

1 **JOHN HERRICK, ESQ., SBN 139125**
Attorney at Law
2 4255 Pacific Avenue, Suite 2
Stockton, CA 95207
3 Telephone: (209) 956-0150
Fax: (209) 956-0154
4 E-mail: jherrlaw@aol.com

5 Attorney for WOODS IRRIGATION COMPANY

6 **DEAN RUIZ - SBN #213515**
Harris, Perisho & Ruiz
7 3439 Brookside Road, Suite 210
Stockton, CA 95219
8 Telephone: (209) 957-4254
Facsimile: (209) 957-5338
9 E-mail: dean@hpllp.com

10 Attorneys for SOUTH DELTA WATER AGENCY
and CENTRAL DELTA WATER AGENCY
11

12
13 **STATE OF CALIFORNIA**
14 **STATE WATER RESOURCES CONTROL BOARD**

15 In the Matter of Draft Cease and Desist) **REQUEST FOR RECONSIDERATION**
16 Order Against Unauthorized Diversions by) **WR 2011-0005**
Woods Irrigation Company)
17 WR 2011-0005)
18 _____)

19 Woods Irrigation Company, South Delta Water Agency, Central Delta Water Agency
20 (“Petitioners”) herein request that the State Water Resources Control Board reconsider its Order
21 WR 2011-0005 (“Order”), and pray for the relief set forth below. This Request for
22 Reconsideration is based on the Memorandum of Points and Authorities in support
23 hereof, the declaration of John Herrick, the hearing record, and such other evidence and
24 argument to be presented at the hearing on this request.

25 **1. The Name and Address of the Petitioner.**

26 The Petitioners are the Woods Irrigation Company (“WIC”), whose address is 311 East
27 Main Street, 400 Bank of Stockton Bldg., Stockton, CA 95202, South Delta Water Agency
28 (“SDWA), whose is address is 4255 Pacific Avenue, Suite 2, Stockton, CA 95207, and Central

1 Delta Water Agency whose address is 235 East Weber Ave., Stockton, CA 95202, collectively
2 hereinafter referred to as (“Petitioners”).

3 **2. The Specific Board Action of Which Petitioner Request Reconsideration.**

4 Petitioners request that Order WR 2011-0005, the (“Order”) be set aside, vacated, and
5 amended as set forth in the Memorandum of Points and Authorities in support hereof.

6 **3. The Date on Which the Order was Made by the Board.**

7 WR 2011-0005 was adopted by the Board on February 1, 2011.

8 **4. The Reason the Action Was Inappropriate or Improper.**

9 Petitioners assert that 1) the Order is not supported by substantial evidence; 2) the Board
10 has committed an error of law in adopting the Order; 3) there is relevant evidence that was
11 incapable of being evaluated by the Board and relevant evidence that could not have been
12 produced with the exercise of reasonable diligence that the Board should consider before
13 rendering its decision; and 4) Petitioners were prevented from receiving a fair hearing due to
14 irregularities in the proceedings. More specifically, Petitioners assert:

- 15 a. There are numerous exhibits which are part of the hearing record which
16 are unreadable and which necessarily needed to be fully evaluated as part
17 of the Board’s deliberation in issuing the Order;
- 18 b. The Atwater Map (Exhibit 8L) was not properly considered by the Board
19 because it incorrectly determined that it was not part of the hearing record
20 the subsequently acknowledged that it was in fact part of the
21 administrative record without considering the weight of same before
22 rendering its decision;
- 23 c. WIC Exhibit 2K was not properly considered by the Board due to a
24 confusion in the colors on the map.
- 25 d. Many additional exhibits, including assessor’s maps, were ultimately
26 unreadable once included in the hearing record;
- 27 e. The Board violated the due process rights of certain landowners within the
28 WIC service area by issuing an order which directly affects them and who

1 were not parties to the proceedings;

2 f. The Board did not view the evidence with respect to the existence of pre-
3 1914 rights in the light most favorable to WIC which is inconsistent with
4 the Cal-Am directive as part of WR 95-10;

5 g. The hearing officers were Boards Member Spivey Weber and Board
6 Member Petit. Board member Petit was present for the entire proceeding
7 and served as the hearing officer, but was no longer a member of the
8 Board when the evidence was considered and the decision was rendered.
9 Board member Francis Spivey Weber was not present during the majority
10 of the proceedings and was, thus, left to view the transcripts and the
11 hearing record, some of which is unreadable. Moreover, Board Member
12 Spivey Weber's absence from the proceedings did not provide her with the
13 benefit of hearing the evidence first hand and fully accessing the
14 credibility of the witnesses;

15 h. The Order improperly includes findings with regard to the existence of
16 riparian rights belonging to landowners who were not parties to the
17 proceedings.

18 i. The Gaul case presents new evidence which could not have reasonably
19 been produced at the time of the hearing;

20 j. The Board lacks the authority to determine the validity of Pre-1914
21 riparian water rights through the subject CDO proceedings.

