Winston H. Hickox
Secretary for Environmental Protection

State Water Resources Control Board

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov

Gray Davis
Governor

CLOSING BRIEF OF DIVISION OF WATER RIGHTS PERMITTING TEAM IN THE MATTER OF HEARING ON PROPOSED ADMINISTRATIVE CIVIL LIABLITY COMPLAINTS NOS.

I. INTRODUCTION

This matter comes before the State Water Resources Control (SWRCB) based on the proposed Administrative Liability Complaints Nos. 262.5-28, 262.5-29 and 262.5-30 against Lloyd L. Phelps, Jr. (Licenses 13444 and 13274), Joey P. Ratto Jr. (License 13194), and Ronald D. Conn and Ron Silva, et al (License 13315), respectively. In addressing the issue of whether the SWRCB should affirm each Administrative Civil Liability Complaint (ACL), the Amended Hearing Notice dated December 13, 2002 asks the following three questions: Did the licensee divert water during the periods when Term 91 makes water unavailable under the conditions of the license? Does the licensee have any basis of right to divert water during the curtailment periods? Is the proposed administrative civil liability amount appropriate?

The Division of Water Rights (Division) Permitting Team (hereinafter referred to as the Permitting Team) presented evidence at the hearing on February 25 and 26, 2002, which showed that licensees were diverting water during the periods when Term 91 makes water unavailable, and that the ACL amounts were calculated in a reasonable manner. These facts went uncontested in the hearing. This brief focuses on the specific questions asked by the hearing officer, which address the issue of whether the licensees established an alternative basis of right to divert water during the curtailment periods. As a defense to liability, licensees had the responsibility and burden to provide evidence to support this claim. The Permitting Team reviewed all the evidence and argument submitted by South Delta Water Agency (SDWA) on behalf of the licensees before the Complaints were issued, and throughout the hearing. The Permitting Team is of the opinion that SDWA did not produce sufficient evidence to establish an alternative basis of right during the curtailment periods, and therefore the licensees' diversions

were unauthorized, a trespass subject to administrative liability. The Permitting Team recommends that the Board order liability in response to all three ACLs as proposed.

II. FACTS

The SWRCB issued licenses to Lloyd L. Phelps, Jr. (Licenses 13444 and 13274), Joey P. Ratto Jr. (License 13194), and Ronald D. Conn and Ron Silva, et al (License 13315), authorizing the diversion of water for irrigation. (WR 3-02.) Each license contains Standard Permit Term 91, which prohibits diversions under the licenses when the Central Valley Project or the State Water Project must release Supplemental Project Water to satisfy inbasin entitlements, including water quality objectives in the Delta. The Division notified the licensees to stop diverting in the years 2000 and 2001, pursuant to Term 91. (WR 3-02, pp. 1-2.)

In its field inspections of the subject properties, the Division found that licensees continued irrigating after the curtailment period went into effect in both years. (WR 3-15; 3-16; 3-17.) By letters dated August 23, 2000, the Division asked each licensee to submit proof of an alternate water supply that would allow diversions during the Term 91 curtailment period. South Delta Water Agency (SDWA), on behalf of the licensees, requested additional time to conduct the necessary research, and eventually submitted its response May 21, 2001. (WR 2-02 pp. 5-6.) The Division found that the evidence and argument submitted by SDWA was insufficient to establish that licensees held riparian or pre-1914 rights to divert water during the Term 91 curtailment period. (WR 2-05, Tab K.)

Under Water Code section 1052, a diversion or use of water without right is a trespass against the State, subject to administrative civil liability of up to $500 for each day a trespass occurs. Water Code section 1055, subdivision (a), provides that the Executive Director of the SWRCB may issue a complaint to any person on whom administrative liability is imposed. This authority is delegated to the Chief of the Division. On July 2, 2002, the Division Chief issued Administrative Liability Complaints Nos. 262.5-28, 262.5-29 and 262.5-30 against licensees, alleging that licensees diverted water during the Term 91 curtailment period without an alternate basis of right. (WR 3-15; 3-16; 3-17; Notice of Postponement of Public Hearing and Re-Notice

of Public Hearing, December 13, 2002.) The complaints propose the following amounts of civil liability: $3,750 for the Ratto license; $14,250 for the Conn/Silva license; and $22,500 for the two Phelps licenses. (*Id.*) The SWRCB held a hearing on February 25 and 26, 2002, to determine whether to affirm the ACL Complaints.

III. ANALYSIS AND ARGUMENT

A. When, based on the hearing record, was each of the subject parcels severed from the current channels of the Delta through a patent or deed? Is there any specific evidence in the hearing record that demonstrates an intention, at the time when the patent or deed severed the parcel, to retain a riparian water right to the channel?

A riparian water right extends to land contiguous to a stream channel. It entitles the landowner the right to use the natural flow of the water on the riparian land for reasonable beneficial use under reasonable methods of diversion and use. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 366 [40 P.2d 486].) Riparian rights are lost when a parcel is severed so that it is no longer contiguous to the watercourse unless express language in the conveyance or some other form of evidence indicates that the parties to the conveyance intended to retain the riparian rights attached to the severed parcel. (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App. 4th 742, 780 [72 Cal.Rptr.2d 1].) "If the tract conveyed was not contiguous, had never received water from the creek, and there were no ditches leading from the creek to it at the time of the conveyance, nor other conditions indicating an intention that it should continue to have a riparian right, notwithstanding its want of access to the stream, the mere fact that it was part of a rancho to which the riparian right had extended while the ownership was continuous from it to the banks of the stream would not preserve that right to the severed tract. The severance under such circumstances would cut off such tract from the riparian right." (*Hudson v. Daily* (1909) 156 Cal. 617, 624-25 [105 P. 748].)

