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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF THE PETITIONS FOR RECONSIDERATION OF ORDER WR 2011-0005	**LANDOWNERS RESPONSE TO THE STATE WATER RESOURCES CONTROL BOARD'S NOTICE RELATING TO ORDER WR 2012-0012**

I. INTRODUCTION

R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC, Dianne E. Young, and Schmidt Highway 4 Ranch LLC (collectively, "Landowners") submit these comments to the State Water Resources Control Board's ("Board") notice relating to the Board's reconsideration of Order WR 2011-0005.

In Order WR 2011-0005, the Board issued a cease-and-desist order ("CDO") against Woods Irrigation Company ("Woods"). Although the order adjudicated the water rights of these Landowners and other landowners that are served by Woods, the Board did not allow any of these landowners to participate in the proceedings leading up to the order. Landowners challenged the Board's order in court, and a trial court ruled the Board's exclusion of these parties violated the due process clause. The Board did not appeal this holding, but instead attempted to remedy the due process violation by offering to reopen the CDO proceedings. The Board now proposes dates for the pre-hearing conference and the supplemental hearing on the reopened CDO proceedings of January 15, 2015 and March 9-12th, 2015 respectively.

The Landowners have significant concerns with the Board's proposal. Given the short time provided to respond to the advance courtesy notice of tentative dates, this response does not fully elaborate on all concerns. Rather, we are highlighting the major issues.

II. BACKGROUND

A. Order WR 2011-005

Landowners own and farm real property on Roberts Island in San Joaquin County. Their properties have been used for irrigated farming for decades. Landowners claim riparian or pre-1914 appropriative rights, or both, to divert water from Middle River for use on their lands.

Woods Irrigation Company ("Woods") is a water distribution corporation that operates a joint water distribution system on Roberts Island. This distribution system enables the Landowners to exercise their respective water rights from Middle River.

On December 28, 2009, the Board initiated cease-and-desist-order proceedings against Woods pursuant to Water Code section 1831. Although the proceedings largely concerned the

water rights of the landowners served by Woods, the Board refused to permit any of these landowners to intervene in the proceedings.

The Board ultimately issued an order, Order WR 2011-005 ("2011 Order"), after an administrative hearing, that limited Woods to diverting an instantaneous maximum of 77.7 cubic feet per second (cfs) unless certain conditions were met. The Board determined that 710.86 acres of land on Roberts Island served by Woods had riparian rights, while the balance—over 7,000 acres—lost their riparian rights through severance in 1891. (Order WR 2011-005, at pp. 21-22.) The Board further concluded that historic evidence did not support a pre-1914 appropriative right exceeding 77.7 cfs. (Order WR 2011-005, at pp. 33-34.)

B. The Landowners' Challenge to the 2011 Order and the Board's Reconsideration Order

On March 2, 2011, Landowners filed a petition for writ of mandate and/or prohibition challenging the 2011 Order on two grounds ("*Young I*"). The petition alleged (1) the Board deprived the Landowners of their due process rights by impairing their riparian and pre-1914 appropriative water rights without affording them notice and an opportunity for a fair hearing; and (2) the Board lacked authority to determine the validity or extent of alleged riparian and pre-1914 appropriative water rights. The trial court agreed with the Landowners on both counts, and issued a peremptory writ of mandate ordering the Water Board to set aside its Order.

The Board appealed the holding that it lacked jurisdiction to determine riparian and pre-1914 rights, but did not challenge the trial court's ruling that the Board violated the Landowners' due process rights. Instead, over a year after the trial court's decision, the Board issued Order WR 2012-0012 ("Reconsideration Order") that set aside three pages of its sixty-three-page 2011 Order to permit the Landowners to participate as parties in future proceedings. The Board retained the majority of its findings from the 2011 Order.

Landowners objected to the Reconsideration Order and moved in the trial court to enforce the amended writ and judgment. They also filed a separate petition for writ of mandate to set aside the Reconsideration Order. The parties stipulated to stay the writ proceedings challenging

the Reconsideration Order pending resolution of the appeal ("*Young II*").

Although the appellate court in *Young I* issued its decision, the San Joaquin County Superior Court has not yet entered a final order completing the *Young I* case. Also, the challenge to the Reconsideration Order has not moved forward as of this date and is pending.