22 **5. The Specific Action Which WIC Requests.**

23 Petitioners herein request that the Board set aside, vacate and rescind WR 2011-0005 and
24 reopen the hearing to include all effected parties, to examine the evidence in the hearing record
25 which is unreadable, examine the new evidence, and view the existing readable evidence in a
26 light most favorable to WIC as directed by the WR 95-10 ("Cal-Am"), or in the alternative, strike
27 portions of the Order regarding riparian water rights.

28

1 6. **A Statement That Copies of the Petition and Accompanying Materials Have**
2 **been Sent to All Interested Parties.**

3 Petitioners herein are providing electronic copies of the Request for Reconsideration to
4 all those parties that participated in the hearing as indicated on the attached service list.

5 **POINTS AND AUTHORITIES**

6 **I. STANDARD OF REVIEW FOR MOTION FOR RECONSIDERATION**

7 An interested party may petition the State Board for reconsideration of a decision or order
8 based on the following grounds: (1) irregularity in the proceedings, or any ruling, or abuse of
9 discretion, by which the person was prevented from having a fair hearing; (2) the decision or
10 order is not supported by substantial evidence; (3) there is relevant evidence, which in exercise of
11 reasonable diligence, could not have been produced; and (4) error in law. Cal. Code Regs., Title
12 23, § 768.

13 WIC asserts that the SWRCB Order WR 2011-0005 constitutes an error in law, and is
14 not supported by substantial evidence. Further, the actions herein alleged also constitute an
15 abuse of discretion, and that relevant information was available to the Board, but not reviewed or
16 submitted due to the expedited process which resulted in the Order.

17 **II. STATEMENT OF FACTS**

18 **BACKGROUND**

19 The SWRCB embarked upon a process to investigate the water rights in the southern
20 Delta based upon a report submitted by parties to this proceeding. That Report, authored by the
21 main expert witness of the MSS parties alleged that vast areas of the southern Delta had no
22 discernable water rights, including the 6000+ acres within WIC's service area. Unfortunately for
23 WIC, a company created in 1909 to provide water to 8000+ acres, that same author/witness was
24 unaware at the time of the existence of the Company. After contacting WIC and requesting it
25 "prove" its water rights, the SWRCB issued a draft CDO which alleged WIC's rights were
26 limited to a maximum diversion rate of 77.7 cfs. A one time measurement of the WIC diversion
27 indicated a rate of 90 cfs was being made.

28

1 A hearing was requested and over numerous days in the spring and summer of 2010 the
2 Prosecution Team, WIC, the MSS parties and others put on evidence and conducted cross
3 examination of witnesses. No landowners within WIC were given notice or participated in the
4 hearing. The final CDO, or Order adopted no factual or legal arguments asserted by WIC, but
5 did find support for a pre-1914 right to divert water at the rate of 77.7 cfs. The Order did
6 recognize that certain lands had retained a riparian right, but them failed to adequately
7 differentiate between the pre-1914 rights and the riparian rights by limiting the rate of diversion
8 regardless of riparian requests or needs.

9 **III. ARGUMENT**

10 **A. IRREGULARITIES IN THE PROCEEDING**

11 1. The final Order in this matter failed to take into consideration evidence that was
12 presented during the hearing, and improperly excluded certain relevant evidence. Both constitute
13 an irregularity which should be corrected before the Board renders any final decision on this
14 matter.

15 In its decision the Board examines the issue of Duck Slough, which was asserted to be a
16 source of riparian rights for lands within the WIC service area. At section 4.4.7.1 of the Order
17 the Board finds insufficient evidence for such assertion. In its analysis in the December 14, 2010
18 draft decision, the Board states on page 51 in footnote 16, that certain "Atwater" maps were not
19 submitted into or are part of the hearing record. After WIC submitted comments noting the
20 footnote was incorrect and that the exhibit had indeed been submitted into evidence as WIC
21 Exhibit 8L, the Board merely removed the footnote without then considering the evidentiary
22 weight of exhibit 8L relative to WIC's riparian claims. The draft Order of December 14, 2010
23 suggested that the absence of Exhibit 8L weighed against the Board adopting the conclusions by
24 the WIC expert witnesses, but when its was noted the evidence was indeed part of the record, the
25 author(s) of the final Order still gave no weight to this evidence in the weighing of the WIC
26 experts' opinions. The reasoning in the Order simply fails to take into account all of the
27 evidence which was presented.

28 2. Similarly, the same footnote states that the author(s) of the decision are confused

1 as to the colorings on Exhibit WIC-2K, a map presented by Mr. Moore which contained
2 information from Mr. LaJoie and the Atwater maps (see WIC Exhibit 2 and attachments, Exhibit
3 8L) . (Mr. Moore's testimony and exhibits were in part based on work done by Mr. LaJoie
4 whose work identified historic sloughs in the area; the Atwater map was from a USGS series of
5 maps depicting the geology of the Sacramento-San Joaquin Delta) The draft Order's author(s)
6 thus concluded that, based in part upon the confusion of colorings on WIC-2K, the evidence
7 presented does not support Duck Slough connecting with Middle River. If the Board is confused
8 as to the notations or colorings on the maps and thus cannot interpret the Exhibits, it should not
9 decide the evidence is insufficient, rather it should reopen the hearing to make sure it considers
10 all relevant evidence which is before it prior to rendering any final ruling. Fully considering
11 these two pieces of evidence would reasonably allow the Board to reach a different conclusion
12 regarding the existence of Duck Slough; it should not result in the Board determining it does not
13 know if Duck Slough connected to Middle River (as indeed shown by the Atwater map, Exhibit
14 8L) or if Duck Slough conferred riparian rights to relevant lands.