The evidence shows that the subject parcels are not contiguous to any current channel in the Delta. (WR 2-14; R.T., p. 43, ln. 13-15.) As discussed in greater detail for each parcel below, all of the subject parcels were severed from the current Delta channels by patent or deed

from 1873 to 1911. SDWA argues that while the patents and deeds contain no express reservation of riparian rights (R.T. pp. 236; 277-278), intent is shown "because at the time of patenting and ever since the land has been put to use for farming." (R.T. p. 127.) SDWA does not rest this assertion on specific evidence of water use. Rather, SDWA provides general descriptions of historic farming in the area. Farming may have occurred on Upper Roberts Island, but SDWA provided no specific evidence to show that irrigation occurred on the licensees' properties or even within the interior of the island where the parcels are located. SDWA also relies heavily on the assumption that the parcels all received water from various internal sloughs that allegedly existed prior to and after reclamation of Upper Roberts Island. While it is reasonable to assume that there were once internal sloughs on Upper Roberts Island, aside from one hand-drawn exhibit and an uncorroborated map, SDWA does not provide any specifics on where these sloughs were, whether the sloughs in fact reached the subject parcels, when they disappeared, and whether they were in fact connected to the main channel. SDWA presents numerous exhibits that stack inference upon inference in order support its conclusion that each parcel possesses a riparian water right. Upon close review of each submittal, it becomes apparent that SDWA simply has no credible evidence to substantiate its claims. We now turn to that analysis.

1. Conn Parcel

The Conn property consists of two parcels. The western parcel was not contiguous to a Delta channel when patented in 1887. (SDWA X.) The eastern parcel was severed from the Middle River in 1891. (*Ibid.*) SDWA contends that before and after reclamation, both parcels abutted an unnamed slough off of the San Joaquin River and were possibly connected to a slough connected to the Middle River. (Neudeck, p. 2.) SDWA also posits that the parcels were subirrigated by these sloughs. In addition, SDWA argues that at the time of severance, the intent of the owners to retain the ability to receive water is apparent from evidence of ongoing farming. SDWA also points to a terra cotta pipe as evidence historic farming practices. These arguments suffer from numerous flaws. First, evidence of sloughs connecting these properties is unsubstantiated. Without evidence of a waterbody directly abutting the property, the western parcel could never have a riparian right to retain. Second, evidence of general farming practices

on the Island is not enough to show intent to retain a riparian right with respect to the particular parcels at issue in this hearing. SDWA simply does not provide any evidence that these parcels were irrigated before and after severance. The arguments regarding subirrigation and the terra cotta pipe are similarly unsubstantiated.

SDWA does not expressly make its arguments regarding the sloughs, subirrigation, and general farming practices in connection with all of the subject parcels. The arguments are addressed below in connection with the Conn parcel. To the extent that SDWA relies on any of these arguments to support its conclusions regarding any of the other parcels, the analyses below applies equally and will not be repeated in detail.

a. The Slough Theory

The premise behind SDWA's Slough Theory is that channels were created when overflow water would spread out over the flood plain, and then retract in periods of low flow. (R.T. p. 153.) Some areas would dry out when floodwater receded. (R.T. p. 50.) During reclamation (beginning in 1870), floodgates were installed in levees to control access to the water, allowing high flows to enter into various sloughs that could be used for irrigation. (R.T. pp. 56-57.) SDWA relies on its Exhibit C for the general premise that in reclaiming the island, floodgates were installed in the levees to provide for drainage and/or irrigation. (Neudeck, p. 1.) Mr. Neudeck testified that this practice eventually gave way to the pumps, ditches and pipelines that we see today. (*Id.* at p.2; R.T. p. 309.)

The first problem with this theory is that SDWA does not clarify exactly when floodgates were installed, or when the alleged conversion to more modern irrigation facilities took place. Second, while some water may have overflowed into sloughs during high flows, we cannot tell how far toward the interior of the island the water could flow.[1] SDWA provides no specific evidence of a floodgate connecting to a slough that reached the properties in question.

[1] SDWA submitted Exhibit E, an aerial photograph of an entirely different section of the Delta, to show what the upper division of Roberts Island allegedly looked like prior to reclamation. (R.T. p. 153; 182.) The extent of dendritic channels would have depended on the tidal range (R.T. p. 183), which is less on Upper Roberts Island than

