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*Mia S. Brown*

509 WEST WEBER AVENUE  
FIFTH FLOOR  
STOCKTON, CA 95203

POST OFFICE BOX 20  
STOCKTON, CA 95201-3020

(209) 948-8200  
(209) 948-4910 FAX

FROM MODESTO:  
(209) 577-8200  
(209) 577-4910 FAX

August 18, 2010

*VIA HAND DELIVERY & EMAIL*

Mr. Ernie Mona  
Division of Water Rights  
State Water Resources Control Board  
1001 I Street, 2nd Floor  
Sacramento, CA 95814

Re: Woods Irrigation Company CDO Hearing.

Dear Mr. Mona:

On behalf of San Joaquin County and the San Joaquin County Flood Control and Water Conservation District, enclosed please find an original and five copies of the Closing Brief related to the above-referenced hearing.

If you have any questions please don't hesitate to contact me.

Very truly yours,

Mia S. Brown  
Attorney at Law

MSB/ect  
Enclosure

1 DEEANNE M. GILLICK (SBN: 179218)  
MIA S. BROWN (SBN: 242268)  
2 NEUMILLER & BEARDSLEE  
A PROFESSIONAL CORPORATION  
3 P.O. Box 20  
Stockton, CA 95201-2030  
4 Telephone: (209) 948-8200  
Facsimile: (209) 948-4910  
5

6 Attorneys for County of San Joaquin and  
San Joaquin County Flood Control and Water  
Conservation District  
7

8 BEFORE THE CALIFORNIA  
9 STATE WATER RESOURCES CONTROL BOARD

10 In the Matter of Draft Cease and Desist )  
11 Order No. 2009-00XX-DWR Against ) **CLOSING BRIEF OF COUNTY OF SAN**  
12 Woods Irrigation Company, ) **JOAQUIN AND SAN JOAQUIN COUNTY**  
13 ) **FLOOD CONTROL AND WATER**  
 ) **CONSERVATION DISTRICT**

14 The County of San Joaquin and the San Joaquin County Flood Control and Water  
15 Conservation District (hereinafter collectively "County") hereby submits its Closing Brief in the  
16 above referenced matter before the State Water Resources Control Board ("State Water Board" or  
17 "Board").

18 **I. INTRODUCTION**

19 The pending hearing by the State Water Board is entirely improper to determine the nature,  
20 extent and validity of the pre-1914 water right held by Woods Irrigation Company ("WIC") or other  
21 pre-1914 water rights or riparian water rights delivered by WIC. The State Board lacks the authority  
22 to issue a cease and desist order ("CDO") regarding a pre1914 water right or to determine the nature,  
23 extent or validity of riparian water rights within the WIC service area. In addition, due process  
24 violations will result if a determination is made by the Board regarding the riparian and pre-1914  
25 water rights, which are property rights, held by WIC and/or property owners within the WIC service  
26 area.  
27  
28

1 In the event that the Board does make a determination in this proceeding regarding the water  
2 rights delivered by WIC, which the COUNTY contends exceeds the Board's authority, it is not  
3 necessary for purposes of the pending CDO for the Board to determine the classification or nature of  
4 the water right held by WIC or any of other water delivered by WIC to property within WIC.  
5 Sufficient evidence was presented to satisfy any inquiry by the Board that the deliveries by WIC are  
6 based on valid water rights and are thus not "unauthorized" diversions in which the Board alleges  
7 that a CDO may be issued.<sup>1</sup> It is not necessary for this proceeding, nor proper for the Board, to  
8 make a determination as to the type of water right in which the WIC water deliveries support, such  
9 as the amount of pre-1914 water right held by WIC, the existence of pre-1914 water rights held by  
10 appropriators within WIC receiving water from WIC, or the parameters of any riparian water rights  
11 benefiting property within the WIC service area.

12 In the event that the Board does examine the nature and extent of the water right delivered by  
13 the WIC, substantial evidence in the record indicates that WIC perfected a pre-1914 water right up to  
14 and exceeding 77.7 cfs to support the amount of water currently delivered by the WIC and that  
15 substantial evidence in the record demonstrates that substantial property within the WIC service area  
16 enjoys riparian water rights to support the authorized delivery of water by the WIC.

17 Any provision within a CDO order cannot place any conditions on WIC's pre-1914 water  
18 right or any pre-1914 or riparian water right delivered by WIC. The Board has no authority over  
19 riparian and pre-1914 water rights, and thus the Board has no authority to require any monitoring,  
20 measuring or reporting by WIC, except as provided by Water Code sections 5100 et seq. The draft  
21 CDO order requires monitoring and measuring devices of water usage by WIC. The Board has no  
22 authority to require such. Such monitoring and measuring is not now required by law, but will be  
23 required after January 1, 2012. Wat. Code § 5103. Compliance with filing a yearly Statement of  
24 Diversion and Use is all that the Board may require regarding the pre-1914 and riparian water rights  
25 delivered by WIC.

26  
27 <sup>1</sup> The COUNTY contends that the Board lacks jurisdiction to issue any CDO against WIC  
regarding pre-1914 or riparian water rights.

1 II. ARGUMENT

2 A. THE CDO IS NOT PROPER AS WIC HOLDS A VALID PRE-1914 WATER RIGHT

3 The draft CDO issued on December 28, 2009 and the Prosecution Team (“PT”) recognize  
4 that WIC holds a valid pre1914 water right up to 77.7cfs.<sup>2</sup> Exhibits PT-1, p.4 and PT-7. The  
5 apparent dispute is to the amount or extent of its pre-1914 water right. In addition, the CDO and the  
6 prosecution team request information regarding riparian water rights within the WIC service area.  
7 Exhibits PT-1, p.4 and PT-7. The Board’s inquiry into and any determination regarding the  
8 parameters of WIC’s pre-1914 water right or the pre-1914 water rights or riparian water rights held  
9 by property owners within the WIC service area is improper and in excess of the Board’s authority.  
10 The validity, nature and extent of pre1914 and riparian water rights are clearly and widely  
11 recognized as outside of the jurisdiction of the Board. Any determination regarding these water  
12 rights in this proceeding by the Board would be improper. Determinations regarding the nature and  
13 extent of pre-1914 and riparian water rights are properly determined by a court of law, not the  
14 Board. Any dispute regarding the use of water based on a pre-1914 or riparian water right must be  
15 properly determined in a court of law pursuant to a quiet tile or adjudication proceeding.

16 The CDO is issued pursuant to *Water Code* sections 1831 and 1052<sup>3</sup>. These sections do not  
17 grant the Board the authority to issue a CDO against WIC’s recognized and claimed pre-1914 water  
18 rights and any riparian water rights held by property owners within WIC. The Board’s authority to  
19 issue CDOs is limited to that authority given to the Board by statute. The power of the Board to  
20 issue CDOs does not include the authority for the Board to make determinations regarding the  
21 validity of WIC’s pre-1914 water rights and those pre-1914 and riparian water rights delivered by  
22 WIC. It’s jurisdictional. The Board simply does not have any jurisdiction or authority over pre-  
23 1914 and riparian water rights. Specifically, the Board’s power pursuant to cease and desist orders  
24 authorized by Water Code 1831 and 1052 simply does not extend to pre-1914 or riparian water

25 <sup>2</sup> WIC contends its pre-1914 water rights exceeds the recognized 77.7 cfs.

26 <sup>3</sup> Unless otherwise specified, all future code section references will be to the California  
27 Water Code.

