting from Middle River. As far as we can tell, the State Board has always evaluated water supply impacts for those wishing to divert Delta water for use outside the Delta by relying on this "Delta Pool" concept. It would be disingenuous and inequitable for the State Board to disregard this same concept when evaluating riparian and pre-1914 rights in the Delta.

Conclusion

Thank you for the opportunity to present these comments on the draft order. We look forward to continuing to work with the State Board and staff to resolve these difficult issues.

Respectfully submitted,

JENNIFER L. SPALETTA
Attorney-at-Law

JLS:

Cc: Clients

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HERUM\CRABTREE
ATTORNEYS

Jennifer L. Spaletta
jspaletta@herumcrabtree.com

May 12, 2010

VIA E-MAIL AND OVERNIGHT MAIL

Division of Water Rights
State Water Resources Control Board
Attention: Jane Farwell
1001 I Street, 2nd Floor
Sacramento, CA 95814

wrhearing@waterboards.ca.gov

Re: Woods Irrigation Company CDO Hearing June 7, 2010
Request to Intervene, Request for Continuance

To Whom It May Concern:

This office represents Eddie Vierra Farms, LLC, which owns real property that is served with water from Woods Irrigation Company's facilities. It has just come to our attention, based on the arguments presented at the May 5, 2010 CDO hearing, that the State Board and/or the other parties may attempt to define the scope of riparian and/or pre-1914 water rights for lands located currently served with water from Woods Irrigation Company at the hearing currently set for June 7, 2010. There are serious conflict of interest and due process concerns with this possibility that require that we request to formally intervene as a party in any such proceeding.

Also, due to the practical impossibility of preparing to present evidence of water rights for our clients' properties on such short notice, and the fact that I will be out on maternity leave during the scheduled hearing time, we respectfully request that the hearing be continued until at least August 2010. These proceedings involve complex factual issues, years of historical title information, and expert testimony. I am the only attorney who has assisted my clients with this work for their properties and it would be highly prejudicial if they were required to obtain alternate counsel to attempt to participate on June 7, 2010.

Further, Eddie Vierra Farms, LLC is already subject to a CDO hearing that has yet to be scheduled. It would be highly prejudicial for any evidence or determinations to be made regarding the water rights of Eddie Vierra Farms, LLC lands served by Woods

Irrigation District at the June 7, 2010 CDO hearing for Woods Irrigation District, prior to the actual CDO hearing for Eddie Vierra Farms, LLC.

We understand that the State Board has not provided notice to any of the landowners served by Woods Irrigation Company of the potential scope of the Woods Irrigation Company CDO hearing. These landowners have not been named as parties to that hearing, nor do they have their own counsel to represent their interests at that hearing.

While I am sure that many, if not all, of these landowners will continue to object to the jurisdiction of the State Board to determine their riparian and/or pre-1914 water rights, it is nonetheless imperative that the State Board consider the due process requirements of any effort to do so. If the State Board intends this hearing to have any bearing on water rights determinations for lands located within the service area of Woods Irrigation Company, each and every one of these landowners must receive notice of the hearing and be given adequate time to obtain their own legal counsel and prepare their own presentations of evidence to support their respective water rights. Otherwise, any decision by the State Board will surely be void. Further, even if the State Board were to try to limit its determination to just the water rights of the Woods Irrigation Company, as an entity, separate and apart from the rights of the individual landowners, these rulings will undoubtedly prejudice the landowners in any future proceedings.

We respectfully request a prompt response to this request so that we can advise our clients accordingly.

Very truly yours,

Jennifer Spaletta

JENNIFER L. SPALETTA
Attorney-at-Law

JLS:jmh

cc: Attached service list (via e-mail and Overnight Mail).

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HERUM\CRABTREE
ATTORNEYS

Jennifer L. Spaletta
jspaletta@herumcrabtree.com

May 12, 2010

VIA E-MAIL AND OVERNIGHT MAIL

Division of Water Rights
State Water Resources Control Board
Attention: Jane Farwell
1001 I Street, 2nd Floor
Sacramento, CA 95814

wrhearing@waterboards.ca.gov

Re: Woods Irrigation Company CDO Hearing June 7, 2010
Request to Intervene, Request for Continuance

To Whom It May Concern:

This office represents Dino Del Carlo and RDC Farms, Inc. Each owns real property that is served with water from Woods Irrigation Company's facilities. It has just come to our attention, based on the arguments presented at the May 5, 2010 CDO hearing, that the State Board and/or the other parties may attempt to define the scope of riparian and/or pre-1914 water rights for lands located currently served with water from Woods Irrigation Company at the hearing currently set for June 7, 2010. There are serious conflict of interest and due process concerns with this possibility that require that we request to formally intervene as a party in any such proceeding.

Also, due to the practical impossibility of preparing to present evidence of water rights for our clients' properties on such short notice, and the fact that I will be out on maternity leave during the scheduled hearing time, we respectfully request that the hearing be continued until at least August 2010. These proceedings involve complex factual issues, years of historical title information, and expert testimony. I am the only attorney who has assisted my clients with this work for their properties and it would be highly prejudicial if they were required to obtain alternate counsel to attempt to participate on June 7, 2010.

Please note that my clients also farm other properties, owned by other landowners, that are served with water from Woods Irrigation Company. However, none of these property owners, or any of the other property owners served by Woods Irrigation Company for that matter, have received notice of the potential scope of the Woods

Irrigation District at the June 7, 2010 CDO hearing for Woods Irrigation District, prior to the actual CDO hearing for Eddie Vierra Farms, LLC.