SDWA submits Exhibit D, a 1912 topographic map, on which SDWA's witness sketched in what he believed were dendritic channels abutting the subject properties. (R.T. p. 177.) Mr. Neudeck testified that the sketched blue lines represent channels that conveyed surface water from 1850 until the time irrigation facilities were installed. (Neudeck, p. 2.) There are several problems with this exhibit that preclude its use as viable evidence of historic water conveyance. First, its author does not submit the evidence he used to support the extension of watercourses beyond those delineated on the underlying topographic map. (R.T. p. 177 ["I've looked at dozens of aerial maps and other historic maps that are not part of my exhibit package"]; see WR 2-14 [underlying 1912 topographic map].) The underlying topographic map does not show sloughs extending to the Conn parcels or any other of the subject parcels, with the exception of the eastern Phelps parcels. (See discussion, *infra*, at p. 14.) Mr. Neudeck stated that his theory that the channels extended beyond what is shown on the underlying topographic map is corroborated by later aerial photographs, in 1940, 1947, 1952, 1960 and 1998 (R.T. p. 178), directly contradicting an earlier statement that sloughs tended to disappear and become masked over time. (Neudeck, p. 2.) On rebuttal, SDWA submitted an aerial photograph dated August 1937. (SDWA 8.) The aerial photograph does not show any water conveyance channels or delivery systems to the subject properties, and does not corroborate or support the extended channels drawn on Mr. Neudeck's Exhibit D. (*Ibid.*)

In addition, SDWA did not provide any evidence that the sloughs were connected to the Middle or San Joaquin Rivers, via floodgates or otherwise. The 1912 topographic map shows several sloughs on Upper Roberts Island that do not connect to the main channels. (WR 2-14; 2-15 [enlarged comparison of SDWA D and the 1912 topographic map].) The cross-hatching on the topographic map show depressions, indicating that after flooding, water may simply seep into the ground. (R.T. p. 56-47.) SDWA relies solely on two exhibits, general descriptions in Exhibit C and Exhibit F, to support the conclusion that floodgates existed on the old sloughs on Upper Roberts Island. (R.T. pp. 242-243.) Neither exhibit specifically references Upper Roberts

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Sherman Island shown in Exhibit E. (WR 2-20 [showing tidal range on Upper Robert Island as +0.5 to +2.0, compared to area near Sherman Island tidal range as –2.2 to +3.0].)

Island. Mr. Neudeck testified that he removed six of these old floodgates in the Delta (R.T. p. 155), but cites only one specifically. Mr. Neudeck did not claim that this floodgate, pictured Exhibit J and dated 1923, connected to a specific slough that reached any of the subject parcels. (Neudeck, p. 5; R.T. pp. 196-198.) Mr. Neudeck stated that most of the alleged floodgates were removed when irrigation practices changed to pumps and pipelines. (*Id.* at 56.) Mr. Neudeck originally testified that this conversion took place in 1879. (R.T. p. 174.) Later, he stated that it occurred gradually over a period of time. (R.T. p. 294.) The ambiguity of the timing of this alleged transition, and lack of evidence regarding specific floodgates for specific sloughs make it impossible to find that the internal sloughs on Upper Roberts Island were ever connected to the main channels and served any specific parcel.

Finally, even if overflow historically reached the places of use and established a riparian right, SDWA offers no explanation of why a claimed riparian right based on spring flooding of the San Joaquin or Middle Rivers would supply an alternative water source to the licensees in the late summer. A riparian right only extends to the available flow that exists adjacent to the riparian land. Lands contiguous to a slough have riparian rights to use water in the slough only during the time stream water is present in that slough. (*Miller & Lux v. Enterprise Canal & Land Co.* (1915) 169 Cal 415, 441 [147 P. 567].) The indication of sloughs on the underlying 1912 topo map show them as dashed lines, suggesting that the water was intermittent. (R.T. p. 182; 359.) Even if the water reached the properties as hypothesized, Mr. Neudeck testified that the water would recede from dendritic channels by June, at the latest July. (R.T. p. 170.) Thus, water in these channels was not available all the time. The proposed ACLs addressed unauthorized diversions for the period of July through August, and only for specific days of diversion. A claim of riparian rights to winter and spring flood flows would not provide an alternative basis of right for the time-period in question.

b. The Subirrigation Theory

SDWA argues that the alleged floodgates would serve to hold water in slough channels, which could then be used to subirrigate crops. (R.T. p. 188; 190.) Mr. Neudeck testified that, while not a subterranean stream (R.T. p. 185), surface and underground flow in historic channel

beds served as conduits to the subject parcels. (Neudeck, p. 2.) This argument is unavailing for several reasons. First, with one exception, SDWA did not establish that sloughs reached the subject parcels, or were close enough to successfully subirrigate the subject parcels. Second, as discussed above, there is no evidence that the sloughs were connected to the main channels. Third, SDWA has not provided evidence of any specific floodgate attached to any specific slough on Upper Roberts Island. Finally, the seasonal storage of spring flows for subirrigation use in the summer is not authorized by riparian rights. SDWA's evidence is insufficient to support the conclusion that the subject parcels were subirrigated by surface or underground water from sloughs at the time of severance. (See also *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 332 [88 Pac. 978] [the location of land contiguous to underflow but not surface flow does not convey a riparian right to divert water from the surface stream].)

c. The General Farming Theory

SDWA paints a general picture of the Delta and attempts to rely on this to support its claim that irrigated agriculture was occurring at the time of severance, thus allegedly indicating an intent to retain riparian rights. The Permitting Team does not dispute that some farming may have occurred on the properties in the last 150 years. We do not believe, however, that SDWA has provided sufficient evidence to show that irrigated farming took place at the time of severance. SDWA's evidence of general historic farming practices all point to a more likely scenario that if farming were taking place, it was dry farming on the interior portions of the island at the time of severance.