15 3. Further, this confusion on the part of the author(s) of the Order highlights another
16 reason to re-open the hearing. It is clear from an examination of WIC-8L that the documents
17 scanned and in the record are not a satisfactory basis for any review by the parties, the SWRCB
18 or a court. WIC-2K contains numerous fine dashed and dotted lines and arrows which show the
19 existence of waterways and channels as of 1850 and the direction of flow. Attached hereto are
20 two blow-ups of the map in that exhibit; one from a 2'x3' (approximate) map and one from the
21 scanned exhibit currently in the SWRCB record. As can be seen, the current hearing record does
22 not show the circled "arrow" which can be seen in the larger version. Since such arrows denote
23 the direction of flow in the waterway, it is clear the evidence in the record is insufficient for
24 review by the Board, and for review on appeal.

25 4. This becomes important in that one of the hearing officers to the WIC proceeding
26 is no longer on the Board and the other was unable to attend many of the hearing days due to
27 illness. This means that the remaining hearing officers and the non-participating Board members
28 were forced to base their decision on the video tapes and the scanned record; a record which is

1 sometimes unreadable, with very little ability to judge the credibility of witnesses.

2 5. A review of the remainder of the hearing record reveals other similar problems.
3 The testimony of Chris Neudeck (WIC Exhibit 4) referred to an incorporated numerous San
4 Joaquin County Assessor maps as part of WIC Exhibit 4A, all of which contained relevant and
5 important information supporting WIC's claims. However, as contained in the hearing record,
6 all of these maps are unreadable in most instances. Moreover, several of the deeds which are part
7 of WIC Exhibit 4A also ended up being unreadable once included as part of the hearing record.
8 Similarly, Exhibit 4C is a highly relevant exhibit to Mr. Neudeck's testimony in that it contains a
9 1919 map assessor's map showing the location of the Nelson, Robinson and Vasquez properties.
10 Unfortunaltely, though not as illegible as other exhibits, it too ended up being of very poor quality
11 when reproduced as part of the hearing record such that important portions of same cannot be
12 discerned. A review of the record from the SWRCB webpage indicates the following exhibits
13 are illegible or only partially legible: Exhibit 4A Testimony of Christopher Neudeck Exhibits its
14 3B, 3C, 3D, 3E, 3F, 3H, 3I, 3L, 3N, 3U; MSS-R-14 Rebuttal Testimony of Stephen R. Wee
15 containing Exhibits WIC 7, WIC 7L, WIC 8D; MSS-R-14A Rebuttal Testimony of Stephen R.
16 Wee containing Exhibit 12, 17, 17A, 17B, 19A, 38, 39, 40, 42, and 54

17 6. This leads to a separate irregularity in the proceedings evidenced by the Order
18 denying the WIC request to incorporate evidence from the other concurrent hearings into the
19 WIC record and excluding evidence submitted in the Term 91 hearing decided in 2007. The
20 former dealt with evidence from the Mussi, et. al., Dunkel and Pak and Young hearings.
21 Regardless of the reasoning in the final Order, there is no doubt that information presented in all
22 these hearings are related and go to the same factual issues before the Board. As the final Order
23 clearly states (page 59), the attorney for MID was to coordinate with the other parties and
24 develop a stipulation regarding the incorporation of similar evidence and testimony into all
25 hearings. His failure to do so resulted in the Board denying the WIC requests. Whether this is
26 fair or whether WIC was the victim of some MSS parties' strategy is generally irrelevant. The
27
28

1 Mussi et. al. hearings included evidence which directly related to the existence of Duck Slough.¹
2 For the Board to consider some of the evidence relating to Duck Slough presented on one day
3 (and cross-examined by all the same parties) yet ignore the existence of other Duck Slough
4 evidence on another day is bad policy, and could result in inconsistent factual determinations. If
5 the Board will not consider the other hearings evidence, it is in fact deciding to make a decision
6 knowing that all the evidence is not before it.

