

1 **DEAN RUIZ - SBN #213515**
2 Harris, Perisho & Ruiz
3 3439 Brookside Road, Suite 210
4 Stockton, CA 95219
5 Telephone: (209) 957-4254
6 Facsimile: (209) 957-5338
7 E-mail: dean@hp LLP.com

8 Attorneys for SOUTH DELTA WATER AGENCY
9 and CENTRAL DELTA WATER AGENCY

10 **JOHN HERRICK - SBN 139125**
11 Law Office of John Herrick
12 4255 Pacific Avenue, Suite 2
13 Stockton, California 95207
14 Telephone: (209) 956-0150
15 Facsimile: (209) 956-0154

16 Attorneys for WOODS IRRIGATION COMPANY

17 **BEFORE THE CALIFORNIA**

18 **STATE WATER RESOURCES CONTROL BOARD**

19 In the Matter of Draft Cease and Desist) **OPPOSITION TO MOTION FOR**
20 Order No. 2009-00XX-DWR Enforcement) **ISSUANCE OF CEASE AND DESIST**
21 Action 73 Against Woods Irrigation) **ORDER BASED ON ADMISSION**
22 Company)
23)
24)
25)
26)

27 **I**

28 **INTRODUCTION**

CENTRAL DELTA WATER AGENCY, SOUTH DELTA WATER AGENCY, and
WOODS IRRIGATION COMPANY ("CDWA", "SDWA", and "WIC") herein oppose the
Motion for Issuance of Cease and Desist Order Based on Admission recently filed by the MSS
Parties.

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II

ARGUMENT

THE MOTION IS PROCEDURALLY IMPROPER

The hearing officers did not invite reply briefs or additional pleadings subsequent to the submission of the closing briefs on August 18, 2010. The MSS Parties' motion is a blatant attempt to submit a reply brief under the guise of a post closing brief motion for issuance. As such, the motion must be denied and stricken from the administrative record.

The MSS Parties assert that the Joint Closing Brief filed by WIC, CDWA, and SDWA includes an admission that WIC has not been appropriating water under its own pre-1914 water rights. (See, MSS Motion at pg. 1, lines 7-9). The MSS motion improperly argues that riparian and appropriative rights are mutually exclusive under California Water Law. As set forth below, MSS Parties are incorrect.

However, prior to reaching the merits of this issue, the supposed admission contained in the Joint Closing Brief filed by WIC, CDWA, and SDWA was previously submitted by CDWA and SDWA, in its written opposition to the Modesto Irrigation District's ("MID") unsuccessful motion in limine which argued that WIC was estopped from asserting its own water rights based on the case of Woods Irrigation Company vs. The Department of Employment, (1958) 50 Cal.2d 174. The opposition filed by CDWA and SDWA, which was joined by WIC, properly summarized the obvious focus of the court in that case by stating:

"It is quite obvious that the testimony in WIC vs. Department of Employment was focused on the fact WIC was delivering the riparian water of those being served through common facilities. The fact that such delivery also establishes a pre-1914 right was not at issue in the case." (See, CDWA, SDWA's Opposition to Motion In Limine at pg. 3, lines 17-20 which was filed on July 2, 2010.)

In their Joint Closing Brief, WIC, CDWA, and SDWA used the exact language, in making the same argument made in their written opposition to the motion in limine with the simple addition of a footnote (FN 6) which simply referenced the discussion within the brief regarding the ability of WIC to hold multiple water rights. (See, Joint Closing Brief at p. 20, line 22-25). Clearly, the MSS Parties are improperly attempting to argue an issue which has no merit and which should have been addressed in their closing brief.

1 **CONTRARY TO THE ASSERTION BY THE MSS PARTIES RIPARIAN AND**
2 **APPROPRIATIVE RIGHTS ARE NOT MUTUALLY EXCLUSIVE**

3 The MSS Parties misconstrue the case of Rindge v. Craggs Land Co., (1922) 56 Cal.App.
4 247 as supporting the proposition that riparian and appropriative rights are mutually exclusive.

5 The Appellate Court in the Rindge case at page 252 clearly confirmed:

6 “It is established in California that a person may be possessed of
7 rights as to the use of the waters in a stream both because of the
8 riparian character of the land owned by him and also as an
9 appropriator.” (emphasis added)

10 The court expressed further that:

11 “An appropriator can gain nothing as against riparian rights which
12 have attached, and, once such rights have become affixed, they
13 continue and are not lost, regardless of whether the water has been
14 put to any beneficial use upon the land; the right is one continually
15 and perpetually appurtenant. There would remain, then subject to
16 appropriation, only the excess water over and above what might
17 reasonably be subjected to a beneficial use by the lands bordering
18 the stream.”