1 rights—the Board’s jurisdiction is limited to statutory, post-1914, appropriations

2 While the Board does have some measure of enforcement authority over riparian and pre-  
3 1914 water rights, that authority is limited to actions involving waste, unreasonable use or diversion,  
4 lack of a beneficial use, or protection of public trust resources, and such enforcement authority is not  
5 necessarily exercised in the form of a CDO. Additionally, the Board may act upon a petition for a  
6 “statutory adjudication” of any stream system or act as a referee or investigate matters referred to it  
7 by a court of competent jurisdiction, which may involve examination of riparian and pre-1914 rights  
8 as part of the process. However, the Board's permitting authority is limited and “does not involve  
9 adjudication of such rights” and even in a statutory adjudication or court referral, its determinations  
10 are tentative in nature and must be filed with a court for final determination. (*United States v. State*  
11 *Water Resources Control Board* (1986) 182 Cal.App.3d 82, 104.) This proceeding is not pursuant to  
12 a statutory adjudication or pending matter in a court of competent jurisdiction, such as a quiet title  
13 action. Thus, the Board has no authority to issue a CDO against WIC regarding WIC’s pre-1914  
14 water rights and any riparian water rights within the WIC service area.

15 1. THE BOARD DISCLAIMS AUTHORITY TO DETERMINE THE VALIDITY OF  
16 RIPARIAN AND PRE-1914 WATER RIGHTS.

17 The Board has varying degrees of administrative authority over California's three different  
18 types of surface water rights. The authority of the Board with respect to these matters is derived  
19 from specific statutory authority--that is, the Board may only exercise those powers vested in it by  
20 statute. It is well recognized and undisputed that the Board has full authority to authorize, regulate  
21 and determine the validity of post-1914 appropriative rights pursuant to the Water Commission Act  
22 and subsequent legislation now codified in the California Water Code. However, the Board's permit  
23 authority extends only to post-1914 appropriative water rights, and not to riparian and pre-1914  
24 water rights: “The Board has jurisdiction over water flowing in a known and definite channel,  
25 whether surface or subterranean, *to the extent it has not been previously appropriated or is not being*  
26 *used upon riparian lands* (*Water Code* §§ 1200 and 1201).” (SWRCB Decision 1595, p. 8, emphasis

1 added) The Board's authority over riparian and pre-1914 water rights is far more limited, and  
2 *specifically* does not extend to determining the validity of those rights.

3 The COUNTY recognizes that the Board has some limited regulatory authority over riparian  
4 and pre-1914 water rights in those certain circumstances where the Board has been given specific  
5 statutory authority, such as where the exercise of these water rights results in waste, unreasonable  
6 diversion or use, unreasonable method of diversion, or impacts to the public trust pursuant to *Water*  
7 *Code* section 275. In the present matter, however, the Board lacks authority to issue cease and desist  
8 orders against a pre-1914 water right holder, because to do so would necessarily require the Board to  
9 make a factual determination regarding the validity of WIC's pre-1914 water rights and possibly a  
10 determination regarding other riparian and pre-1914 water rights delivered by WIC but held by  
11 others. Such action exceeds the Board's authority.

12 The Board's own literature states that the Board "does not have the authority to determine the  
13 validity of vested rights other than appropriative rights initiated December 19, 1914 or later." Exhibit  
14 1 to County's Motion for Official Notice at p.7-8. <sup>4</sup> The Board's literature also indicates that it will  
15 not investigate complaints involving pre-1914 or riparian surface water rights due to its lack of  
16 authority over those rights:

17  
18 Because we do not have permitting authority over groundwater or pre-1914  
19 and riparian surface water rights or authority to determine the relative priority of  
20 these classes of use, we will not investigate complaints that involve diversions by  
21 these water users unless the complaint involves waste or unreasonable diversion or  
22 use or unreasonable method of diversion or impacts to the public trust. Disputes

21 <sup>4</sup> The July 19, 2010 memo from Hearing Officer Frances Spivy-Weber regarding Woods  
22 Irrigation Company Hearing Motions and Evidentiary Objections indicates that Exhibit 1 and  
23 Exhibit 2 to the County's Motion for official notice are documents "produced and placed on the  
24 State Water Board's website by an unknown staff person or persons at an undefined time." The  
25 memo suggests that the Board does not agree with the statements or positions asserted in these  
26 documents prepared by Board staff and posted on the Board website. This is disingenuous. The  
27 Board and its staff controls and manages the information posted on its website. If the information  
28 posted on its website is not accurate the Board has a responsibility to disclaim or remove such  
information or documents. The documents were obviously prepared by Board staff to assist the  
public to understand the role and responsibilities of the Board. Exhibit 1 includes an Introduction  
advising on how additional information and "SWRCB's publications" can be obtained. Clearly this  
document is being held out by the SWRCB as providing accurate information to the public on the  
Board.

1 between these water users must be resolved by a court. The court may refer the  
2 matter to the State Water Board for findings of fact or of law.

3 (*SWRCB, Frequently Asked Questions: Will the Division of Water Rights accept complaints*  
4 *involving matters other than illegal diversions of water or permit or license condition violations?*

5 Exhibit 2 to County's Motion for Official Notice at p. 8.

6 Federal Judge Oliver Wanger acknowledged the Board's own denial of authority over pre-  
7 1914 and riparian water rights in the recent decision *Natural Res. Def. Council v. Kempthorne*  
8 (2009) 621 F. Supp.2d 954, stating: "The SWRCB disclaims authority to directly adjudicate or  
9 otherwise resolve disputes over the validity, nature, or extent of pre-1914 water rights. *See SWRCB,*  
10 *Information Pertaining to Water Rights in California-1990* at p. 8." (*Id.*, p. 963, fn. omitted.)

11 Numerous Board water rights decisions and orders indicate that the Board has no power to  
12 adjudicate riparian and pre-1914 water rights and that the Board has no jurisdiction to validate  
13 riparian rights or pre-1914 appropriative rights-such determinations are within the sole purview of a  
14 court of law. (See e.g., SWRCB Decision 1379, at p. 8 ["The Board does not have jurisdiction to  
15 adjudicate or determine the validity of individual vested water rights-this is a judicial function"]; see  
16 also, SWRCB Decisions D-934, at p. 3; D-1282, at p. 7; D-1290, at p. 32; and D-1324 at p. 3.)

17 Despite its own repeated admissions, and despite judicial acknowledgment of those  
18 admissions, the Board now attempts to vest itself with this authority by pursuing the issuance of a  
19 CDO against WIC regarding delivery by WIC of pre-1914 and riparian water rights. This, it cannot  
20 do. The CDO and the Prosecution Team recognizes that WIC holds a valid pre-1914 water right.  
21 Exhibit PT-1, p.4 and PT-7, p. 2, 3. In addition, WIC asserted that the water delivered by WIC was  
22 based on this valid pre-1914 water right and additional valid pre-1914 and riparian water rights.  
23 Draft CDO p.2, para 2, 4, Exhibit PT-7. Exhibit PT-5.

24 It is beyond the Board's authority to issue a CDO to WIC determining or based on any  
25 determination by the Board of the extent of WIC's pre-1914 water right or any pre-1914 or riparian  
26 water rights delivered to properties by WIC. Such determinations are in excess of the Board's  
27 limited jurisdiction over such rights.

1 2. THE BOARD DOES NOT HAVE AUTHORITY TO ISSUE CEASE AND DESIST  
2 ORDERS AGAINST WIC WHICH IS DELIVERING VALID PRE-1914 AND RIPARIAN  
WATER

3 a. **The Board's Authority to Issue Cease and Desist Orders Is Limited to Specific  
4 Statutory Situations Not Present in the Current Proceeding.**

5 The Board does not have blanket authority to issue a cease and desist order for merely any  
6 matter in which the Board may otherwise have jurisdiction or be involved. The Board's authority to  
7 issue cease and desist orders is limited to the specific situations authorized and enumerated in *Water*  
8 *Code* section 1831.<sup>5</sup> The authority of the Board is limited to the specific situations enumerated in  
9 statute and the cease and desist authority is specifically limited by statute to apply to only the  
10 substantive legal areas in which the Board otherwise has authority.

