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Landowner Groups A and B
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12 BEFORE THE STATE WATER RESOURCES CONTROL BOARD
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14 IN THE MATTER OF THE
15 RECONSIDERATION OF ORDER WR
2011-0005
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LANDOWNERS' OPENING BRIEF

1 The Landowners respectfully submit this opening brief as a road map of key issues.

2 **I. KEY ISSUES FOR THE REHEARING**

3 **A. The Pre-1914 Right of the Landowners is Larger than 77.7 cfs**

4 Previously the Board relied on the two 1911 agreements between WIC and the Landowners
5 predecessors to conclude the pre-1914 appropriative right was 77.7 cfs, measured as an
6 instantaneous maximum rate of diversion. At the re-hearing, Landowners will explain why the
7 proper measure of the right is 100+ cfs during peak diversion periods, on a 30-day average.

8 **1. The 1911 Agreements State a Delivery Obligation - Not a Diversion Amount**

9 The Board derived the 77.7cfs from language in the two 1911 agreements stating
10 " [WIC] agrees under the terms, conditions, limitations and restrictions herein stated, to furnish
11 the [Landowner] water, not exceeding at any one time [77.7] cubic feet per second." (WIC-60
12 [44.8cfs], 6P [32.86 cfs]). The Board treated the two contracts as notices to appropriate 77.7 cfs.

13 The 1911 agreements are not simple "Notices to Appropriate" that state the amount WIC
14 planned to divert from Middle River. Rather, they are water supply contracts that obligate WIC
15 to deliver water to lands owned by EWS Woods and the heirs of the late John Woods. The
16 formation of WIC in 1909 and the two 1911 contracts merely formalized the operations that
17 served these lands for many years prior to facilitate the sale of the John Woods properties after his
18 death. The Landowners' pre-1914 rights were perfected in large part before the 1911 contracts,
19 and there is no evidence WIC ever limited deliveries under the 1911 agreements.

20 Further, even if one were to read the 1911 contracts as a form of "notice" to appropriate,
21 this reading should review the contracts as a whole, which reference a canal system. WIC
22 conveys water several miles through open earthen channels before delivery to landowners.
23 Delivery of 77.7 cfs, by physical necessity, required an actual diversion at a larger rate to account
24 for system efficiency losses between the point of diversion and point of delivery, and the carriage
25 water needed in the canals to effectuate delivery at landowner turn-outs. Dr. Charles Burt, an
26 irrigation engineering expert, estimates diversion rates would have had to exceed 100 cfs, on
27 average, to deliver 77.7 cfs. Thus, these contracts are notice of intent to appropriate, or divert, an
28 amount large enough to delivery 77.7 cfs through a canal system to the identified lands - which is
an amount larger than 77.7 cfs.

1 **2. 77.7 cfs Omits an Additional Delivery Obligation under a Third Water Service**
2 **Contract Discovered After the Hearing**

3 After the prior hearing, WIC and the Landowners located a 1902 Contract between the
4 Woods brothers and the owners of 315 acres of land outside of the two 1911 contracts, but within
5 the current WIC service area. This acreage is depicted in orange outline on Exhibit A. A WIC
6 canal runs along the western edge of this 315 acre block.

7 In 1902, the Woods brothers sold the 315 acres to Eaton and Buckley and entered into the
8 1902 water supply contract. The contract granted Woods a right of way for the canal in exchange
9 for the Woods's commitment to supply water to the 315 acres.¹ The contract does not specify a
10 delivery flow rate. Using a water duty of 1 cfs per 80 acres of irrigated land, the water duty for
11 the 315 acres is 3.94 cfs. Accounting for delivery system efficiency, it is likely Woods would
12 have had to divert at least an additional 5 to 6 af to provide water to the 315 acres. Thus, the
13 contract confirms a WIC canal in 1902 and a larger documented pre-1914 right.

14 **3. New Historic Evidence Confirms Diversion and Use of 100+ cfs Pre-1914**

15 The Landowners's historian, Dr. Littlefield, has discovered dozens of articles documenting
16 irrigated farming of the current WIC service area by the Woods Brothers between the 1890's and
17 early 1900's. The articles describe 8,000 acres of irrigated farmland on Middle Roberts Island in
18 1907, and prior to the formation of WIC in 1909. The articles reference specific crop types being
19 farmed, including alfalfa, vegetables, onions, potatoes, beans asparagus, grains and dairies - all of
20 which would have required water diversion and use similar to the crops grown today. The articles
21 even describe double-cropping by the Woods brothers in 1907, due to the fertility of their soils.