C. Modesto Irrigation District Challenge to the 2011 Order and the Woods Rights

On March 3, 2011, Modesto Irrigation District, San Luis & Delta-Mendota Water Authority, Westlands Water District, and State Water Contractors, Inc. (collectively, "MID") also challenged the 2011 Order in a Petition for Writ of Administrative Mandate and Complaint for Declaratory and Injunctive Relief to determine the water rights of Woods. The MID parties challenge the order's conclusion that Woods has a right to divert from the Middle River. The case is scheduled for trial on August 10, 2015.

III. PROBLEMS WITH THE PROPOSED DATES

A. The Ten Days to Respond to the Notice is Insufficient

The Landowners know that fellow landowners within Woods either (1) have yet to receive the Notice, (2) did not understand the Notice, or (3) are still looking for legal counsel to represent them in a possible rehearing. Further, many landowners are busy with harvest and are not checking mail daily. The ten days provided to respond to the Notice is inadequate given the number of landowners involved and the serious prior due process violations. At a minimum, a new notice should be sent and provide for at least a 60 day response time.

B. The March 2015 Hearing Dates Conflict with Another Trial Involving the Same Witnesses and Attorneys

The attorneys representing Woods Irrigation Company are also attorneys of record in the matter of *Modesto Irrigation District ("MID") et al. v. Tanaka et al.*, Sacramento Superior Court Case No. 34-2011-00112886 ("Tanaka"). In addition, the historian who will represent Woods and the Landowners in any rehearing proceeding related to the Woods CDO is also a likely expert witness in the Tanaka matter. The Tanaka matter is scheduled for trial in March 2015. These attorneys and witnesses cannot prepare for and/or attend both the trial and the hearings on this

matter during the same month. Therefore, at a minimum, this rehearing must be re-scheduled for a different time.

C. The Rehearing Should be Stayed Pending the Outcome of *MID et al. v. WIC et al.*, Sac. Superior Court Case No. No. 34-2011-80000803 Due to Lack of Jurisdiction

MID et al. (parties to this rehearing matter) sued Woods for declaratory relief regarding its water rights. That case is currently pending in Sacramento Superior Court with a trial date set for August 2015: *Modesto Irrigation District v. WIC et. al*, Case No. 34-2011-80000803 ("*MID v. WIC*"). There is a motion pending in that case to dismiss for failure to join the Woods landowners. If that motion is not granted, the Landowners will likely intervene to protect their water right interests. While the *MID v WIC* case is pending, the State Board lacks jurisdiction to consider the water rights issues of WIC or its landowners.

As the California Supreme Court explained in *Scott v. Industrial Acc. Commission* (1956) 46 Cal.2d 76, "[w]hen two or more tribunals in this state have concurrent jurisdiction, the tribunal first assuming jurisdiction retains it to the exclusion of all other tribunals in which the action might have been initiated." (*Id.* at 81.) The *Scott* Court described two reasons for this rule: first, "to avoid unseemly conflict between courts that might arise if they were free to make contradictory decisions or awards at the same time or relating to the same controversy"; and second, "to protect litigants from the expense and harassment of multiple litigation." (*Ibid.*) This rule is generally evoked when two or more California courts take up the same claims, but it also applies to actions involving an administrative tribunal and a state court. Thus, in *Scott*, the California Supreme Court found an administrative agency and a state court could not simultaneously consider actions involving the same personal injuries, even though each body could have individually exercised jurisdiction in its own right. (*Id.* at 79.)

D. There are Serious Due Process Problems with the Manner in Which the State Board Proposes to Proceed with the Rehearing

The Board's Reconsideration Order and proposed rehearing fail to remedy previous due process violations. Although the Board has agreed to reopen the CDO proceedings, it has

retained the majority of the findings from its prior order. The Board thus wrongly places on the Landowners the burden of overcoming an adverse decision—a position the Landowners would not be in had the Board allowed them to participate in the proceedings from the start. To address the due process violation, the Board must start the CDO proceedings anew. The Board cannot burden the Landowners with findings under its previous order.