11 Subsection (e) of *Water Code* section 1831 specifically provides that "This article shall not  
12 authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to  
13 regulation of the board under this part."<sup>6</sup> This "part" referenced in subsection (e) refers to Part 2 of  
14 Division 2 of the Water Code regarding "Appropriation of Water," which includes sections 1200

15 <sup>5</sup> Section 1831 reads in full as follows:

- 16 (a) When the board determines that any person is violating, or threatening to violate, any  
17 requirement described in subdivision (d), the board may issue an order to that person  
18 to cease and desist from that violation.
- 19 (b) The cease and desist order shall require that person to comply forthwith or in  
20 accordance with a time schedule set by the board.
- 21 (c) The board may issue a cease and desist order only after notice and an opportunity for  
22 hearing pursuant to Section 1834.
- 23 (d) The board may issue a cease and desist order in response to a violation or threatened  
24 violation of any of the following:
- 25 (1) The prohibition set forth in Section 1052 against the unauthorized diversion or  
26 use of water subject to this division.
- 27 (2) Any term or condition of a permit, license, certification, or registration issued  
28 under this division.
- (3) Any decision or order of the board issued under this part, Section 275, or  
Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in  
which decision or order the person to whom the cease and desist order will be  
issued, or a predecessor in interest to that person, was named as a party  
directly affected by the decision or order.
- (e) This article shall not authorize the board to regulate in any manner, the diversion or  
use of water not otherwise subject to regulation of the board under this part.

<sup>6</sup> For purposes of understanding the references within the Water Code the Water Code is  
developed based on the following hierarchy: Division, Part, Chapter, Article, Section.



1 through 1851 and this “article” is Article 2 of Chapter 12 of Part 2 of Division 2 of the Water Code,  
2 regarding cease and desist orders, which includes sections 1831, 1832, 1834, 1835 and 1836.  
3 Pursuant to subsection (e) enforcement by the Board in the form of cease and desist orders is  
4 specifically restricted to the diversion and use of water regulated as specified in Part 2 of Division 2  
5 of the Water Code which relates to the appropriation of water --- permits and licenses issued by the  
6 State Board pursuant to post-1914 statutory appropriations. A complete review of every section in  
7 Part 2 of Division 2 does not reference any authority by the Board to regulate claimed riparian or  
8 pre-1914 water rights. Therefore, because there is no statutory authority vested in the Board to issue  
9 CDOs with respect to riparian or pre-1914 water pursuant to Part 2 of Division 2, the Board lacks the  
10 authority to do so as a matter of law, and issuance of the draft CDOs to WIC exceeds the Board's  
11 jurisdiction.

12 In response to a writ of prohibition filed by claimed riparian and pre-1914 water right holders  
13 subject to pending CDOs which are the subject of the CDO proceedings which commenced on May  
14 5, 2010 before the Board ( the Mussi et al, Dunkel, and Pak and Young matters), the Attorney  
15 General argued on behalf of the Board that in 2002 the authority of the Board was expanded thus any  
16 prior Board Decisions “disclaiming” authority over riparian and pre-1914 water rights are not  
17 relevant. See p. 13, Fn. 7. of SWRCB Opposition to Petition for Writ of Prohibition. However, the  
18 2002 legislation, AB 2261 (2001-2002 Reg. Sess.) clearly indicates that the legislative changes do  
19 no expand the legal authority for the Board to issue cease and desist orders. Subsection (e) of  
20 section 1831 was added on the Senate Floor on August 12, 2002. This was the only amendment  
21 made to the bill on that date. See [http://leginfo.ca.gov/pub/01-02/bill/asm/ab\\_2251-](http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_bill_20020812_amended_sen.html)  
22 [2300/ab\\_2267\\_bill\\_20020812\\_amended\\_sen.html](http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_bill_20020812_amended_sen.html). The Senate Rules Committee Bill Analyses  
23 dated August 19, 2002 located at [http://leginfo.ca.gov/pub/01-02/bill/asm/ab\\_2251-](http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_cfa_20020820_153745_sen_floor.html)  
24 [2300/ab\\_2267\\_cfa\\_20020820\\_153745\\_sen\\_floor.html](http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_cfa_20020820_153745_sen_floor.html) clearly states that the amendments to the  
25 cease and desist order procedures and administrative do not expand the powers of the Board stating:  
26  
27

1           Senate Floor Amendments of 8/12/02 clarify that by streamlining the  
2           administrative process for issuing cease and desist orders the bill does not also  
3           expand the powers of the SWRCB.

4           The Board's powers prior to 2002 did not include authority over riparian and pre-1914 water rights  
5           and the Board did not then gain powers over such riparian and pre-1914 water rights. In the pending  
6           proceeding the Board alleges its authority to issue a cease and desist order is based upon a violation  
7           of section 1052. Section 1052 was not amended by AB 2261 in 2002. [http://leginfo.ca.gov/pub/01-](http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_bill_20020918_chaptered.html)  
8           02/bill/asm/ab\_2251-2300/ab\_2267\_bill\_20020918\_chaptered.html. In 2002, the Board's authority  
9           to regulate was specifically not expanded, rather the administration of that authority was modified.  
10          As will be discussed below, the Board continues to lack authority over riparian and pre-1914 water  
11          rights, except in limited situations not at issue in the pending proceeding pursuant to Water Code  
12          section 275. Any determination or cease and desist order by the Board regarding WIC's pre-1914  
13          water rights and any pre-1914 or riparian water rights delivered by WIC is entirely improper.

14                   **b.       Riparian and Pre-1914 Water Rights Are Not Subject to Division 2 of the Water**  
15                   **Code Referenced in Section 1052 for Issuance of a Cease and Desist Order**  
16                   **Pursuant to Section 1831.**

17           The CDO specifies that the cease and desist order is issued pursuant to section 1831 due to a  
18           prohibition set forth in section 1052. Exhibit PT-7. Subsection (d)(1) of section 1831 provides that  
19           the Board may issue a cease and desist order for a violation or threatened violation of "[t]he  
20           prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to  
21           this division." Subsection (a) of Section 1052 provides that "The diversion or use of water subject to  
22           this division other than as authorized in this division is a *trespass*." (Emphasis added.) The  
23           "division" referenced in this subsection (a) of Section 1052 is Division 2 of the Water Code which  
24           includes sections 1000 through section 5976. Therefore, a "trespass" for purposes of section 1052 is  
25           limited to situations that fail to comply with the requirements of sections 1000 through 5976.  
26           Riparian and pre-1914 rights are not regulated by the Board by any provision in sections 1000  
27           through 5976. Therefore, there is no "trespass" and thus no grounds for the Board to issue the  
28           pending CDOs against WIC who claim riparian and pre-1914 water rights.

1 In order for the Board to have authority to issue a cease and desist order, there must be a  
2 violation of something that is subject to regulation by the Board, as authorized by sections 1000  
3 through 5976. The diversion of water by WIC claiming a diversion of riparian and pre-1914 water  
4 rights is not subject to regulation by Division 2 of the Water Code. Therefore, the use and diversion  
5 of water under a claim of riparian and/or pre-1914 water rights cannot be the subject of a cease and  
6 desist order issued pursuant to section 1831 due to an alleged violation of section 1052. Such action  
7 by the Board is in excess of its authority and jurisdiction.

8  
9 **i. The Board Itself States Riparian and Pre-1914 Water Rights Are Not  
Subject to Division 2's Statutory Appropriation Procedures.**

10 The Board itself has stated that riparian and appropriative rights perfected prior to December  
11 19, 1914 do not have to comply with the statutory appropriation procedures set forth in Division 2 of  
12 the Water Code. For example, SWRCB Water Rights Order, WR 2001-22, states, at page 14: "With  
13 the exception of riparian rights or appropriative rights perfected prior to December 19, 1914, all  
14 water use is conditioned upon compliance with the statutory appropriation procedures set forth in  
15 division 2 of the Water Code commencing with section 1000. (Wat. Code., §§ 1225, 1201.)"