SDWA's own evidence on historic development in the area contradicts SDWA's argument that these lands were irrigated. For example, SDWA quotes its Exhibit C extensively to support its proposition that the subject properties had been subirrigated before and after severance from a surface channel. Exhibit C is a 500-page dissertation on the Settlement Geography of the Sacramento-San Joaquin Delta. The dissertation in fact rebuts the assumption that the subject parcels were irrigated at the time of severance. Mr. Neudeck cited portions of the dissertation stating that subirrigation of beans and potatoes occurred on Delta Islands in the 1870's. (SDWA C, pp. 310-312.) Mr. Nuedeck neglected to point out that the dissertation also

states: "Nevertheless, it appears that much of the land was without irrigation as late as 1898...." (SDWA C, pp. 311-312.) The dissertation describes in detail how strips of irrigated land ran down the eastern and western banks of the island in 1875. (R.T. pp. 192-193; 296.) The subject parcels are located some distance from the strip of farmed land described in this passage. (R.T. p. 327.) The dissertation characterizes the interior of the island as an extensive grain field. (SJRGA 2, p. 323; see also SDWA B, p. 2 ["and another year the landscape will present an unbroken prospect of waving wheat and barley"].) While some grain crops can be irrigated, evidence in the record shows that grain crops are generally dry farmed. (WR 2-23.) Moreover, grain is typically planted in the winter and the spring, so the use of water would not occur in the season at issue in this proceeding. Both winter and spring crops are generally harvested or come to ripeness in June. (R.T. pp. 92-93; see also WR 2-22 [irrigation season for grain begins September 1 and ends March 1].)

Further evidence that this area was dry-farmed can be found in the Permitting Team's rebuttal Exhibit WR 2-23. This table lists in detail the acreages irrigated in the Delta in 1927, well beyond the time of severance. In 1927, only 2,205 acres were irrigated out of a total of 7,480 within the levees of Upper Roberts Island. (WR 2-23, p. 2, Table 47.) In 1928, the Sacramento-San Joaquin Water Supervisor's Report indicates that 1,500 acres of grain was irrigated and 3,500 acres of grain or pasture was not irrigated. (WR 2-22, p.4, Table 45.) The irrigated column includes acreage that received direct benefit through subirrigation. (*Id.*, fn. 1; see also WR 2-22 [detailing percent not irrigated].) These data show that even as late as the 1920's, the majority of grain harvested on Upper Roberts Island was not irrigated. SDWA has not provided any evidence to show that grain, if farmed on the subject properties, was in fact a portion of the small percent that was directly irrigated or subirrigated.

d. The Terra Cotta Pipe Theory

The Declaration of Peter Ohm is vague at best regarding the existence of a terra cotta pipe from the San Joaquin River to serve Mr. Conn's place of use. Mr. Ohm declared that the Conn parcels continuously received water from the San Joaquin River before and after severance based on his personal experience. Mr. Ohm states that a terra cotta pipe was "likely" used only

prior to the 1900s, but the parcel was severed in 1889 at the latest. (SDWA Y.) He was 83 years old at the time he made this declaration, making it impossible to have personal experience of the water conveyance to the parcel before 1900. SDWA purports that Exhibit J, a photograph of a piece of pipe, confirms Mr. Ohm's testimony. Yet the photograph shows only a piece of pipe in what looks like a storage area. We have no way of knowing where the pipe came from, yet Mr. Neudeck leaps to the conclusion that this piece of pipe corresponds to the current cross island levee and likely supplied both of Conn's parcels with water. (Neudeck, p. 10.) Exhibit J also includes a photograph of an old pump shed. SDWA included this photo in the exhibit merely to reference a historic fact, not specific to the Conn property or to his cross levee theory. (R.T. pp. 210; 301-302; 329.) "The shack was not related to one of the parties of this hearing. It was property to the east of these that was served." (R.T. p. 329.) This evidence is insufficient to prove intent to retain riparian status.

2. *Silva Parcel*

The property owned by Mr. Silva was severed from the Middle River by deed dated December 28, 1911. The deed transfers Lot 22 (Silva parcel) and 21. (SDWA M.)

a. The Wood Irrigation Company Canal Theory

SDWA argues that intent to retain a riparian right is shown because Lot 22 borders Lot 21, which borders the main irrigation ditch of Woods Irrigation Company. (Neudeck, p. 6.) SDWA claims that a contract with the Woods Irrigation Company shows intent to retain the ability to receive from water the Middle River. The September, 1911 agreement between Woods Irrigation Company and the various property owners, including the previous owner of the Silva parcel, does not reference a riparian right. (SDWA L.) It is merely a contract whereby the property owners pay the Company money in exchange for water not to exceed 32.86 cubic feet per second. (*Id.*, at p. 3.)

SDWA produced no evidence that the Woods Irrigation Company delivered water to Lot 22.[2] (R.T. pp. 204; 288.) More importantly, SDWA failed to explain how a contract to obtain water from the District's canal shows intent to maintain a riparian right. (*Id.*, at p. 205.) As Mr. Neudeck states in his testimony, this evidence shows intent to retain the ability to get water from the Middle River. This is secured via a contract right, which is not the same as intent to retain a riparian right.