19 In the case of WIC the appropriative right is of course junior to the
20 riparian rights of the landowners sharing the same water supply and WIC does not
21 hold any riparian rights.

22 In the Rindge case the appropriative right on the part of Rindge was established while the
23 subject riparian property (which was later acquired by Rindge) was still owned by the United
24 States government. Due to acts of Congress grants of public lands were made subject to all
25 water rights that may have previously accrued to any person other than the grantee. Although
26 not referenced in the opinion, the acts of Congress of 1866 and 1870 appear to be applicable only
27 to United States grants after such acts. See Lux v. Haggin (1886) 69 Ca. 255, 372.

28 The trial court established that Rindge and her predecessors made an appropriation prior
to the United State conveyance of 4.95 inches of continuous water flow based on beneficial use
from a point of diversion which was changed on two occasions.

The trial court, however, erroneously concluded that Rindge could not claim both as

1 riparian owner and as an appropriator and apportioned the flow of the stream among the riparians
2 including Rindge. The Appellate Court vacated the trial court decision in this respect and
3 directed the trial court to amend its conclusions of law and judgment to provide that:

4 “May K. Rindge was entitled to take water from Malibu Creek
5 4.95 inches of continuous flow; that this appropriated water should
6 be deducted from the proportion assigned to the defendant Craggs
7 Land Company for riparian uses. This would require a
8 readjustment of the proportions in which the parties would be
9 entitled to share in the remaining water. In other words, the
10 judgment should be that the land of Craggs Company, by reason of
11 the prior appropriation by May K. Rindge, has had its riparian right
12 to waters flowing into Malibu Creek diminished by the amount of
13 that appropriation, while the riparian rights of the plaintiffs are not
14 diminished at all on account thereof. . . .” (Rindge v. Craggs Land
15 Co., supra, Pages 253 and 254) (emphasis added)

16 In the case of WIC the appropriative right is not prior to the United States conveyance
17 and therefore is junior to the riparian rights of landowners sharing the same waters. It is,
18 however, additive to the riparian right of any user subject of course to the limitation of
19 reasonable beneficial use. WIC is not a riparian right holder and simply qualifies as a pre-1914
20 appropriator. The additional rights resulting from establishing pre-1914 use even by riparians
21 include among other rights the transferability for use of non-riparian parcels and the clear
22 applicability to waters other than “natural flow”.

23 Pre-1914 appropriative rights and riparian rights are clearly not mutually exclusive. The
24 qualification is that the total water under the combined rights can not amount to more than is
25 reasonably necessary to satisfy the necessary uses to which it is designed to be put. Rindge v.
26 Craggs, supra Page 253.

27 As contended by the MSS Parties, “Woods Brothers” began construction on a gravity
28 flow irrigation system on Middle River in 1898 and that irrigation would commence in March of
1899 unless it rained. (See MSS R.14 top of page 22) John Newton Woods and E.W.S. Woods
were commonly referred to as Woods Brothers. The record is also clear that they were farmers
trying to raise crops with irrigation. Their farm on Robert’s Island grew in time to about 12,000
acres. (See WIC 8-J History of San Joaquin County excerpt page 348)

1 Pre-1914 appropriations are recognized as developing over time and there is no evidence
2 in the record to show that the claimed pre-1914 appropriative rights when combined with the
3 riparian rights of the lands served exceeded the amount of water reasonably necessary to satisfy
4 the necessary uses on the lands of John Newton Woods and E.W.S. Woods and those lands
5 otherwise connected to the Woods Irrigation Company (WIC) systems.

6 WIC was formed in 1909 and commenced operation and control of portions of the
7 "Woods Brothers" irrigation system shortly thereafter. WIC did not own the land served and
8 was not assigned the riparian rights. Their delivery of riparian water for others does not detract
9 from their establishing an appropriative right to serve the same or additional acreage provided
10 that the combined amounts do not exceed the amount of water reasonably necessary to satisfy the
11 necessary uses intended to be served.

12 **WATER CODE SECTION 1201 DOES NOT APPLY TO PRE-1914**
13 **APPROPRIATIONS AND DOES NOT ADDRESS MUTUAL EXCLUSION**

14 The MSS Parties cite Water Code Section 1201 as support for its erroneous argument that
15 riparian and appropriative rights are mutually exclusive. First, Water Code Section 1201 is not
16 applicable to pre-1914 appropriations, but rather to appropriations administered by the State
17 Water Resources Control Board and its predecessors. Second, the section does not address
18 mutual exclusion, but simply defines as public the water subject to appropriation through what is
19 now the SWRCB process. Water needed for useful and beneficial purposes upon lands riparian
20 thereto or otherwise the subject of pre-1914 appropriation is not to be subject to the
21 appropriations administered by the SWRCB.