16  
17 **ii. *Shirokow* Confirms That Division 2's Statutory Appropriation  
Procedures Do Not Apply to Riparian and Pre-1914 Water Rights.**

18 In *People v. Shirokow* (1980) 26 Cal.3d 301, the California Supreme Court provided an  
19 extensive review of California water law including the ability of the Board to regulate certain water  
20 rights. This case specifically addressed the circumstances under which the Board could obtain an  
21 injunction pursuant to *Water Code* section 1052. In so doing, *Shirokow* evaluated the language of  
22 section 1052 and what types of water diversions or use are subject to regulation by section 1052 as  
23 specified in Division 2. *Shirokow* then evaluated Division 2 of the Water Code itself, and  
24 specifically section 1201. Section 1201 provides that the authority of the Board over appropriation  
25 of water subject to the Water Code provisions is as follows:

26 All water flowing in any natural channel, excepting so far as it has been or is  
27 being applied to useful and beneficial purposes upon, or in so far as it is or may be  
reasonably needed for useful and beneficial purposes upon lands riparian thereto, or

1 otherwise appropriated, is hereby declared to be public water of the State and subject  
2 to appropriation in accordance with the provisions of this code.

3 In determining the application of section 1201 of the *Water Code*, *Shirokow* interpreted section 1201  
4 to apply as broadly as possible “in accordance with the code to the fullest extent consistent with its  
5 terms.” (*People v. Shirokow, supra*, 26 Cal.3d 301, 309.) The Court concluded that the application  
6 of Division 2 of the Water Code is as follows:

7 *The rights not subject to the statutory appropriation procedures* are narrowly  
8 circumscribed by the exception clause of the statute and *include only riparian rights*  
9 *and those which have been otherwise appropriated prior to December 19, 1914*, the  
effective date of the statute. [Fn. omitted.] Any use other than those excepted is, in  
our view, conditioned upon compliance with the appropriation procedures of division  
2.

10 (*Ibid.*, emphasis added; see also *Modesto Properties Co. v. State Water Rights Bd.* (1960) 179  
11 Cal.App.2d 856, 860 [appropriation includes any taking of water for other than riparian or overlying  
12 uses]; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 [term “appropriation” means  
13 any taking of water for other than riparian or overlying uses].)

14 *Shirokow* clearly indicates that riparian and pre-1914 water rights are not subject to  
15 compliance with the statutory appropriation procedures in Division 2 of the Water Code. As  
16 discussed above, in order to constitute a “trespass” pursuant to section 1052, which provides  
17 authority for the Board to issue a cease and desist order, there must be a violation of one or more  
18 requirements in Division 2. Contrary to the Board’s suggestion in the instant draft CDO, both the  
19 Board and *Shirokow* acknowledge that riparian and pre-1914 water right holders cannot be found to  
20 have violated any of Division 2’s statutory appropriation procedures because those procedures  
21 simply do not apply to the exercise of such rights.

22 *Shirokow* acknowledges, however, that the Board may indeed have authority over riparian  
23 water rights pursuant to other provisions in Division 2 of the Water Code, however, none of those  
24 provisions are applicable to the instant CDO proceedings. At footnote 11 in *Shirokow*, the Court  
25 discusses the authority of the Board over riparian rights including “prospective” riparian rights,  
26 stating:

27 Section 1201 by its terms exempts from water subject to appropriation  
riparian rights which are being applied to, or *may be* reasonably needed for, useful

1 and beneficial purposes. The status of prospective riparian rights is discussed in our  
2 recent opinion in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d  
3 339 []. The opinion holds the board possesses broad authority in statutory  
4 adjudications pursuant to section 2500 et seq. to make determinations as to the scope,  
5 nature, and priority of future riparian rights, in order to foster the most reasonable and  
6 beneficial use of the scarce water resources of the state.

7 (*People v. Shirokow, supra*, 26 Cal.3d 301, 309, fn. 11.) As pointed out in this footnote, the Board  
8 does have some jurisdiction over riparian water rights but the jurisdiction referenced by the Court is  
9 limited to “statutory adjudications” which is provided for in Division 2 of the Water Code at section  
10 2500 et seq. However, that authority is expressly limited to a statutory adjudication proceeding, and  
11 the Board's role in such proceedings is limited to the facts and circumstances of that proceeding. A  
12 statutory adjudication is not in any manner implicated in the instant CDO proceedings.

13 (Incidentally, the reference in *Shirokow* to the Board's authority to limit riparian water rights in the  
14 event of a statutory adjudication pertained to then-unexercised riparian water rights, not existing  
15 riparian rights then in use, and where the Board's authority to limit those future riparian rights was  
16 necessary in order to foster “reasonable and beneficial use” of water within the state.)

17 *Shirokow* also discussed section 1050 in its analysis of the Board’s authority over various  
18 water rights pursuant to Division 2 of the Water Code. Section 1050 states that “[Division 2 of the  
19 Water Code] is to be in furtherance of the policy contained in Section 2 of Article X of the  
20 California Constitution . . .” As a result, Division 2 of the Water Code may be deemed to be in  
21 furtherance of the policy contained in Section 2 of Article X of the California Constitution which  
22 applies to all water rights including riparian and pre-1914 water rights and which prohibits the  
23 “waste or unreasonable use or unreasonable method of use of water.” *Shirokow* reviewed the  
24 policies expressed in the Water Code as consistent with the expression in the 1928 amendment  
25 including sections 100, 102, 104 and 105, which are within Division 1 of the Code. The Court stated  
26 that “[t]hese declarations of policy together with the comprehensive regulatory scheme set forth in  
27 section 1200 et seq. demonstrate a legislative intent to vest in the board expansive powers to  
28 safeguard the scarce resources of the state.” (*People v. Shirokow, supra*, 26 Cal.3d 301, 309.)  
However, despite the Court's finding of legislative intent to vest the Board with “expansive powers,”

1 the Court still concludes that riparian and pre-1914 water rights are not water rights which are  
2 conditioned upon compliance with the statutory appropriation procedures of Division 2. (*Ibid.*)  
3 *Shirokow* clearly determines that the scope of Division 2 of the Water Code, and particularly any  
4 enforcement pursuant to section 1052 of the *Water Code*, is limited to water rights that are subject to  
5 Division 2's statutory appropriations, which do not include riparian and pre-1914 water rights.

6 **c. The draft CDO and Prosecution Team's case recognizes that WIC has pre-1914**  
7 **water rights and WIC asserts it is otherwise delivering pre-1914 and riparian**  
8 **water rights Which Are Not Subject to Division 2 of the Water Code and Which**  
9 **Are Not Subject to the Board's Authority to Issue Cease and Desist Orders.**

10 The draft CDO issued on December 28, 2009 and the prosecution team's presentation during  
11 the pending hearing recognizes that Woods Irrigation Company holds a valid pre-1914 water right.<sup>7</sup>  
12 Exhibits PT-1, p.4 and PT-7. The apparent dispute is to the amount or extent of its pre-1914 water  
13 right. In addition, the CDO and the prosecution team request information regarding riparian water  
14 rights within the Woods Irrigation Company service area. Exhibits PT-1, p.4 and PT-7. WIC asserts  
15 a pre-1914 water right up to 77.7 cfs and in excess of 77.7 cfs and delivery of pre-1914 water and  
16 riparian water to property holders within its service area. The Board lacks the authority to make a  
17 factual determination of the existence or non-existence of these rights as a matter of law. Such  
18 determinations re outside of the authority of section 1052 and are thus not a proper bases for a cease  
19 and desist order issued pursuant to section 1831. Such a determination of the extent, nature and  
20 validity of claimed riparian and pre-1914 water rights must be determined by a court of law. As the  
21 Board's own literature posted on its website states, riparian, prescriptive or pre-1914 water rights  
22 "can only be confirmed by the courts." (Exhibit 2 to SJC Motion for Official Notice at p. 4.