In addition, respondents do not explain how a riparian right attaches to an artificial channel or canal, such as the Woods Irrigation Company's canal. Riparian rights attach only to a natural watercourse, and not to an artificial channel such as a canal which is used to carry water from a stream. (*Tusher v. Gabrielsen* (1998) 151 Cal.App.3d 1107 [80 Cal.Rptr. 2d 126, 147].) In some cases an artificial watercourse may give rise to riparian rights where an existing stream is diverted into a new channel and the artificial channel is permanently substituted for the natural one, or the watercourse is subject to long-continued use and acquiescence. (See *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 17-18 [25 P.2d 435].) "As to whether or not any riparian rights can attach to artificial watercourses depends entirely upon their origin and character. If they are clearly artificial channels, such as canals, ditches, conduits or aqueducts, used to convey the water from the stream or other body of water, riparian rights cannot attach." (*Id.* at 17 [citing Kinney on Irrigation and Water Rights, § 473, pp. 803, 804].) As a matter of law, the Silva parcel does not hold riparian rights to use water in the Woods Irrigation Company's canal.

SDWA also argues that the property held some right to receive water through floodgates and a slough and that there is no evidence that this right was terminated. (Neudeck, p. 6.) The problems with the Slough Theory, as discussed for the Conn parcel above, are equally applicable here. The assumption that a right existed from a floodgate and a slough is based on conjecture.

[2] Describing Lot 22 as "highlands," the last page of the contract references the Silva parcel specifically. (R.T. p. 203-204; SDWA L, p. 7.) "[T]he Consumer may place water upon these "high lands" at his election, conditioned that should Consumer avail himself of this privilege, he shall give written notice to the Company of his intention." (*Id.*) The record contains no evidence that the owner of Lot 22 ever exercised this option under the contract. Even if SDWA produced this evidence, it would show only that the owners exercised a right under the contract.

Based on the evidence submitted by SDWA, we have no way of knowing what property was served by any floodgate or when any such floodgate stopped functioning.

3. Ratto

The Ratto parcel was severed from the Middle River on June 15, 1891. (R.T. p. 211.) Again, SDWA submits that the property abutted an unnamed slough off Middle River that continuously supplied water from the 1870's to the present, and that this shows intent to maintain a riparian right.

a. The North/South Slough Theory

To support its contention, SDWA presented Exhibit Q, which includes a map showing a slough running through the Ratto parcel. This map appears quite distorted, is not dated, and the same exhibit features a drawing depicting Upper Roberts Island with only a east-west Willow Slough. (SDWA Q.) Without corroboration, we cannot conclude that the slough depicted on this map actually conveyed water to the Ratto parcel. It is conceivable that the map in Exhibit Q simply misplaced Willow Slough. (See e.g. WR 2-17 [1886 map depicting east/west Willow Lake Slough].) SDWA Exhibit R is a survey of a north-south slough that does not reach the Ratto parcel. This exhibit is more reliable because it is an actual dated survey.

Mr. Neudeck claimed that his investigation confirmed that the north/south slough had a floodgate to facilitate irrigation, yet cites no evidence to support this conclusion. (Neudeck, p. 8.) When asked about this specific slough, Mr. Nuedeck could not provide a specific reference. (R.T. p. 213.) Not only is there no evidence that a north-south slough ever reached the property, as discussed above, SDWA provided no evidence that this slough was connected to a floodgate. The problems previously addressed with the Slough Theory are equally applicable here.

b. Farming Theory

SDWA attempts to bolster its General Farming Theory with specific evidence for the Ratto parcel, however, this evidence does not establish that irrigated farming was occurring on the Ratto parcel at the time of severance. Neudeck testified that the illustration in Exhibit Q is

"valuable evidence of ongoing practices at the time." (Neudeck, p. 8.) While the illustration shows farming taking place in the area, there is no indication in the picture of any irrigation facilities, confirming the view that the interior island was dry-farmed.

SDWA's Exhibit T, the distribution of the estate of the prior owner of the Ratto parcel, is also consistent with the discussion above that the property was dry farmed, if farmed at all. The property description includes farming equipment which would be used for the type of farming illustrated in Exhibit Q, mainly wheat farming. (SDWA T [citing personal property of cows and poultry; various plows; one grain drill; etc.].) Also, the document addresses other real property not at issue in this proceeding owned by Mr. Small that could have been farmed at that time, offering an alternative explanation for the existence of the farming equipment in the estate. (*Ibid.*)

SDWA submits two PG&E easements to provide specific evidence that farming activity was taking place on the Ratto parcel. (Neudeck, p. 8.) The easements, identified as SDWA Exhibits U and V, are insufficient to establish intent to retain a riparian right for two reasons. First, the easements were executed in 1917 and 1930, long after the Ratto parcel was severed from the stream channel. Second, the easements are insufficient to verify that farming was taking place on the property because the documents also contain provisions addressing timber and mining activities, land-use practices which obviously did not occur on the interior Delta parcels. (R.T. p. 291.) These agreements are boilerplate language and the fact that they contain provisions for damage to crops does not establish that the practice was actually occurring.