22 To the extent that other parties contend a pre-1914 right can only be proven with more
23 specific information regarding precisely how much water was diverted each month in each year
24 for each parcel, they are overreaching. To establish a non-statutory pre-1914 right, a water user
25 had to: (1) provide notice of intent to appropriate before December 19, 1914, and (2) appropriate
26 water and beneficially use that water.² The notice established the date of priority date of the right,

27 ¹ In 1921, the owner of a portion of this 315 acre tract abandoned his rights under the 1902 contract in favor of
28 joining WIC as a shareholder. The balance the 315 acre tract was confirmed as WIC shareholders in the 1957 WIC
Quiet Title Action.

² See, e.g., *Haight v. Costanich* (1920) 184 Cal. 426, 431.

1 and the actual appropriation and use perfected the right.³ Notice was customarily provided by the
2 posting of a notice, but written notice was not required. It was enough that there was a visible
3 act and avowed intent sufficient to give notice⁴ for example, through actual appropriation.⁵

4 The amount of the perfected right is determined by the volume of water that was actually
5 put to beneficial use⁶ an amount that may have increased over time through further diversions.⁷
6 Determining the exact amount of a perfected pre-1914 right, decades after the right is perfected,
7 can be difficult at best. Courts consider the totality of circumstances to estimate the right to a
8 reasonable degree of certainty.⁸ Relevant factors used to estimate the amount of the perfected
9 right include, among other things, the following:

- 10 1. the carrying capacity of an appropriator's ditch,
- 11 2. the amount necessary to irrigate an appropriator's land,
- 12 3. the amount of land capable of cultivation,
- 13 4. title documents,
- 14 5. the necessity of irrigation,
- 15 6. character and amount of crops cultivated, and
- 16 7. notice of intended diversions.⁹

17 In evaluating claims in support of a pre-1914 right, the Board considers the evidence in
18 the light most favorable to the claimant due to the difficulty, at this date, of obtaining
19 evidence that specific pre-1914 appropriative claims of right were actually perfected and have
20 been preserved by continuous use.¹⁰ Viewing the historic evidence in the light most favorable to
21 WIC and its Landowners, an estimate of the amount of the pre-1914 right can be made with a
22 reasonable degree of certainty:

- 23 • The current WIC Service Area is about 6,500 acres on Middle Roberts Island. There is
24 documentary evidence regarding the Woods Brothers farming and irrigating more than 6,500
25 acres on Middle Roberts Island between 1890 and 1911.

26 ³ See *Haight, supra*, 184 Cal. at p. 431.

27 ⁴ *Inyo Consol. Water Co. v. Jess* (1911) 161 Cal. 516, 519; *De Necochea v. Curtis* (1889) 80 Cal. 397, 405-06.

28 ⁵ *De Necochea, supra*, 80 Cal. at pp. 405-06.

⁶ *Hufford v. Dye* (1912) 162 Cal. 147, 153.

⁷ *Haight, supra*, 184 Cal. at p. 431-432; *Trimble v. Heller* (1913) 23 Cal. App. 436, 443-44.

⁸ *Trimble, supra*, 23 Cal. App. at p. 443-445.

⁹ *Trimble, supra*, 23 Cal. App. at p. 445; see also *Millview Cnty. Water Dist. v. State Water Res. Control Bd.* (2014) 229 Cal. App. 4th 879, 887-88 (the Board estimated actual use based on expert's opinion of the amount needed to irrigate property).

¹⁰ See Board Order WR 95-10 at p. 17.

- 1 • A generally accepted water duty for 6,500 acres is 1 cfs per 80 acres, or 81 cfs. Alternatively,
2 using a 1 cfs per 100 acre conversion, the water duty would be 65 cfs.
- 3 • With either water duty, the required diversions to satisfy the demand would have had to
4 exceed 100 cfs during peak periods, given the nature of the water diversion and open earthen
5 canal distribution system.
- 6 • The crop mix documented by historic articles of alfalfa, dairies, potatoes, beans, onions,
7 vegetables and grains, would require water deliveries similar to current WIC deliveries.

8 Using this analysis, the Board should find that a reasonable estimate of the pre-1914 diversion
9 right associated with the lands in the WIC service area is in excess of 100 cfs during peak periods.
10 This conclusion is corroborated by the two 1911 agreements and the 1902 contract, which include
11 a delivery obligation of 81 cfs, which would require diversions of more than 100 cfs.

12 Further, under the evidence code, “[t]he party claiming that a person is guilty of crime or
13 wrongdoing has the burden of proof on that issue.”¹¹ The Prosecution Team (and similarly any
14 other party contesting the rights of WIC and the Landowners in this proceeding) thus carries the
15 burden of proving that WIC’s diversions were wrongful. To carry its burden, the Prosecution
16 Team must present “proof by a preponderance of the evidence” that WIC violated the law.¹² The
17 Prosecution Team’s single instantaneous measurement of 90 cfs on one day in 2009 is insufficient
18 to meet its burden.