23 The Board is exceeding its authority by pursuing the pending cease and desist orders against  
24 WIC who holds a recognized pre1914 water right and for which WIC has provided supporting facts  
25 thereof. This pursuit of the pending cease and desist orders against WIC, and others similarly  
26 situated, exceeds the Board's authority as it has no jurisdiction to engage in these enforcement

27 <sup>7</sup> A pre-1914 water right up to 77.7 cfs is not disputed by the CDO or the prosecution team.  
28 See Exhibit PT-1 p. 4 and Exhibit PT-7. However, Woods contends its pre-1914 water rights  
exceeds the recognized 77.7 cfs.

1 proceedings which determine the validity, nature and extent of claimed riparian and/or pre-1914  
2 water rights.

3 **3. THE BOARD DOES HAVE SOME AUTHORITY WITHIN DIVISION 2 TO**  
4 **DETERMINE RIPARIAN AND PRE-1914 WATER RIGHTS WHICH IS LIMITED**  
5 **TO SPECIFIC CIRCUMSTANCES AND REMEDIES NOT INVOLVING CEASE**  
6 **AND DESIST ORDERS.**

7 **a. In Determining Whether Surplus Water Is Available for Appropriation, the**  
8 **Board Does Not Affect Riparian or Pre-1914 Water Rights.**

9 In 1986, First District Court of Appeal evaluated a decision of the Board regarding the Delta.  
10 (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82 [*"Racanelli"*].)  
11 *Racanelli* indicates that in carrying out its authority, the Board does indeed make some  
12 determinations related to riparian and pre-1914 water rights. However, these determinations are  
13 limited to particular administrative processes and do not affect riparian and pre-1914 water right  
14 holders. The Board plays only a "limited role" in "enforcing rights of water rights holders, a task  
15 mainly left to the courts." (*Id.*, p. 102.) *Racanelli* discusses the Board's role in issuing appropriative  
16 permits and the Board's authority over riparian and senior appropriators (that is, appropriators with  
17 priority for being "first in time") under the statutory appropriation procedure. *Racanelli* recognizes  
18 in "its role of issuing appropriation permits, the Board has two primary duties: 1) to determine if  
19 surplus water is available and 2) to protect the public interest." (*Ibid.*)

20 *Racanelli* explains the Board's role in determining the surplus water supply available for  
21 appropriation, and the limitations on the Board's authority over riparian and senior appropriators as  
22 follows:

23 Section 1375 declares the basic principle that: "As a prerequisite to the  
24 issuance of a permit to appropriate water ... [t]here must be unappropriated water  
25 available to supply the applicant." (Subd. (d).) Accordingly, in reviewing the permit  
26 application, the Board must first determine whether surplus water is available, a  
27 decision requiring an examination of prior riparian and appropriative rights.  
28 (*Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90.) In exercising its  
permit power, the Board's first concern is recognition and protection of prior rights to  
beneficial use of the water stream. (*Meridian, Ltd. v. San Francisco* [1939] 13 Cal.2d  
424, 450.) Yet, the Board's estimate of available surplus water is in no way an  
adjudication of the rights of other water right holders (*Temescal [supra]*, at p. 103);  
*the rights of the riparians and senior appropriators remain unaffected by the issuance*  
*of an appropriation permit.* (*Duckworth v. Watsonville Water etc. Co.* (1915) 170  
Cal. 425, 431.)

1 (*Id.*, p. 102-103, emphasis added.) In the above excerpt, the Court recognizes that the Board may  
2 consider riparian and senior appropriative rights in making a determination of available,  
3 unappropriated water, but that such a determination does not in any way alter these pre-existing  
4 rights.

5 Continuing, *Racanelli* observes that the Board has only a limited role with respect to disputes  
6 and the enforcement of water rights, and that such matters are properly resolved by *judicial* action:

7  
8 Yet notwithstanding its power to protect the public interest, **the Board plays**  
9 **a limited role in resolving disputes and enforcing rights of water rights holders, a**  
10 **task mainly left to the courts.** Because water rights possess indicia of property  
11 rights, water rights holders are entitled to judicial protection against infringement,  
12 e.g., actions for quiet title, nuisance, wrongful diversion or inverse condemnation.  
13 [Citations.] **It bears reemphasis that the Board's role in examining existing water**  
14 **rights to estimate the amount of surplus water available for appropriation does**  
15 **not involve adjudication of such rights.** [Citations.]

16 (*Id.*, p. 104, bold emphasis added, italics in original.) *Racanelli* unequivocally recognizes that it is  
17 the courts, not the Board, which have the authority to resolve water rights disputes and enforce the  
18 rights of water right holders regarding riparian and/or pre-1914 water rights.

19 The Board's past decisions regarding water rights reflect its understanding and  
20 acknowledgment of the Board's limitation against determining the existence of riparian water rights.  
21 In 1967, in SWRCB Decision 1282, the Board discussed the issuance of a new appropriative water  
22 right, where the applicant claimed to already possess a riparian or pre-1914 water right which served  
23 the same place of use as the pending appropriative right. In so doing, the Board placed a restriction  
24 on the application for a new appropriative water right permit:

25  
26 Persons with apparent but unadjudicated riparian rights sometimes have  
27 reason to file with the Board applications to appropriate unappropriated water for use  
28 on such lands. To prevent situations such as that which would result from approval of  
this petition, the Board now uses where appropriate a permit clause which reads:

“Upon a judicial determination that the place of use under this  
permit or a portion thereof is entitled to the use of water by riparian  
right, the right so determined and the right acquired under this permit  
shall not result in a combined right to use of water in excess of that  
which could be claimed under the larger of the two rights.”



1 (SWRCB Decision 1282, p. 6; see also, SWRCB Water Rights Order, WR 65-25.) In issuing new  
2 appropriative rights, Decision 1282 stated quite clearly that the Board's practice was to not  
3 adjudicate any existing claimed riparian, or pre-1914, water rights: "The Board has no power to  
4 adjudicate this or any other claimed riparian right." (SWRCB Decision 1282, p. 7.) The Board  
5 acknowledged it lacked the authority to determine such rights and properly indicated that such  
6 determination is dependent on a "judicial determination." In the present matter, the Board is now  
7 attempting to adjudicate the validity of riparian and pre-1914 water rights. This is a determination  
8 that the Board expressly declined to make in Decision 1282 due to its lack of power to do so, even in  
9 the context of new appropriative water rights which are squarely within the Board's jurisdiction. Just  
10 as the Board lacked the authority to determine or adjudicate riparian or pre-1914 rights in Decision  
11 1282, it lacks the authority to do so regarding WIC.

12 **b. The Board's Statutory Authority to Make Recommendations to a Court**  
13 **Regarding Riparian and Pre-1914 Water Rights Does Not Grant the Board**  
14 **Authority to Determine the Existence of Such Rights Nor to Issue Cease and**  
15 **Desist Orders.**

16 The superior courts have jurisdiction over water right disputes in California.<sup>8</sup> Part 3 of  
17 Division 2 of the Water Code, entitled "Determination of Water Rights," provides the manner in  
18 which the Board may participate in a water right determination pending before a court. The Board  
19 may become involved in an action pending in court for the determination of rights to water as a court  
20 may "order a reference to the board, as referee, of any or all issues involved in the suit" (§ 2000) or  
21 "refer the suit to the board for investigation of and report upon any or all of the physical facts  
22 involved" (§ 2001). Therefore, the ability of the Board to referee or investigate any facts or issues  
23 related to water rights is limited to two situations: 1) when ordered to do so by a court of law  
24 (§ 2000); or 2) upon a petition filed by a claimant to water (§ 2525).

25 A "statutory adjudication" (§ 2500 et seq.) is a court action to determine the nature, extent  
26 and validity of all water rights along a stream system. Section 2501 grants the Board authority to

27 <sup>8</sup> See sections 2000 and 2001 stating "In any suit brought in any court of competent  
28 jurisdiction in this State for determination of rights to water . . . ."