4. Phelps

The Phelps' hold three parcels at issue in this proceeding: 1) two parcels on the east, which form an upside-down L; and 2) the western parcel. The eastern parcels were never contiguous to a current Delta channels and were patented in 1874. (R.T. p. 215; SDWA CC; SJRG 6.) The western Phelps parcel was severed from the San Joaquin, Whiskey Slough and Middle River in 1886 or 1887. (R.T. p. 216.)

a. Brick Pipe Theory

SWDA concludes that at the time of severance, the intention of the owners to retain the ability to receive water from the San Joaquin River is clear and continuous. This conclusion appears to be based on the assumption that the land was farmed throughout. (Neudeck, p. 12.) These sweeping conclusions rest solely on Mr. Neudeck's observation of an old brick pipe located near Brandt Bridge. "My investigation as well as the fact that the structure was of brick indicate to me that it was in use probably sometime in the 1890's and continuing thereafter. The irrigation off this brick pipe could have connected to the remains of the old sloughs nearby." (*Ibid.*) This conclusion is highly speculative. In addition, Mr. Neudeck's opinion that the pipe was in use in the 1890's does not show that the pipe was in use at the time of severance and therefore cannot be used to show intent to retain riparian status. (R.T. pp. 217-218.)

Mr. Neudeck also speculated that this brick pipe could have connected to the remains of the old sloughs nearby. (Neudeck, p. 12.) Yet even the unsubstantiated sloughs drawn in Exhibit D do not connect to the location of this pipe. There is a slough depicted on the underlying 1912 topographic map running through the eastern Phelps parcels. But as discussed previously, the sloughs are not connected to the main channels and even if they were, the slough is shown in a dashed line indicating that it is intermittent and water likely was not available in the summer months.

B. If the respondent's land was riparian to a natural surface watercourse at some time in the past, under what circumstances can it remain riparian after the watercourse is no longer present? Have past owners of any of the parcels involved in this hearing preserved riparian rights through actions concurrent with the obliteration of a watercourse to which the parcel was riparian? Is there evidence in the hearing record that owners of the parcels in question were using water from a past watercourse before the watercourse was obliterated?

Riparian rights are lost by avulsion, a process whereby the stream undergoes a sudden change in its course of flow that separates it from the land previously riparian. (*McKissick Cattle Co. v. Alsaga* (1919) 41 Cal. App. 380, 388-89 [182 P. 793].) Avulsion can occur from natural or artificial forces. (*Beach Colony II v. Coastal Commission of California* (1984) 151

Cal.App.3d 1107 [199 Cal.Rptr. 195] [property lost through avulsion as result of unnaturally diverted river course]; *Alexander Hamilton Life Ins. Co. of Am. v. Governor of the Virgin Islands* (3d Cir.1985) 757 F.2d 534, 538 [avulsion caused by "sudden and major shift of land," such as "human placement of artificial fill"]; see also *Georgia v. South Carolina* (1990) 597 U.S. 376, 405 [110 S.Ct. 2903] [dredging and other processes used by Army Corps of Engineers were properly treated as "avulsion"].) To protect the riparian right, the owner must restore the stream to its original channel within a reasonable time period. (*McKissick, supra*, 41 Cal. App. 380, 388-89.)

Here, SDWA claims that the subject parcels retain riparian status because they were once adjacent to internal sloughs on Upper Roberts Island.[3] Levees were constructed along the San Joaquin, Old, and Middle Rivers in a large-scale effort to reclaim swamp and overflow lands on Upper Roberts Island. (Neudeck, p. 1.) Levee construction dammed up sloughs. SDWA maintains that the common practice was to install floodgates to provide for drainage and/or irrigation.[4] (*Ibid.*) Beginning in 1897, and upon full reclamation of the island, Mr. Neudeck testified that farmers converted from floodgates to replacement irrigation facilities found today (R.T. p. 294), straightening out the old sloughs and squaring off the property for farming purposes. (R.T. p. 174.) While the testimony is unclear regarding the actual timing of this event, we know that these alleged sloughs do not at the present time carry water. (Neudeck, p. 2; WR 2-07.)

The process of draining and reclamation altered the hydrology on Upper Roberts Island. At the time that reclamation and obliteration of internal sloughs occurred, any owners of land riparian to the sloughs had the right to restore the sloughs in order to retain riparian status. We do not know exactly when the obliteration of any slough occurred, or even whether a slough in fact reached the parcels in question. Notwithstanding, SDWA has provided no evidence that at

[3] As discussed preciously, SDWA's evidence is insufficient to substantiate its claim that the subject properties received water from internal sloughs.

[4] Mr. Neudeck claims to have removed half dozen old gates (R.T. p. 155), yet could not provide any specific references to Upper Roberts Island. Nowhere does he provide any details as to location. Unless these old gates

anytime, owners of the subject parcels attempted to restore sloughs to their original course. The testimony indicates that in fact property owners on the island deliberately obliterated any sloughs present.

C. If land was reclaimed from swamp and overflow land, is there a legal basis for claiming that a riparian water right attaches to all of the reclaimed land?

The designation of all the land in the Delta as swamp and overflow lands does not automatically grant riparian status to every parcel located in the Delta Lowlands. A riparian right attaches to swamp and overflow lands in the same way as it would to other lands. (*California Pastoral & Agricultural Co. v. Enterprise Canal & Land Co.* (S.D. Cal. 1903) 127 F. 741, 742; *Lux v. Haggin*, *supra*, at 340-41.) The case law does not stand for the proposition that by virtue of being reclaimed from land designated as swamp and overflow land, riparian status automatically attaches to such lands. There must still exist the required elements to establish a riparian right, including land contiguous to a watercourse.