7 7. The Order on pages 59-60 also excluded certain evidence from the Term 91
8 hearings decided 2007 which was attached to WIC 4A as 3V. The Order mis-characterizes the
9 events surrounding the Hearing Officer's ruling. However, the important issue is that testimony
10 presented to all parties and the Board has been excluded as "irrelevant." The decision is based
11 upon the Board's position that it made a previous ruling rescinding whether a groundwater
12 connection to surrounding surface water can constitute a riparian right to land over the former but
13 no touching the latter. First, the previous ruling on the legal issues/conclusions has nothing to do
14 with the relevancy of the evidence. Nothing in the Evidence Code or the SWRCB regulations
15 precludes a party (unrelated to the parties in the prior proceeding) from giving evidence regarding
16 the factual conditions of the property which is the subject of the hearing based on a theory that
17 WIC may later argue a legal position not favored by the Board. Second, the excluded testimony
18 is the factual foundation on which WIC argued that interior island channels will "naturally" fill
19 with water, and as such would confer riparian status on abutting lands just as an interior island
20 lake would. These factual relationships are the basis for the determination of riparian rights to
21 lands notwithstanding any prior decision in the Term 91 hearing. In fact, the evidence excluded
22 consists of both testimony and a DWR report; each of which are subject to judicial notice by the
23 Board. To exclude it is both an error in law and an irregularity in the proceeding.

24 All of the above argue for, and WIC requests, that the hearing be re-opened to make sure
25 that all relevant evidence is before the Board and that the record is clear and readable. As it now

26
27 ¹ Mussi et. al. hearing included Mussi Exhibits 30 and 40 which were a State Engineer's
28 map and a (predecessor to the) Corps' map, each of which showed that Duck Slough was longer,
and existed well past the time the MSS Parties' witness testified.

1 stands under the final Order, the Board is rendering a decision based on an artificially limited
2 record which precludes a reasoned evaluation of the relevant facts.

3 **B. NOT SUPPORTED BY THE EVIDENCE**

4 1. The final Order precludes WIC from diverting “water in excess of 77.7 cfs at any
5 time . . .” absent compliance with the other conditions in the Order. Per the Board
6 workshops/meetings held in January and February of 2011 to consider the draft Order, this rate of
7 diversion is a maximum instantaneous diversion rate. This limitation is not supported by any
8 information in the hearing record, and in fact is contradicted by the only relevant evidence on the
9 topic (see WIC-8, and especially rebuttal testimony and exhibits at RT Vol.IV, pages 1031
10 et.seq.). First, the clarification of whether this rate was a maximum rate or an average rate was
11 discussed and resolved by questions from Board members to their own staff during the
12 workshop, with no other parties able to question said staff. Staff were not under oath, were
13 giving opinions rather than evidence, and were not referring to evidence in the record. As stated
14 by staff, all other permits and licenses contain averaging limitations which take into account the
15 variables associated with most all water needs. For example, agricultural demand varies such
16 that diversion needs are episodic and not constant. Thus a license for agricultural diversion
17 allows for a 30 day average. Since the WIC diversions are exclusively for agricultural use, their
18 needs too are episodic and they too should have a 30 day average. No evidence was put in the
19 record by the Prosecution Team or the MSS parties which went to this issue. Second, WIC put in
20 evidence which showed that as the tides in Middle River fluctuate and the rate of diversion
21 changes through the pumps (see RT Vol. IV pages 1034 et.seq.). The final Order’s instantaneous
22 limitation effectively means WIC can never divert at its full rate because it would have to
23 constantly operate the diversions and adjust for tidal changes. Such are not the limitations on any
24 other pre-1914 diverter or any permittee or licensee and should not be placed exclusively on
25 WIC.

26 **C. CONTRARY TO LAW**

27 1. As set forth at length in WIC’s Closing Brief and its comments to the draft Order,
28 the final Order specifically and directly impairs the property rights of parties who were not

1 noticed for the proceeding and did not appear at the hearings. As an example, the Order states
2 “Before diverting at a rate greater than 77.7 cfs, Woods shall demonstrate to the satisfaction of
3 the Deputy Director that such a rate increase is either due to increased reasonable demand on
4 riparian lands identified as Parcel 2 on Exhibit MSS-R-14, exh, 7A ...” Hence, a riparian diverter
5 within the WIC service area cannot receive as much water as it deems necessary without
6 approval by the Deputy Director. It is beyond doubt that this limits a recognized riparian within
7 the WIC service area from receiving all the water to which he is entitled under his water right.
8 The Board is without authority to determine a diversion rate limit when the lands served by that
9 rate include riparian ones.

10 2. As stated in WIC’s closing brief, in Order No. WR95-10 California-American
11 Water Company, (“Cal-Am”), the Board provided as follows:

12 “For purposes of this order in evaluating Cal-Am’s claims, the evidence in the
13 hearing record is considered in the light most favorable to Cal-Am due to the
14 difficulty, at this date, of obtaining evidence that specific pre-1914 appropriative
claims of right were actually perfected and have been preserved by continuous
use.” Order No. WR95-10, page 17.

15 The policy stated in the Cal-Am case is a reasonable one in that the evidence surrounding events
16 100 years or more ago is difficult sometimes to locate, or has been lost. Thus, interpreting the
17 evidence in a light most favorable to those asserting a right which arose nearly 100 years ago is
18 appropriate. In addressing the Cal-Am policy in the final Order, the Board reasons Cal-Am does
19 not require any finding on behalf of WIC, and that it still must review all the evidence and
20 determine what is reliable and what is not (Order at pages 29-30). However, in the WIC hearing,
21 the Board makes *no* findings which are in agreement with the facts and arguments presented by
22 WIC. The final Order is written as if the entire collection of evidence submitted by WIC is
23 unreliable; all of it. Hence, it is an error in law when the Board interprets all of WIC’s evidence
24 but finds none of it reliable. A brief listing is appropriate.