19 **4. An Agricultural Pre-1914 Right Should be Based on a Thirty-day Average, Not** 20 **an Instantaneous Maximum**

21 The most egregious error in the prior order was the limit on total diversions to an
22 instantaneous maximum, rather than a 30-day average. It is not physically possible to achieve a
23 constant diversion rate with the WIC diversion facilities given the nature of the channel, the effect
24 of the tide and agricultural demands. To meet the instantaneous maximum diversion rate, WIC
25 would have to significantly reduce diversions so that with fluctuations, it never exceeded 77.7 cfs.
26 This would reduce average diversions to far less than 77.7 cfs, making it impossible for WIC to
27 honor the 1911 contracts or supply the crop irrigation demands documented for the lands irrigated
28 from this system in the early 1900’s.

¹¹ Evid. Code, § 520; *Lane & Pyron, Inc. v. Gibbs* (1968) 266 Cal. App.2d 61, 67 (the law “plac[es] upon the party claiming illegality the burden of proof on that issue”); see also *Farr v. County of Nevada* (2010) 187 Cal. App. 4th 669, 682 (“the burden of proof remains with the party on which it is placed by law”).

¹² Evid. Code, § 115 (“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”).

1 Limiting a pre-1914 agricultural diverter to an instantaneous diversion rate is also directly
2 contrary to State Board precedent and would amount to an improper regulation of the pre-1914
3 right, as opposed to a mere preliminary determination for purposes of enforcement.¹³ The State
4 Board's own regulations allow agricultural appropriative rights to be exercised based on a 30-day
5 average provided there is no injury to others.¹⁴ Further, all prior decisions of the State Board
6 regarding pre-1914 appropriative rights have adopted this 30-day average convention¹⁵, and it
7 appears in all State Board-issued agricultural water rights along Middle River.

8 **5. Actual Measured Diversions by WIC Illustrate that a CDO is Unnecessary**

9 Following the prior hearings, WIC installed measurement devices and collected data for
10 2011 through the present. The data illustrates 30-day average diversion rates that rarely exceed
11 77.7 cfs. The maximum 30-day average diversion rate measured since 2011 exceeded 77.7 cfs
12 for only a few days each year. The four years of measurement data, as compared to the single
13 instant measurement taken by State Board staff in 2009, provide a much more realistic picture of
14 the WIC diversions and illustrate that the diversions are highly variable, but on average, are likely
15 less than the diversions that would have been required when the pre-1914 right was perfected due
16 to improved efficiencies and significant conversion to drip and micro irrigation in recent years.

17 **II. CONCLUSION**

18 These are the key issues. Many others will be addressed at the hearing. While the
19 Landowners look forward to presenting their evidence at the re-hearing, we remain hopeful
20 that the parties can reach a resolution of this matter that obviates the need for the hearing,
21 particularly during such a difficult water year.

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25 ¹³ *Young v. SWRCB* (3rd Dist. 2013) 219 Cal.App.4th 397, 400 (Board may not regulate riparian and pre-1914
26 appropriative rights, but may make preliminary or initial determinations for purposes of enforcement).

27 ¹⁴ 23 C.C.R., § 697(a)(2) (The equivalent of these continuous flow allowances for any 30 -day period may be
28 diverted in a lesser time at a greater rate so long as there is no interference with other users, and a clause allowing
such rotation will be included in a permit issued for irrigation purposes.ö).

¹⁵ See, e.g., Board Order WR 79-35 at p. III-9; Board Order WR 89-7 at p. 96; Board Order WR 90-6 at p. 27;
September 21, 1922 Board Order Determining and Establishing the Several Rights by Appropriation of the Waters of
the Stanislaus River, at pp. 3-4.

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Dated: April 10, 2015


Respectfully submitted,

SPALETTA LAW PC

By: 
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Attorney for Landowner Group A

Dated: April 10, 2015

NEUMILLER & BEARDSLEE

By: 
KURTIS C. KELLER
Attorney for Landowner Group B

MAP OF LANDS SERVED BY WOODS IRRIGATION CO.