In a similar vein, SDWA's argued in previous submittals that licensees must have a riparian water right because in the past, federal and state governments presumed that Delta lowlands were riparian. (WR 2-05, Tab J, p. 2.) The documents cited by SDWA are written by agencies other than the SWRCB, and used water right assumptions solely for engineering purposes. The Report on 1956 Cooperative Study Program states clearly in the forward: "The cooperating engineering group wishes to emphasize that water right assumptions made for study purposes may differ considerably from the rights as they might be determined by a court of law." (WR 2-10, p.1.) The 1964 Bureau of Reclamation report elaborated on the assumptions made in the 1956 report: "The Delta Lowlands in the 1956 Cooperative Study Program were assumed to have riparian status. Subsequently, in contract negotiations with Sacramento River and Delta Uplands water users, the validity of this assumption has been questioned. * * * It is not the purpose of this report to substantiate or repudiate the riparian assumption, but rather to present

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supplied water to the sloughs that were supposed to have supplied water to the subject parcels, the testimony is insufficient to establish a reserved right.

information that will aid in analyzing the various problems and help in understanding the physical characteristics involved." (WR 2-11, p. 2.) The status of riparian and pre-1914 rights has never been determined in these cases.

Similarly, SDWA's argument that licensees are protected under the Delta Protection Act assumes that Licensees are "entitled" to certain waters, however, to date SDWA has not submitted sufficient data to establish that licensees possess valid entitlements to Delta water aside from that authorized by the licenses.

D. Can pre-patent water uses support a riparian water right?

A riparian right vests when property is passed into private ownership. (*Lux v. Haggin* (1884) 69 Cal. 255, 368-76 [4 P. 919]; see also *McKinley Bros. v. McCauley* (1932) 215 Cal. 229, 229 [9 Pac. 2d. 298].) Prior to the issuance of a patent for swamp and overflow lands, a certificate of purchase could be acquired, whereby for 20 percent advance payment, the purchaser gained an interest in the land that was transferable. (R.T. pp. 118; 122.) Upon proof that the purchaser or successor in interest reclaimed the subject land, they could obtain a patent for that land. (R.T. at p. 122.) Certificates of purchase are admissible to show ownership of land riparian to a watercourse. (*Lux v. Haggin* (1884) 69 Cal. 255, 424-25 [4 Pac. 919]; *Boehmer v. Big Rock Irrigation Dist.* (1897) 117 Cal. 19, 26-27 [48 Pac. 908].) The property must be the smallest tract held under one title leading up to the present owner. (*Ibid.*)

The legal effect of pre-patent water uses is only germane to those parcels that were never contiguous to the main Delta channels at the time of patenting. If SDWA could show that these parcels, although not abutting the watercourse at the time of patent, were previously part of a larger parcel adjacent to the stream acquired by a certificate of purchase, they could use the same arguments that apply to the remaining parcels severed by deed and assert that an intent was shown to retain riparian status by continued farming.

The eastern Conn and Phelps parcels were not contiguous to a watercourse at the time they were patented. Mr. Neudeck testified that both were subject to pre-patent deeds. (Neudeck, p. 9; 11.) SDWA introduced Exhibit CC to show the chain of title for the Phelps parcel, which includes two pre-patent deeds to George Kidd. It is not clear whether these 1873 and 1874 deeds were issued pursuant to a certificate of purchase. This is irrelevant because the deeds do not convey a larger parcel that encompasses the eastern Phelps parcels and is also contiguous to a watercourse. Similarly, we cannot tell from SDWA's Exhibit X, a pre-patent deed of the eastern Conn parcel, whether it was in fact a certificate of purchase. Moreover, this deed did not convey a larger parcel that was connected to a watercourse. SDWA has not submitted any evidence to show that either parcel was originally connected to a watercourse via a pre-patent deed. Even if they could, this would only elevate these parcels to the same status as the remaining parcels. They would suffer from the same flaws in the argument and evidence as previously discussed regarding the other properties, mainly that SDWA has not submitted sufficient evidence to establish an intent to retain riparian status upon severance.

E. Is there evidence in the hearing record to support the establishment of a pre-1914 water right on any of the subject parcels? If such evidence is present, what quantity of water right was established in the right before 1914, how much of the land on the parcel was irrigated, what was the season of diversion, and what was the source of the water?

The exclusive method for acquiring appropriative water rights after the enactment of the Water Commission Act, December 14, 1914, is by the procedures set forth in the California Water Code. (Wat. Code, § 1225; *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742,753-754 [72 Cal.Rptr.2d 1].) To appropriate water prior to 1914, three elements must exist: (1) an intent to apply water to beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for that purpose; and (3) an application of water to beneficial use within a reasonable time period. (*Simons v. Inyo Cerro Gordo Mining & Power Co.* (1920) 48 Cal.App. 524, 537 [192 P. 144].) Intent is shown by posting notice at the place of intended diversion, including the quantity of water to be appropriated. Other acts may suffice if they manifest the intent to divert water, however, under the Civil Code at the time (Cal. Civil Code, §§ 1410-

1422), compliance with the notice procedures provided evidence in disputes over priority. Under the Civil Code, a claimant was to record the notice with the county recorder 10 days after posting. For our purposes, compliance with the noticing and recording requirements would provide evidence of whether a right was initiated.

Another important aspect of an appropriative water right is that the right is for a specific quantity of water actually diverted. An appropriator can acquire no right to water beyond the needs necessary for the purpose of the water. (*Barr v. Branstetter* (1919) 42 Cal.App. 725, 731 [184 P. 409].) In addition, the appropriative water right may be limited to a specific period or season of use. (*Smith v. O'Hara* (1872) 43 Cal. 371, 376.) Thus, a pre-1914 right is limited to the quantity of water diverted and the season of use that occurred when that right was perfected.