25 WIC asserted via experts Moore, Nomellini, Neudeck and Blake (see Exhibits WIC-2, 4,
26 4A, 6 and 8) that historic channels went through much of the Woods lands, and identified which
27 channels matched up with identified irrigation and drainage channels before and after 1914. The
28 testimony included the general practices of the time (using these historic features for irrigation),

1 and included descriptions of how these channels, because of their depth and the relation to
2 shallow underground water, would (and do) naturally fill and that water flowed down hill. These
3 facts supported the argument that the lands of WIC abutted natural streams (or lakes) and thus
4 conferred riparian status to abutting lands or, were indications of the landowners intent to
5 preserve the ability to get water to their lands. No evidence contradicted either the historic
6 channels, the early irrigation and drainage channels, or the natural seepage and flow in these
7 features. Interpreting the above information in a light most favorable to WIC results in at least
8 some of the lands having retained riparian rights. However, the Order only recognizes riparian
9 lands which the MSS parties agree were so.

10 Similarly, WIC put on evidence (WIC-4) that when damming off old sloughs the
11 common practice was to install a flood gate for irrigation and drainage purposes. No contrary
12 evidence was presented that indicated specific sites (such as the slough where the current WIC
13 intakes are located) were not dammed, yet the Board finds in the final Order that no flood gate
14 was installed until many years later.

15 WIC demonstrated that the flood gate installed at the junction of Duck Slough and Burns
16 Cut-off, if operated only for drainage, would still result in flowing water in at least some portion
17 of Duck Slough as well as those other interior channels identified by the MSS parties' witness.
18 Yet, the final Order makes no conclusion that riparian lands existed along Duck Slough,

19 WIC showed that the historic maps of the era indicated that the crops being grown (see
20 WIC-10 and RT Vol. IV, pages 1042 et.seq., and 1081 et.seq.) would have required the
21 application of irrigation water, and not just "dry farming." This evidence was not contradicted
22 anywhere in the record, yet the final Order does not conclude the WIC lands were all being
23 irrigated prior to 1914. WIC presented evidence that the amount of water being applied prior to
24 1914, based on acreage and crops was well above the amount set forth in the two 1911
25 agreements, yet the final Order finds the opposite; that WIC eventually reached the 77.7 cfs limit
26 only.

27 The only findings in the Order which might be construed as beneficial to WIC, are those
28 presented by the Prosecution Team (there is a 77.7 cfs pre-1914 right) and those of the MSS

1 parties (one parcel retained a connection to the River). The Order is devoid of any finding that
2 *any* WIC evidence is reliable or supports the WIC positions. There can be no real disagreement
3 that the final Order gives little or no consideration to the WIC evidence, and thus the SWRCB is
4 not interpreting the evidence in a light most favorable to WIC which, under its own policy set
5 forth in the Cal-Am case, is an error of law.

6 **D. THE ORDER INAPPROPRIATELY RENDERS OPINIONS ON ISSUES NOT**
7 **BEFORE IT.**

8 1. In the alternative, if the SWRCB does not choose to re-open the hearing to make
9 sure that all the evidence is before it, and in a legible form for review and appeal, the Board
10 should strike those portions of the Order which are not necessary to the discussion and the ruling.
11 Specifically, the Order contains an extensive discussion on riparian rights in sections 4.4, and
12 those portions of section 4.2 not dealing with the parcel deemed to have retained a riparian right.
13 However, Hearing Officer Pettit stated² specifically at the onset of the WIC hearing, that the
14 Board was not making any determination with regard to other parties rights.

15 2. These statements were made as a response to the concerns raised by both the
16 parties to the hearing and third parties. If the Board is only determining that the WIC has
17 established a pre-1914 right to divert water, it need not reach out and make any factual or legal
18 conclusions regarding riparian rights, the basis on which such rights are created, or the factual
19 situation in the present proceeding which might determine or preclude such rights.

20 It may be appropriate for the Board to generally discuss riparian rights if the Board were
21 to conclude that a party like WIC has made a prima facie showing of such rights. Such a
22 showing would allow the Board to decide that this process should not assert jurisdiction (or issue
23 a CDO) over a diverter. However, when the Board believes it has not been given a sufficient
24 showing to “leave someone alone” it is wholly improper for the Board to make findings about the
25 evidence, or to reach out and unnecessarily decide legal issues not squarely before it. Since none

26
27 ² “And again, as has been stated many times, the people who are not the direct recipients
28 of the CDO cannot have their rights affected without further due process in any event.” RT: vol.1
20:16-19]

1 of the landowners within the WIC service area were part of the hearing process, the Board should
2 not decide issues such as whether the Delta pool concept affects water rights, if the Swamp and
3 Overflowed Lands acts affect water rights, if internal sloughs and canals confer water rights, if
4 “tenements, hereditaments and appurtenances” language constitutes the preservation of water
5 rights in deeds, etc. Clearly, a landowner, not before the Board is prejudiced by the factual and
6 legal findings in the Order since issues he/she can properly assert such issues are being decided
7 in the Order. For example, a landowner whose chain of title includes the deeds from Stewart et.
8 al. (See for example Exhibit WIC-6E), which deeds contain the preservation of all “tenements,
9 hereditaments and appurtenances” is prejudiced if not precluded from arguing this language
10 preserved his riparian rights when and if that issue comes before the Board.³ Unfortunately, the
11 Order contains such premature and prejudicial determinations. The same is true for the other
12 factual and legal conclusions reached by the Board in the sections referenced above.