ON MIDDLE DIVISION OF ROBERTS ISLAND
SAN JOAQUIN COUNTY, CALIFORNIA

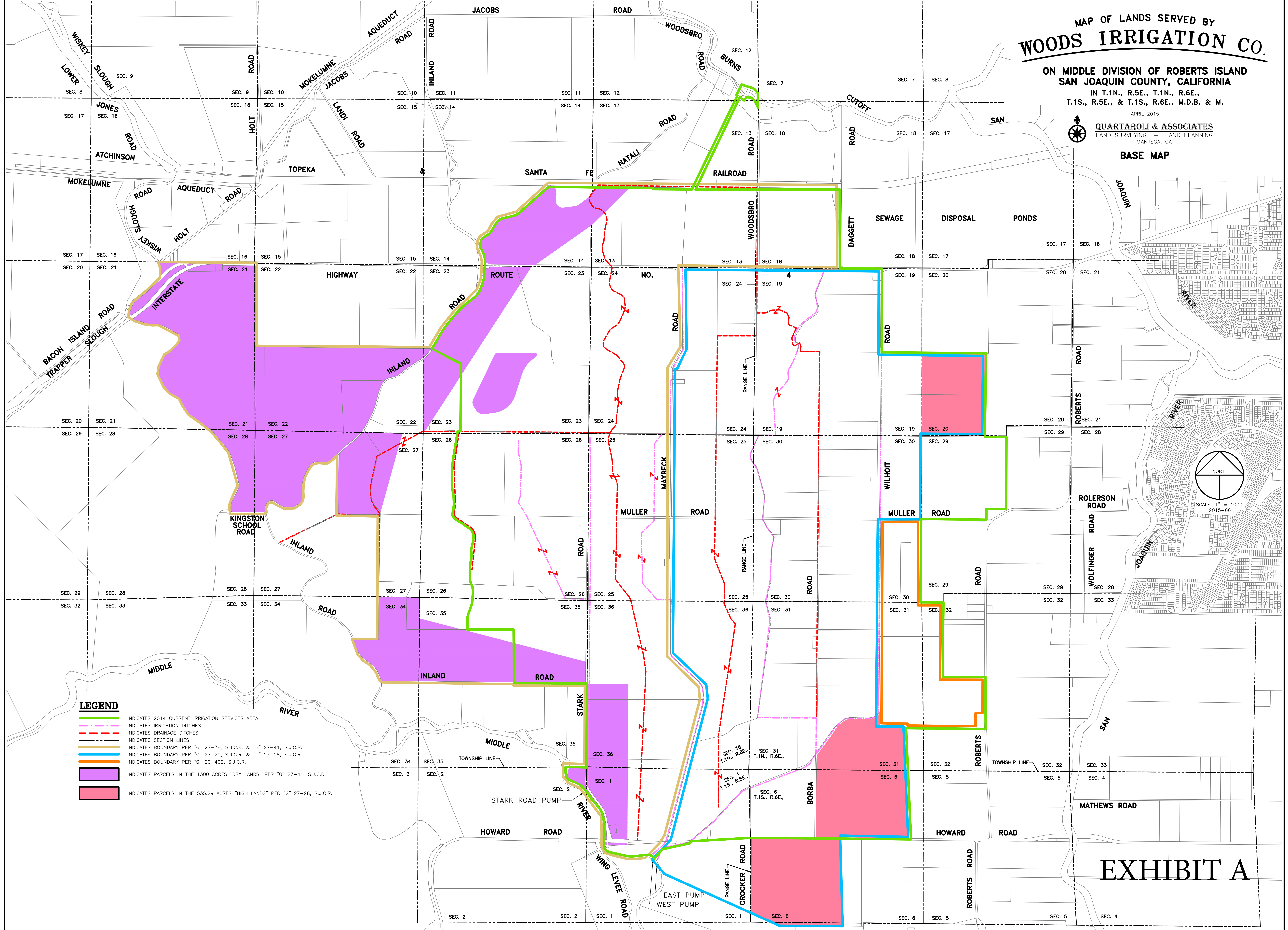
IN T.1N., R.5E., T.1N., R.6E.,
T.1S., R.5E., & T.1S., R.6E., M.D.B. & M.

APRIL 2015

QUARTAROLI & ASSOCIATES
LAND SURVEYING — LAND PLANNING
MANTECA, CA



BASE MAP



- LEGEND**
- INDICATES 2014 CURRENT IRRIGATION SERVICES AREA
 - INDICATES IRRIGATION DITCHES
 - INDICATES DRAINAGE DITCHES
 - INDICATES SECTION LINES
 - INDICATES BOUNDARY PER "G" 27-38, S.J.C.R. & "G" 27-41, S.J.C.R.
 - INDICATES BOUNDARY PER "G" 27-25, S.J.C.R. & "G" 27-28, S.J.C.R.
 - INDICATES BOUNDARY PER "G" 20-402, S.J.C.R.
 - INDICATES PARCELS IN THE 1300 ACRES "DRY LANDS" PER "G" 27-41, S.J.C.R.
 - INDICATES PARCELS IN THE 535.29 ACRES "HIGH LANDS" PER "G" 27-28, S.J.C.R.

NORTH
SCALE: 1" = 1000'
2015-66

EXHIBIT A

PROOF OF SERVICE

I am employed in the County of San Joaquin; my business address is 225 West Oak Street, Lodi, California; I am over the age of 18 years and not a party to the foregoing action.

On April 10, 2015, I served a true and correct copy of:

LANDOWNERS OPENING BRIEF

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

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8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct.
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Dated: _____