We understand that the State Board has not provided notice to any of the landowners served by Woods Irrigation Company of the potential scope of the Woods Irrigation Company CDO hearing. These landowners have not been named as parties to that hearing, nor do they have their own counsel to represent their interests at that hearing.

While I am sure that many, if not all, of these landowners will continue to object to the jurisdiction of the State Board to determine their riparian and/or pre-1914 water rights, it is nonetheless imperative that the State Board consider the due process requirements of any effort to do so. If the State Board intends this hearing to have any bearing on water rights determinations for lands located within the service area of Woods Irrigation Company, each and every one of these landowners must receive notice of the hearing and be given adequate time to obtain their own legal counsel and prepare their own presentations of evidence to support their respective water rights. Otherwise, any decision by the State Board will surely be void. Further, even if the State Board were to try to limit its determination to just the water rights of the Woods Irrigation Company, as an entity, separate and apart from the rights of the individual landowners, these rulings will undoubtedly prejudice the landowners in any future proceedings.

We respectfully request a prompt response to this request so that we can advise our clients accordingly.

Very truly yours,

JENNIFER L. SPALETTA
Attorney-at-Law

JLS:jmh

cc: Attached service list (via e-mail and Overnight Mail).

B

O'Laughlin & Paris LLP

Attorneys at Law

May 20, 2010

Walter Petit
Frances Spivey-Weber
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Woods Irrigation Company CDO hearing, June 7, 2010

Dear Mr. Petit and Ms. Spivey-Weber:

This letter is written on behalf of Modesto Irrigation District ("MID"), the State Water Contractors ("SWC") and the San Luis & Delta Mendota Water Authority ("SLDMWA"). We have read and reviewed the letter of May 12, 2010 submitted by Ms. Spaletta regarding continuing the June 7, 2010 hearing date for Woods Irrigation Company ("WIC"). We met with Ms. Spaletta and spoke extensively regarding her concerns. The purpose of this letter is to address the concerns of Ms. Spaletta and allow the WIC hearing to go forward on a basis that protects her client.

SLDMWA, SWC and MID have no desire to adjudicate or determine the water rights of the individual landowners in WIC. WIC has asserted its own water right separate and apart from the lands and landowners within WIC's purported service area. We agree the only focus of the June 7, 2010 hearing should be: Does WIC have a pre-1914 water right, and, if so, what amount, season and lands are covered by the pre-1914 right? Whether individual landowners have separate rights is an issue to be addressed another day.

WIC cannot represent the water rights of individual landowners. The testimony offered by WIC does not include evidence that WIC can or claims to represent the interests of the landowners with respect to any of their claimed separate rights. There is nothing in WIC's Articles of Incorporation stating it can so represent the landowners' interest. There is no evidence of an assignment of water rights from the landowners to WIC. Indeed, Ms. Spaletta's letter points out that WIC can not represent her clients. In fact, WIC and its counsel have a major conflict with their landowners. WIC is asserting its own pre-1914 water right. Needless to say, this conflicts with numerous landowners in WIC who may, or will, assert that any pre-1914 rights are their rights and not WIC's.

If the scope of the CDO is limited to determining WIC's independent, separate and distinct water right, then the CDO should only address WIC's water right claims and not the water right claims of the landowners within WIC. If the prosecution team is

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successful and the hearing officers rule that WIC has a limited or no pre-1914 water right, then the CDO to be issued should state:

> Woods Irrigation Company is limited to/prohibited from diverting water from Middle River under a claim of pre-1914 right by Woods Irrigation Company. Woods Irrigation Company may continue to deliver water to landowners in WIC who have valid riparian, pre-1914, or post-1914 appropriative rights.

We would request a pre-hearing conference this week to discuss this issue. We suggest a telephonic conference call, or if the hearing officers desire, a short conference in Sacramento.

Very truly yours,
O'LAUGHLIN & PARIS LLP

By: _____
TIM O'LAUGHLIN

cc: John Herrick (via e-mail)
Dean Ruiz (via e-mail)
Dennis Geiger (via e-mail)
Jon Rubin (via e-mail)
Valerie Kincaid (via e-mail)
Stanley Powell (via e-mail)
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State Water Resources Control Board

Linda S. Adams
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Executive Office

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Arnold Schwarzenegger
Governor

May 24, 2010

Ms. Jennifer L. Spaletta
Herum\Crabtree Attorneys
2291 West March Lane, Suite. B100
Stockton, CA 95207

Dear Ms. Spaletta:

CONTINUANCE RESPONSE

The State Water Resources Control Board (State Water Board) hearing team received your letters of May 12, 2010. The letters request that your clients Eddie Vierra Farms, LLC, Dino Del Carlo, and RDC Farms, Inc., be allowed to intervene in the Cease and Desist Order (CDO) hearing for the Woods Irrigation Company (Woods); that the hearing be continued until at least August 2010 to accommodate your maternity leave; and that all landowners in the Woods service area receive individual notice. The letters express concern that Eddie Vierra Farms, Inc. specifically, and other landowners in general could be prejudiced by evidence or determinations concerning their rights in the Woods hearing. The State Water Board declines to continue the CDO hearing or to allow late intervention of your clients at this point.

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

If the hearing is held open and re-noticed for the participation of additional potential parties, then the hearing team will not schedule such additional hearing before August 2010 in order to accommodate your maternity leave.

Sincerely,

Walt Pettit
Board Member
Hearing Officer

cc: See Next Page

cc: NELLY MUSSI AND RUDY M. MUSSI INVESTMENT LP
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