13 It should be again stated that the converse of the above does not hold true; the converse
14 being the Board should make no mention of factual and legal matters if it *does* find a prima facie
15 case for the existence of riparian rights was presented. Here, (WIC) a third party provided
16 sufficient evidence for the Board to conclude that riparian rights did exist on lands. Such a
17 conclusion by the Board is not a final ruling on anyone’s rights, and other parties or the
18 landowner are free to assert what they must in an adjudication of such rights or other proceeding.

19 The Board should strike the referenced sections and simply state something like: *“WIC’s*
20 *evidence was insufficient, and its legal arguments unpersuasive to show riparian rights on*
21 *other lands within its service area. However, the Board cannot make determinations*
22 *regarding such rights unless the relevant parties are before it.”*

23 **E. EVIDENCE WHICH COULD NOT HAVE BEEN REASONABLY PRODUCED**

24 After conclusion of the hearing and adoption of the order, a researcher for SDWA and
25 CDWA located records for San Joaquin County Superior Court Case No. 1140 titled *Leland*
26 *Meyer, Julius W. T. Muhs and Charles A. Brandt as Trustees for the Benefit of Reclamation*

27
28 ³ Such landowner would argue that this language was used well before any of the relevant
case law on preservation of such rights via deed language was made.

1 *District No. 544 and Reclamation District No. 544 vs. A. Gaul, et al.*, filed May 22, 1914. The
2 suit involved a challenge by the Reclamation District to work by A. Gaul in repairing a floodgate
3 and culvert through the levee along Old River without a permit from the Reclamation District.
4 The Findings of Fact and Conclusions of Law adopted by the Court on September 11, 1914,
5 reveal that the conduit was constructed in the year 1898 and consisted of brick and cement
6 mortar; that at the southerly or river end there was a wooden gate sliding in wooden grooves and
7 that southerly for about 50 feet there was an uncovered wooden box or conveyor; and that the
8 gate and conduit was used for conveyance of irrigation water into a slough or drain. The
9 Conclusions of Law and Judgment confirmed that the levee was owned by the Reclamation
10 District and part of its public reclamation works; that Defendant Gaul's land, by reason of it
11 adjoining the river and levee, was riparian to the river and that Gaul had the right to use the
12 waters of Old River for purposes of irrigation subject to the reasonable regulations of the
13 Reclamation District to protect the integrity of the levee.

14 Contrary to the inappropriate negative inferences drawn from the record by the drafters of
15 the Order, this evidence confirms the following:

- 16 1) the early construction materials (brick and cement mortar) and structure of
17 floodgates;
- 18 2) the early use of floodgates for gravity delivery of irrigation water on Roberts
19 Island from the upper reaches of Old River well upstream from the subject WIC service area;
- 20 3) use of sloughs and drains for the conveyance of irrigation water; and
- 21 4) levee construction does not sever riparian rights.

22 The SWRCB should take judicial notice of the documents in this case and reverse the
23 negative inferences drawn by the drafters of the order as to the riparian nature of all of the lands
24 within the Woods Irrigation Company Service Area.

25 **IV. CONCLUSION**

26 WIC, SDWA and CDWA request the Board re-open the hearing to both clarify various
27 exhibits and reconsider evidence discounted or disallowed in the Order, or in the alternative,
28