1 make a recommendation to the courts regarding the determination of rights of water, including  
2 riparian and pre-1914 water rights. However, authority to make such a determination is very limited  
3 in scope. First, there must be a pending court action. Second, the determination by the Board is  
4 only a recommendation which must be approved by the courts. Footnote 3 in *Racanelli*, which  
5 follows the statement: “It bears reemphasis that the Board's role in examining existing water rights to  
6 estimate the amount of surplus water available for appropriation does *not* involve adjudication of  
7 such rights” acknowledges that even in statutory adjudications the Board's role is limited and the  
8 Board does not determine or adjudicate water rights. Footnote 3 reads as follows:

9           In two instances the Board performs a limited adjunct function in the process  
10 of adjudication of water rights: One, as a special master or referee upon reference  
11 from the court ( ' 2000 et seq.), a function advisory in nature [citations]; another, as a  
12 hearing body to conduct a “statutory adjudication,” upon petition of any water rights  
13 holder, determining all the water rights in a “stream system” (§ 2500 et seq.;  
14 [citation]). The statutory hearing is contingent upon the Board's finding that the  
15 public interest will be served by such determination. (§ 2525.) But again, the Board's  
16 determination is tentative in nature and must be filed in the superior court for hearing  
17 and final adjudication. (§§ 2750, 2768, 2769; [citation]; see *In re Waters of Soquel*  
18 *Creek Stream System* (1978) 79 Cal.App.3d 682 [], disapproved on other grounds in  
19 *In re Waters of Long Valley Creek Stream System, supra*, 25 Cal.3d 339 [] [trial court  
20 properly rejected and remanded Board's determination of water rights]; [citation.]

21 (*United States v. State Water Res. Control Bd., supra*, 182 Cal. App. 3d 82, 152.)

22           There are numerous California cases related to the adjudication of water rights which  
23 reference the Board's authority over riparian and pre-1914 water rights in the context of a statutory  
24 adjudication. This line of cases cannot be interpreted to extend to the Board any authority over  
25 riparian and pre-1914 water rights outside of an adjudicatory proceeding. For example, *In re Waters*  
26 *of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, holds that the predecessor to the Board  
27 possesses broad authority in statutory adjudications pursuant to section 2500 et seq. to make  
28 determinations as to the scope, nature, and priority of future riparian rights, in order to foster the  
most reasonable and beneficial use of the scarce water resources of the state. Again, this referenced  
authority is limited to statutory adjudications only, and was based upon the Board's authority to  
foster “the most reasonable and beneficial use of its scarce water resources.” Additionally, in *In re*  
*Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, the California Supreme Court  
recognized the ability of the Board to determine riparian and pre-1914 water rights in a statutory

1 adjudication. This authority of the Board to make recommendations determining water rights is  
2 similarly limited to statutory adjudication proceedings only.

3 Where the Board lacks the authority to determine or affect riparian water rights and prior  
4 appropriative rights, including pre-1914 rights, when the Board is called upon to determine the  
5 availability of surplus water for purposes of issuing new appropriative rights; and when, in a  
6 statutory adjudication, the Board's determinations are merely *recommendations* that must be  
7 approved by a court, then it is evident that the Board cannot make such water rights determinations  
8 generally, such as in the present matter. Therefore, the Board's attempt to do so against WIC in the  
9 form of a CDO, which is not a court adjudication proceedings, is outside the scope of the Board's  
10 authority, and as such, contrary to law.

11 **4. THE BOARD'S AUTHORITY OVER RIPARIAN AND PRE-1914 WATER RIGHTS**  
12 **IN LIMITED CIRCUMSTANCES NOT AT ISSUE IN THE PENDING WIC CDO**  
13 **PROCEEDING**

14 **a. The Board Has Power to Investigate, but this Does Not Confer Authority to**  
15 **Issue CDOs.**

16 Section 1051 provides the Board with investigative powers, but this does not authorize the  
17 issuance of the pending CDO to WIC. Section 1051 provides in full as follows:

18 The board for the purpose of this division may:

19 (a) Investigate all streams, stream systems, portions of stream systems, lakes, or other  
20 bodies of water.

21 (b) Take testimony in regard to the rights to water or the use of water thereon or  
22 therein.

23 (c) Ascertain whether or not water heretofore filed upon or attempted to be  
24 appropriated is appropriated under the laws of this State.

25 The investigative power vested in the Board under this section authorizes the investigation of all  
26 streams and water bodies. However, any determination by the Board under this section is limited  
27 only to water "filed upon or attempted to be appropriated." The Board may "ascertain whether or  
28 not" water which is "filed upon or attempted to be filed upon" is "appropriated under the laws of the  
State." The reference to water "appropriated under the laws of this State" should be deemed to be  
consistent with the conclusions of *Shirokow, supra*, interpreting the provisions of Division 2 of the  
Water Code which involve an analysis of similar language. *Shirokow* concluded that the language of

1 *Water Code* section 1201 which states “subject to appropriation in accordance with the provisions of  
2 this code” only conferred authority over appropriative water rights, not riparian and pre-1914 water  
3 rights. (*People v. Shirokow, supra*, 26 Cal.3d 301, 309.) A similar interpretation of the language of  
4 *Water Code* section 275 stating “appropriated under the laws of the State” would also not apply to  
5 riparian and pre-1914 water rights.

6 An investigation of riparian and pre-1914 appropriative water rights might occur by the  
7 Board under the authority of section 1051. Such investigation can include taking testimony, and the  
8 Board may “ascertain whether or not” the water is “appropriated under the laws of the State.”  
9 However, there is no authority in this section for the Board to issue any enforcement orders, or  
10 commence proceedings or actions based on that investigation, including the pending CDOs against  
11 WIC. Cease and desist orders must be issued pursuant to the circumstances specified by section  
12 1831 only. The Board cannot issue cease and desist orders based solely on its general investigative  
13 power.

14 The Board’s investigatory power was discussed in *Meridian v. City and County of San*  
15 *Francisco* (1939) 13 Cal.2d 424, at page 450:

16 The State Water Commission (now Department of Public Works, Pol. Code,  
17 sec. 363e), has the power under section 10 of the act to investigate all streams of the  
18 state for the purpose of ascertaining whether the use of water therein is in conformity  
19 with the water appropriation laws of the state. And the power extends to the use of  
20 water made under appropriations or attempted appropriations acquired or asserted  
21 prior to the passage of the act. By section 15 of the act the commission is given  
22 power to allow the appropriation for beneficial purposes of unappropriated water  
23 under such terms and conditions as in the judgment of the commission will best  
24 develop, conserve and utilize in the public interest the water sought to be  
25 appropriated. It should be the first concern of the court in any case pending before it  
26 and of the department in the exercise of its powers under the act to recognize and  
27 protect the interests of those who have prior and paramount rights to the use of the  
28 waters of the stream. The highest use in accordance with the law is for domestic  
purposes, and the next highest use is for irrigation. When demands on the stream for  
those and other recognized lawful purposes by riparians and appropriators are fully  
met and an excess of water exists, it is for the state to say whether, in the conservation  
of this natural resource in the interest of the public, the diversion is excessive.

25 *Meridian* refers to the power of the predecessor to the Board to investigate, including the power to  
26 investigate pre-1914 water rights. However, *Meridian* does not extend this power of investigation to  
27 the power to issue a cease and desist order. Rather, this reference to an investigation was related to

1 the appropriateness of the predecessor to the Board's issuance of a post-1914 water right and the  
2 application of the 1928 Constitutional Amendment requiring reasonable use of all waters of the  
3 State.