Further, allowing the Landowners to cross-examine witnesses who have already provided testimony and admit new evidence does not equate to due process here. The Landowners must be allowed to face and confront all evidence and testimony as it is admitted and to make all necessary objections or motions to strike. Specifically, Landowners must have the opportunity to be heard "at a meaningful time and in a meaningful manner." See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

An equivalent scenario would be a trial court conducting a trial and reaching a decision without a defendant being allowed to participate, and then, if the defendant objects, allowing the defendant to present additional evidence to try to change the court's earlier opinion. The U.S. Supreme Court long ago in *Armstrong v. Manzo* (1965) 380 U.S. 545 explained that such a procedure clearly violates basic due process principles.

In *Armstrong*, the Supreme Court considered whether a juvenile court's adoption decree violated the due process clause. The juvenile court initially granted an individual legal father status over a child, even though the natural father was never given notice of the proceeding. (*Armstrong v. Manzo* (1965) 380 U.S. 545, 548.) On learning of the adoption decree, the natural father brought a motion to have the decree set aside and a new trial granted. (*Ibid.*) The juvenile court allowed the natural father to present evidence to show the decree should not have been granted, but declined to allow a new trial. (*Id.* at 549.) After hearing the natural father's evidence, the juvenile court reaffirmed the adoption decree. (*Ibid.*)

Considering these facts, the Supreme Court found it "clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law." (*Armstrong, supra*, 380 U.S. at 550.) The Court firmly rejected the

argument that the failure to give the petitioner notice had been cured by the hearing subsequently afforded him upon his motion to set aside the decree. (*Ibid.*) Because of the close parallels here, it is useful to quote the opinion at length:

> Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. . . . Had neither side offered any evidence, those who initiated the adoption proceedings could not have prevailed. [¶] Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. . . . The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' . . . Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.
>
> *Id.* at 551.

Thus, the Court concluded, the juvenile court could have satisfied due process requirements only by granting the motion to set aside the decree and consider the case anew. (*Armstrong*, *supra*, 380 U.S. at 552.) "Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." (*Ibid.*)

Likewise, to satisfy the due process clause here, the Board must wipe the slate clean and begin the CDO proceedings from scratch. It is not enough that the Board offers the Landowners the opportunity to counter existing evidence.

IV. CONCLUSION and RECOMMENDATION

Landowners do not want to be forced to go back to Court to achieve the necessary stay or dismissal of the proposed rehearing. The State Board and the parties have already spent too much time and money on procedural matters. Landowners propose that the State Board determine that it does not have jurisdiction to proceed with the rehearing at this time and wait for the conclusion of the MID v. WIC matter before proceeding if necessary (the MID v. WIC case may determine the water rights at issue).

If the Board decides to proceed with the rehearing process, at a minimum it must schedule an early case management conference of all parties during early November 2014. The case

management conference could be used to see if there is consensus on how and whether to proceed with the rehearing or stay the process, outline and agree on the issues for rehearing, and discuss methods to streamline the presentation of evidence through stipulations or otherwise so as to save the State Board and parties precious time and resources. The case management conference would likely be followed by the submission of stipulations or written proposals on how to proceed which could be reviewed prior to the Pre-Hearing Conference.

It is absolutely critical that the hearing issues be outlined more than 60 days before the hearing is scheduled (the current notice provides for less than 60 days between the Pre-Hearing Conference and the Hearing). It would be impossible for the number of landowners involved in this case to prepare their cases for presentation in less than 60 days and only worsen the current due process violations. There should be at least nine months between the time the issues for rehearing are identified and any hearing is scheduled to ensure due process is satisfied and that the presentation of evidence is coherent and streamlined. This time would also allow for meaningful settlement discussions which could obviate the need for the rehearing and save considerable resources for all involved.

Respectfully submitted,

Dated: September 14, 2014

SPALETTA LAW PC

By: 

JENNIFER L. SPALETTA
Attorney for R.D.C. Farms, Inc., et al.

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 September 14, 2014, I served a true and correct copy of:

LANDOWNERS' RESPONSE TO BOARDS SEPTEMBER 4, 2014 NOTICE ON ORDER 2012-0012

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

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[X] **BY U.S. MAIL.** By enclosing the document(s) in a sealed envelope addressed to the person(s) set forth below, and placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Dated: ___September 14, 2014___

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JENNIFER L. SPALETTA_____