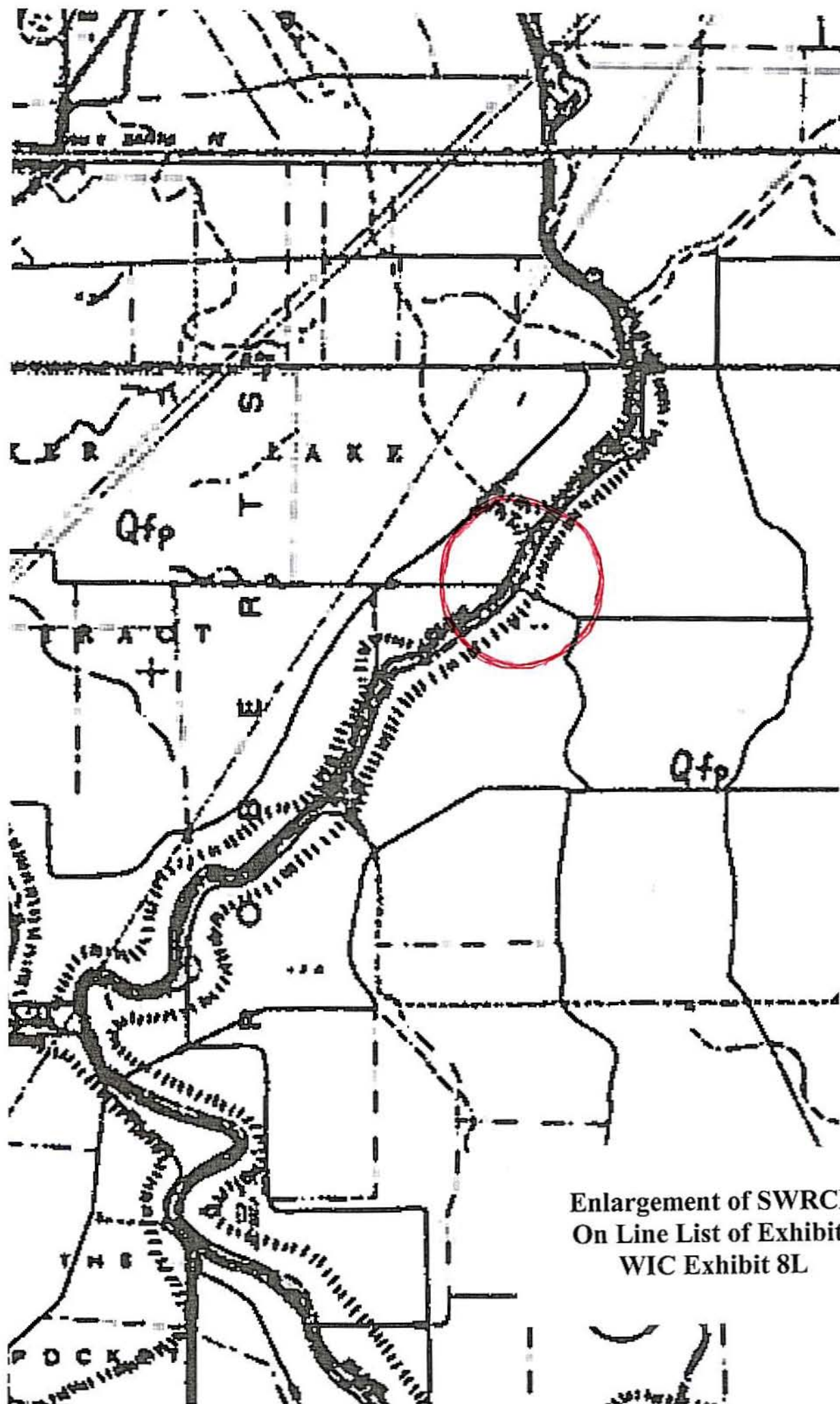
1 strike portions of the Order dealing with water rights of properties whose owners are not before
2 the Board.