22 **II**
23 **CONCLUSION**

24 For the reasons set forth above, the Motion for Issuance of a Cease and Desist Order is
25 procedurally improper and substantially incorrect. Thus, the motion should be denied and struck
26 from the administrative record.

27 DATED: September 3, 2010

HARRIS, PERISHO & RUIZ

28 BY  _____
DEAN RUIZ

3 **CERTIFICATE OF SERVICE**

4 I am employed in the County of San Joaquin, State of California, over the age of eighteen
5 years, and not a party to the within action. My business address is Harris, Perisho & Ruiz, 3439
6 Brookside Road, Suite 210, Stockton, California 95219.

7 On, September 3, 2010, I served the following document(s) described as:

8 **OPPOSITION TO MOTION FOR ISSUANCE OF CEASE AND DESIST ORDER**
9 **BASED ON ADMISSION**

10 (BY MAIL) by placing the original a true copy thereof enclosed in sealed
11 envelopes for collection and mailing with the United States Postal Service that same day
12 in the ordinary course of business. I am aware that on motion of party served, service is
13 presumed invalid if postal cancellation date or postage meter date is more than 1 day after
date of deposit for mailing in affidavit.

14 (BY CERTIFIED MAIL)
15 Certified Mail Receipt No. _____ (attached)/Return Receipt Requested

16 (BY FACSIMILE) I transmitted from a facsimile transmission machine whose telephone
17 number is (209) 957-4254 the following documents described above. The above-
18 described transmission was reported as complete without error by a transmission report
19 issued by the facsimile transmission machine upon which the said transmission was made
immediately following the transmission. A true and correct copy of the said transmission
report is attached hereto and incorporated herein by this reference.

20 (BY OVERNIGHT DELIVERY)
21 Depositing originals/copies of the above documents in a box or other facility regularly
22 maintained by Federal Express, or UPS, in an envelope or package designated by
 Federal Express or UPS with delivery fees paid or provided for.

23 (BY PERSONAL SERVICE) (as indicated below)
24 process server courier service

25 (BY ELECTRONIC MAIL)
26 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the
27 electronic mail transfer system in place at Harris, Perisho & Ruiz, originating from the
undersigned at 3439 Brookside Road, Suite 210, Stockton, California, to the address(es)
28 indicated below.

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To the interested parties and/or their counsel addressed as follows:

MODESTO IRRIGATION DISTRICT

Tim O'Laughlin
O'Laughlin & Paris LLP
PO Box 9259
Chico, CA 92927
towater@olaughlinparis.com
kpetruzzelli@olaughlinparis.com

SAN JOAQUIN FARM BUREAU

c/o Bruce Blodgett
3290 North Ad Art Road
Stockton, CA 95215-2296
director@sjfb.org

**THE SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY**

Jon D. Rubin / Valerie C. Kincaid
Diepenbrock Harrison
400 Capitol Mall, 18th Flr.
Sacramento, CA 95814
jrubin@diepenbrock.com
vkincaid@diepenbrock.com

**SAN JOAQUIN COUNTY AND THE
SAN JOAQUIN COUNTY FLOOD
CONTROL & WATER
CONSERVATION DISTRICT**

c/o DeeAnne M. Gillick
Neumiller & Beardslee
PO Box 20
Stockton, CA 95201-3020
dgillick@neumiller.com
mbrown@neumiller.com

**DIVISION OF WATER RIGHTS
PROSECUTION TEAM**

David Rose
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
drose@waterboards.ca.gov

STATE WATER CONTRACTORS

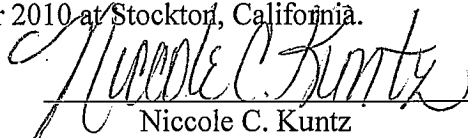
Stanley C. Powell
Kronick, Moscovitz, Tiedermann & Girard
400 Capitol Mall, 27th Flr.
Sacramento, CA 95814
spowell@kmtg.com

STATE WATER RESOURCES CONTROL BOARD

Jeannie Townsend
PO Box 100
Sacramento CA 95812-0100
jtownsend@waterboards.ca.gov

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

Executed this 3rd day of September 2010 at Stockton, California.



Niccole C. Kuntz