4  
5 **b. The Board Lacks the Authority to Regulate Riparian and Pre-1914 Water  
Rights to the Same Extent it May Regulate Post-1914 Appropriative Rights.**

6 A 2005 Law Review Article by Andrew H. Sawyer, who is the Assistant Chief Counsel to  
7 the Board, reviewed the implementation of the recommendations of the 1978 Governor's  
8 Commission to Review California Water Rights Law. Mr. Sawyer states in Footnote 89 of that  
9 article:

10  
11 The SWRCB has authority regarding pre-1914 rights under the public trust  
12 doctrine and *Water Code* section 275. [Citations.] *This continuing authority does not*  
13 *amount to regulatory authority over proprietary right issues to the same extent as for*  
*permitted and licensed rights.* Rather, the SWRCB may review and make findings on  
issues concerning claimed pre-1914 rights to the extent reasonably necessary to carry  
out the SWRCB's other responsibilities. e.g. Cal. *Water Code* §§ 1051, 1052, 1202.

14 (36 McGeorge Law Review 209, 223, emphasis added.) This footnote indicates that the Board does  
15 not have continuing authority to regulate pre-1914 and riparian water rights to the same extent as it  
16 regulates permitted and licensed appropriative water rights. Although the Board might make  
17 findings regarding riparian and pre-1914 water rights in carrying out its other authority, such as  
18 determining surplus water to a stream as discussed in *Racanelli*, its authority does not amount to  
19 “regulatory authority over proprietary right issues” and the Board has no authority under *Water Code*  
20 section 1831 to issue the pending CDO against WIC and its pre-1914 water right or the pre-1914  
21 water rights or riparian water rights held by others delivered by WIC.

22 **c. The CDO Against WIC Does Not Involve a Violation or Threatened Violation of**  
23 **a Prior Board Order Which Might Authorize the Issuance of a Cease and Desist**  
**Order Pursuant to Section 1831.**

24 Subsection (3) of subsection (d) of section 1831 provides that the Board may issue a cease  
25 and desist order for a violation or threatened violation of “[a]ny decision or order of the board issued  
26 under this part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division  
27 7 [regarding use of potable water instead of non potable water in certain circumstances], in which

1 decision or order the person to whom the cease and desist order will be issued, or a predecessor in  
2 interest to that person, was named as a party directly affected by the decision or order.” Thus, a  
3 CDO may be issued for a violation of a previously issued Board order. No former Board order  
4 exists against WIC, and therefore, subsection (3) of subsection (d) of section 1831 does not apply.

5 In addition, a CDO might be issued for a violation or threatened violation of *Water Code*  
6 section 275. Section 275 provides in full as follows:

7 The department and board shall take all appropriate proceedings or actions  
8 before executive, legislative, or judicial agencies to prevent waste, unreasonable use,  
9 unreasonable method of use, or unreasonable method of diversion of water in this  
10 state.

11 This provision confers on the Board the authority to take all appropriate proceedings and actions to  
12 “prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion  
13 of water.” Many Board decisions have been based on the Board's authority to regulate waste and  
14 unreasonable use under section 275, including regulation of such with respect to the exercise of  
15 riparian and pre-1914 water rights. (See e.g., *Forni vs. State Water Resources Control Board* (1976)  
16 54 Cal.App.3d 743 [action brought by the Board against riparian water right based on reasonable use  
17 or reasonable method of use of water]; SWRCB Water Rights Order, WR 95-4 [the Board issued an  
18 order requiring certain instream flow requirements be met by the pre-1914 water right holders based  
19 upon the Board's authority over public trust resources and section 275 of the *Water Code*]; *Imperial*  
20 *Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal. App. 3d 548 [Board has the  
21 power to take steps necessary to prevent unreasonable use of water and board is vested with power  
22 to investigate alleged water waste and to take appropriate remedial action].) These cases and  
23 decisions involved the Board's broad authority to regulate waste and unreasonable use, even over  
24 riparian and pre-1914 rights, pursuant to section 275. However, this authority does not grant the  
25 Board the authority to issue CDOs nor determine the existence or validity of riparian or pre-1914  
26 water rights. The pending CDO does not allege that WIC has engaged in any “waste, unreasonable  
27 use, unreasonable method of use, or unreasonable method of diversion of water” that would come  
28 under the purview of section 275. Exhibit PT-7. No such allegations occurred during the hearing.

1 Therefore, the CDO against WIC cannot be based upon any authority of the Board derived from  
2 *Water Code* section 275.

3 B. CDO NOT PROPER TO DETERMINE OTHER RIPARIAN OR PRE-1914 WATER  
4 RIGHTS DELIVERED BY WIC

5 The pending proceeding was noticed by the Board and conducted by the Board against WIC  
6 regarding the pre-1914 water right held by WIC. The draft CDO requests additional information  
7 from WIC regarding other riparian or pre-1914 water rights that may be served by WIC. Those other  
8 property owners and water right holders, both riparian and pre-1914 rights, are not before the Board  
9 and not parties to this proceeding. The Board cannot properly issue any order or make any  
10 determination regarding the validity of those property rights, the water rights, held by individuals  
11 who are not parties or have not received notice of this proceeding. The COUNTY contends that  
12 WIC provided sufficient evidence to demonstrate valid water rights by riparian and pre-1914 water  
13 right holders in the amount currently delivered by WIC to properties within WIC service area. In the  
14 event that the Board makes any determination regarding such valid water rights, the Board is  
15 precluded from determining the nature or extent of such water rights held by individuals not privy to  
16 this proceeding. The Board lacks substantive and procedural jurisdiction to issue such.

17 C. WIC PROVIDED SUBSTANTIAL EVIDENCE TO SUPPORT A VALID PRE-1914  
18 WATER RIGHT IN THE AMOUNTS CURRENTLY DIVERTED AND TO SUPPORT  
19 DELIVERY OF OTHER VALID WATER RIGHTS

20 A pre-1914 water right up to 77.7 cfs is not disputed by the CDO or the prosecution team.  
21 See Exhibit PT-1 p. 4 and Exhibit PT-7. However, Woods contends its pre-1914 water rights  
22 exceeds the recognized 77.7 cfs. Now 100 years after this water right was perfected by the Woods  
23 family and WIC the Board is requiring documentation of the nature, extent and validity of this pre-  
24 1914 water right. WIC produced evidence that the water was delivered by WIC to the property  
25 within WIC before 1914. Any determination by the Board must take into consideration the difficulty  
26 of this task given the lapse of over 100 years. The State Board has previously recognized this  
27 burden on pre-1914 water right holders and determined that it will consider evidence in the light  
28 most favorable to the pre1914 water right holder as follows: "For purposes of this order when

1 evaluating Cal-Am's claims, the evidence in the hearing record is considered in the light most  
2 favorable to Cal-Am due to the difficulty, at this date, of obtaining evidence that specific pre-1914  
3 appropriative claims of right were actually perfected and have been preserved by continuous use.”  
4 WR-95-10 p. 8. Such an evaluation of the evidence is appropriate in this proceeding regarding pre-  
5 1914 water rights.

6 In addition, WIC provided substantial evidence that riparian water rights exist within WIC  
7 service area for which WIC delivers. Based on this substantial evidence the issuance of a cease and  
8 desist order to WIC is improper and not supported by the evidence.

9 D. PROVISIONS OF THE DRAFT CDO ARE INDEPENDENTLY IMPROPER

10 Any provision within a CDO order cannot place any conditions on WIC's pre-1914 water right  
11 or any pre-1914 or riparian water right delivered by WIC. As discussed the Board has only limited  
12 authority over riparian and pre-1914 water rights. Thus the Board cannot place conditions on the  
13 recognized pre-1914 water right held by WIC. There is no authority for the Board to place any  
14 condition or regulation regarding measuring, monitoring or reporting of any valid pre-1914 or  
15 riparian water right, except as provided by Water Code sections 5100 et seq.. The draft CDO's  
16 condition 3 is improper. The draft CDO order requires monitoring and measuring devices of water  
17 usage by WIC. Such monitoring and measuring is not now required by law, but will be required  
18 after January 1, 2012. Wat. Code § 5103. Compliance with filing a yearly Statement of Diversion  
19 and Use is all that the Board may require regarding the pre-1914 and riparian water rights delivered  
20 by WIC.