3 Dated: March 3, 2011

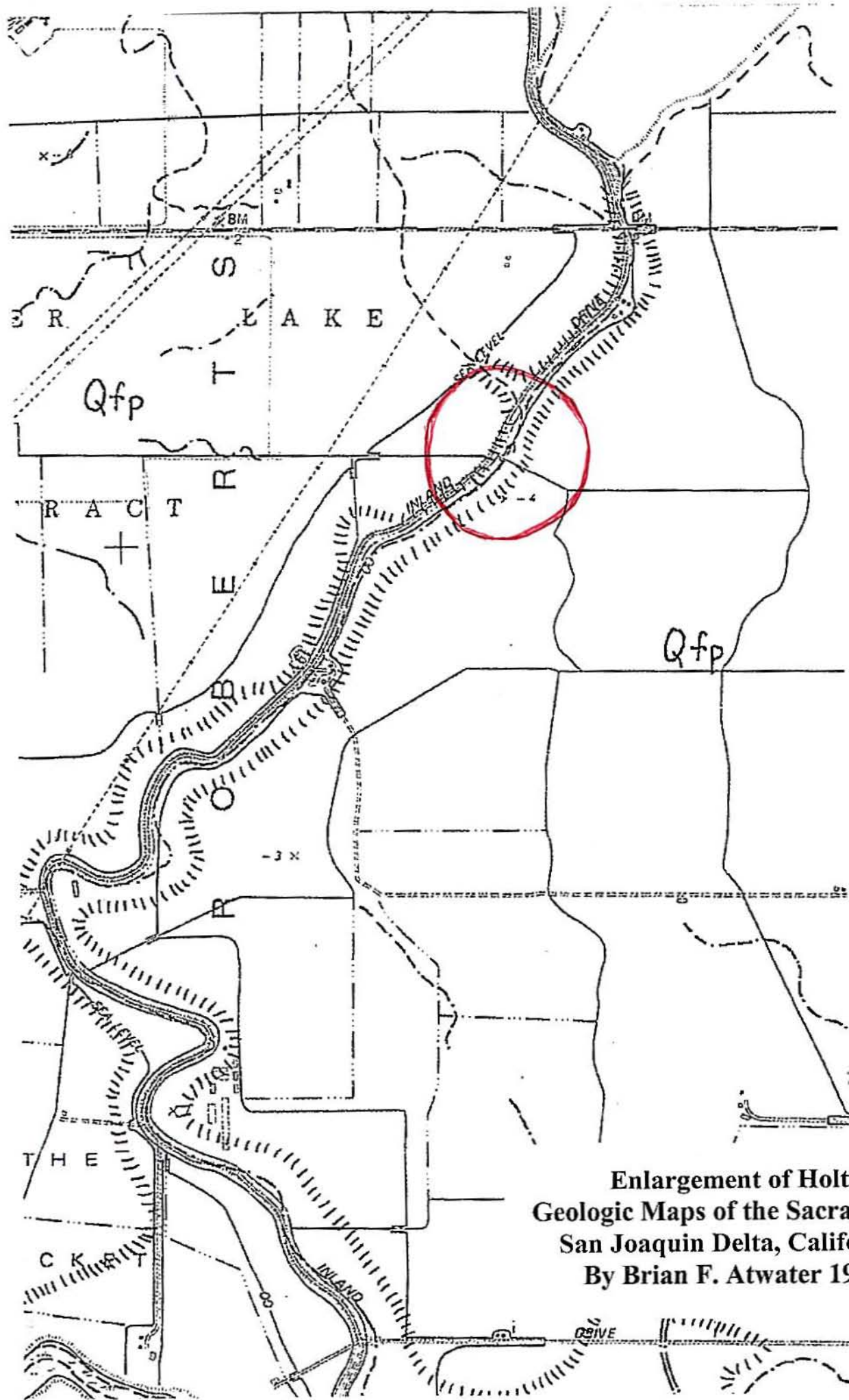


4 John Herrick, Esq., Attorney for
WOODS IRRIGATION COMPANY

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Enlargement of SWRCB
On Line List of Exhibits
WIC Exhibit 8L



**Enlargement of Holt
Geologic Maps of the Sacramento-
San Joaquin Delta, California
By Brian F. Atwater 1982**

1 **PROOF OF SERVICE BY E-MAIL**

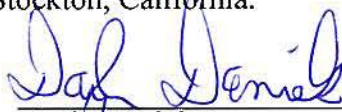
2 I declare as follows:

3 I am over eighteen years or age and not a party to the within entitled action. My
4 business address is the Law Office of John Herrick, 4255 Pacific Avenue, Suite 2,
5 Stockton, California, 95207. I am employed in San Joaquin County, California. Based on
6 an agreement of the parties to accept service by e-mail or electronic transmission, on
7 March 3, 2011, at approximately 4:40 p.m., I began sending the Request for
8 Reconsideration and this Proof of Service by E-mail (and mail) to be sent to the persons at
9 the e-mail addresses listed below. I did not receive, within a reasonable time after the
10 transmission, any electronic message or other indication that the transmission was
11 unsuccessful.

12	SWRCB	llindsay@waterboards.ca.gov
13	Dean Ruiz	dean@hpllp.com
14	Donald Geiger	dgeiger@bgrn.com
15	David Rose	drose@waterboards.ca.gov
16	Tim O'Laughlin	towater@olaughlinparis.com
17	Ken Petruzzelli	kpetruzzelli@olaughlinparis.com
18	Valerie Kincaid	vkincaid@olaughlinparis.com
19	Stanley C. Powell	spowell@kmtg.com
20	Jon D. Rubin	jrubin@diepenbrock.com
21	J. Seaton	jseaton@diepenbrock.com
22	DeAnne M. Gillick	dgillick@neumiller.com
23	Mia Brown	mbrown@neumiller.com
24	Bruce Blodgett	director@sjfb.org
25	Jennifer J. Spaletta	jspaletta@herumcrabtree.com
26	Mark A. Pruner	mpruner@prunerlaw.com
27	David J. Guy	dguy@norcalwater.org

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

EXECUTED on March 3, 2011, at Stockton, California.


Dayle Daniels

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
County of San Joaquin) ss.

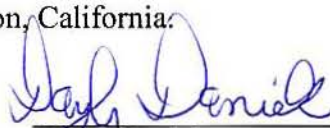
I am a citizen of the United States and a resident of the County of San Joaquin. My business address is 4255 Pacific Avenue, Suite 2, Stockton, California 95207. I am over the age of eighteen years and not a party to the within entitled action. I am readily familiar with the practice of the Law Office of John Herrick for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business of the Law Office of John Herrick, correspondence is deposited with the United States Postal Service the same day as it is collected and processed.

On March 3, 2011, I served the within Request for Reconsideration on Charles L. Lindsay, by placing the original thereof enclosed in a sealed envelope with postage thereon fully prepaid, and placed for collection and mailing on said date to be deposited with the United States Postal Service following ordinary business practices at Stockton, California, addressed as follows:

Charles L. Lindsay, Chief
Hearings Unit
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

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

EXECUTED on March 3, 2011, at Stockton, California.



Dayle Daniels