21 **III. CONCLUSION**

22 WIC claims a pre-1914 water right and delivery of pre-1914 and riparian water rights.  
23 Substantial evidence demonstrated the existence of those rights and the draft CDO and Prosecution  
24 Team recognize WIC holds a pre-1914 water right. The Board is precluded from making any  
25 determinations regarding the validity, nature or extent of those rights within the instant CDO  
26 proceedings. The Board has not been granted authority by the Legislature to determine the validity,  
27



1 nature or extent of those alleged riparian and pre-1914 water rights, and therefore, cannot, as a  
2 matter of law, make such determinations.

3         The Board itself recognizes this limitation in its authority as indicated in its own publications  
4 and issued Water Rights Orders. (See Exhibit 1 to SJC Motion for Official Notice at p.7-8 [“The  
5 SWRCB does not have the authority to determine the validity of vested rights other than  
6 appropriative rights initiated December 19, 1914 or later”]; and SWRCB Decision 1379, p. 8 [“The  
7 Board does not have jurisdiction to adjudicate or determine the validity of individual vested water  
8 rights-this is a judicial function”].) While the Board does have some regulatory authority over  
9 public trust resources and water use which is considered unreasonable or wasteful, the pending CDO  
10 does not allege public trust impacts or unreasonable or wasteful use. The pending CDO issued  
11 pursuant to *Water Code* section 1831, based on an alleged violation of section 1052, which prohibits  
12 a diversion or use of water “subject to this division other than as authorized in this division.”  
13 However, diversions and use of water subject to Division 2 of the Water Code does not include  
14 water diverted pursuant to riparian and pre-1914 water rights.

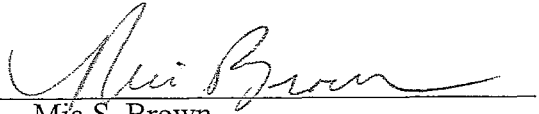
15         As indicated by the *Racanelli* decision “Because water rights possess indicia of property  
16 rights, water rights holders are entitled to judicial protection against infringement, e.g., actions for  
17 quiet title, nuisance, wrongful diversion or inverse condemnation.” (*United States v. State Water  
18 Res. Control Bd.*, *supra*, 182 Cal. App. 3d 82, 104.) Any dispute regarding WICs delivery of water  
19 rights held by WIC or the property owners within WIC and the use and enjoyment of these claimed  
20 property right-that is, their riparian and/or pre-1914 water rights, must be determined in a court of  
21 law, not by the Board. Any issuance of a CDO to WIC by the Board is a violation of the Board’s  
22 statutory authority and the due process and property rights of those who receive water from WIC.

23         Assuming the Board does issue a CDO regarding WIC pre-1914 water rights and the pre-  
24 1914 and riparian water rights delivered by WIC, substantial evidence in was presented by WIC that  
25 supports WIC pre-1914 water right in the amount of the current diversions and the service of riparian  
26 water rights to property within the WIC service area. A CDO to WIC should not be issued by the  
27 Board.

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Dated: August 18, 2010

NEUMILLER & BEARDSLEE  
A PROFESSIONAL CORPORATION

By:   
Mia S. Brown  
Attorney for  
County of San Joaquin and  
San Joaquin County Flood Control and  
Water Conservation District

1 **PROOF OF SERVICE**  
2 **CCP 1013a**

3 I am a resident of the State of California, over the age of eighteen years, and not a party to  
4 the within action. My business address is 509 W. Weber Avenue, Stockton, California 95203. On  
5 August 18, 2010, I served the within documents:

6 **CLOSING BRIEF OF COUNTY OF SAN JOAQUIN AND SAN JOAQUIN COUNTY**  
7 **FLOOD CONTROL AND WATER CONSERVATION DISTRICT**

- 8  **(BY U.S. MAIL)** I am readily familiar with the firm's practice of collection and  
9 processing correspondence for mailing. Under that practice it would be deposited with  
10 the U.S. Postal Service on that same day with postage thereon fully prepaid in the  
11 ordinary course of business. I am aware that on motion of the party served, service is  
12 presumed invalid if postal cancellation date or postage meter date is more than on day  
13 after the date of deposit for mailing in affidavit.
- 14  **(BY PERSONAL SERVICE)** I delivered such envelope by hand to the address(es)  
15 shown below.
- 16  **(BY ELECTRONIC MAIL)** I caused a true and correct scanned image (.PDF file) copy  
17 to be transmitted via the electronic mail transfer system in place at Neumiller &  
18 Beardslee, originating from the undersigned at 509 W. Weber Avenue, 5th Floor,  
19 Stockton, California, to the email address(es) indicated in the attached Service List of  
20 Participants.
- 21  **(BY OVERNIGHT DELIVERY)** I enclosed the documents in an envelope or package  
22 designated by an overnight delivery carrier and addressed to the persons at the addresses  
23 stated below. I placed the envelope or package for collection and overnight delivery at an  
24 office or a regularly utilized drop box of the overnight delivery carrier, or with a courier  
25 or driver authorized by the overnight delivery carrier to receive documents.

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

28 Executed this 18th day of August 2010, at Stockton, California.

  
\_\_\_\_\_  
ELVIA C. TRUJILLO

**WOODS IRRIGATION COMPANY CDO HEARING  
SERVICE LIST  
(VIA ELECTRONIC MAIL)**

<p>DIVISION OF WATER RIGHTS PROSECUTION TEAM c/o David Rose State Water Resources Control Board 1001 I Street Sacramento, CA 95814 <a href="mailto:DRose@waterboards.ca.gov">DRose@waterboards.ca.gov</a></p>	<p>WOODS IRRIGATION COMPANY c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p> <p>c/o Dean Ruiz, Esq. Harris, Perisho &amp; Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <a href="mailto:dean@hpllp.com">dean@hpllp.com</a></p> <p>c/o Dennis Donald Geiger, Esq. 311 East Main Street, Suite 400 Stockton, CA 95202 <a href="mailto:dgeiger@bqm.com">dgeiger@bqm.com</a></p>
<p>SOUTH DELTA WATER AGENCY c/o John Herrick Attorney at Law 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a></p> <p>c/o Dean Ruiz, Esq. Harris, Perisho &amp; Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <a href="mailto:dean@hpllp.com">dean@hpllp.com</a></p>	<p>CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho &amp; Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <a href="mailto:dean@hpllp.com">dean@hpllp.com</a></p>
<p>SAN LUIS &amp; DELTA-MENDOTA WATER AUTHORITY c/o Jon D. Rubin diepenbrock+harrison 400 Capitol Mall, Suite 1800, Sacramento, California 95814 <a href="mailto:jrubin@diepenbrock.com">jrubin@diepenbrock.com</a></p>	<p>MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin Ken Petruzzelli O'Laughlin &amp; Paris LLP 117 Meyers St., Suite 110 P.O. Box 9259 Chico, CA 95927-9259 <a href="mailto:towater@olaughlinparis.com">towater@olaughlinparis.com</a> <a href="mailto:kpetruzzelli@olaughlinparis.com">kpetruzzelli@olaughlinparis.com</a></p>
<p>SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD CONTROL &amp; WATER CONSERVATION DISTRICT c/o DeeAnne M. Gillick Neumiller &amp; Beardslee P.O. Box 20 Stockton, CA 95201-3020 <a href="mailto:dgillick@neumiller.com">dgillick@neumiller.com</a> <a href="mailto:mbrown@neumiller.com">mbrown@neumiller.com</a></p>	<p>STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moskovitz, Tiedemann &amp; Girard 400 Capitol Mall, 27<sup>th</sup> Floor Sacramento, CA 95814 <a href="mailto:spowell@kmtg.com">spowell@kmtg.com</a></p>
<p>SAN JOAQUIN FARM BUREAU c/o Bruce Blodgett 3290 North Ad Art Road Stockton, CA 95215-2296 <a href="mailto:director@sifb.org">director@sifb.org</a></p>	