SDWA did not provide any evidence of intent to establish appropriative water rights prior to 1914. Instead, SDWA relies solely on its version of how the island looked in 1912 based on Exhibit D as evidence of pre-1914 rights. (R.T. p. 283.) As explained earlier, Exhibit D features lines drawn by Mr. Neudeck that represent internal sloughs allegedly reaching the subject properties, but this is nowhere corroborated by any evidence. (See discussion, *infra*, p. 6.) Moreover, SDWA fails to produce any evidence to show that, even if the sloughs reached the subject properties, this water was actually put to beneficial use. (See General Farming Theory.)

For example, SDWA could not identify any specific evidence to establish pre-1914 water rights on the Silva parcel, including whether a notice was filed with the county recorder, what surface water was diverted to the parcel, during what years, how much water was diverted, where the points of diversion were, and what the season was. (R.T. p. 289.) Similarly, SDWA could not identify any specific evidence to establish pre-1914 water rights on the Phelps parcels, including whether a notice was filed with the county recorder, what surface water was diverted to the parcel, during what years, how much water was diverted, where the points of diversion were, and what the season was. (R.T. pp. 283-284.)

SDWA suggests that an old brick pipe located near Brandt Bridge was used to irrigate the Phelps parcels prior to 1890. (Neudeck, p. 12.) As discussed in the Brick Pipe Theory section above, this conclusion is highly speculative. Curiously, the location of the brick pipe does not connect to any of the interior sloughs drawn by Mr. Neudeck on the 1912 topographic map, nor did SDWA submit any evidence that the brick pipe was directly connected to the Phelps parcels. (SDWA D.)

Absent specific evidence that a pre-1914 right was ever established, it is impossible to determine the extent of such a right, including the quantity of water diverted and the season of use. SDWA relies on Mr. Neudeck's version of historical events that landowners used the sloughs up until some ill-defined point of time in which they converted to efficient irrigation systems. SDWA provides no evidence of such a conversion for the specific properties, except for documents much later in time that relate to the water rights held under the current licenses. If anything, these more recent documents provide evidence that irrigated agriculture did not occur on the subject properties until the owners applied to the SWRCB for water right permits.

For example, SDWA Exhibit O references an agreement that allows the Silva property to install a pipeline over its western neighbor to receive water from the Middle River. (Neudeck, p. 6.) The Silva/Conn license was issued pursuant to Application 22638, which indicates that that construction for that water right began on or before 1942. (WR 3-20, Item 10; R.T. p. 362.) This time frame exactly coincides with the time in which the easement was secured to receive water from the Middle River. In a statement filed May 25, 1973, licensee stated that the year of first water use is on or about 1946. (WR 3-21.)

A second example is SDWA Exhibit W, which references three agreements in 1964 pursuant to which the Ratto property received a right-of-way to allow irrigation pipes over neighboring parcels to the Middle River. (Neudeck, p. 8.) The Ratto license was issued pursuant to Application 22598, which indicates that construction for that water right began on or before 1964. (WR 3-20, Item 10; R.T. p. 363.) This time frame exactly coincides with the time in which the easement was secured to receive water from the Middle River. In a statement filed

June 1, 1973, licensee stated that the year of first water use is on or about 1965. (WR 3-21.) When asked why landowners would pursue a license from the SWRCB if they held valid alternative rights, SDWA's witness could not provide an answer. (R.T. pp. 207; 214-215.)

F. Has any established pre-1914 water right on any of the subject parcels been forfeited or abandoned? Is there evidence in the hearing record to show that any part of any of the subject parcels has been continuously irrigated since before 1914?

An appropriative right is limited to the amount actually used and put to beneficial use. Appropriative rights may be abandoned by the intent to permanently relinquish the right, and an affirmative act, such as leaving the property. Non-use of water is not sufficient to establish abandonment (*Land v. Johnston* (1909) 156 Cal. 253, 256 [104 P. 449]), but it does provide a reputable presumption that abandonment has occurred. (*Utt v. Frey* (1875) 106 Cal. 392, 398 [39 P. 807].) Appropriative rights may also be subject to forfeiture under Water Code section 1240. Water Code section 1240 originates from an old section of the Civil Code that provided: "'The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.'" (*Lindblom v. Round Valley Water Co.* (1918) 178 Cal. 450 at 455 (citing Civ. Code § 1411).) As construed by the courts, the appropriative right is lost after five consecutive years of non-beneficial use. (See *Wright v. Best* (1942) 121 P.2d 702, 710 (citing Cal. Civ. Code, § 1411; *Smith v. Hawkins* (1985) 110 Cal. 122, 126-27).

Assuming that SDWA had shown that licensees established pre-1914 rights via internal sloughs that reached the subject parcels, such rights probably were lost by abandonment or forfeiture once these sloughs were obliterated in the process of reclamation. SDWA provides no evidence of continued water use. Evidence in the Division of Water Right records regarding the subject properties and adjacent properties show that water use had not commenced much earlier than the date when the property owners filed water right applications with the SWRCB. (WR 3-20 [Conn/Silva water applied to beneficial use on or before 1946]; WR 3-25 [Ratto water applied to beneficial use on or before 1965]; WR 3-27 [Phelps application filed 1963]; WR 3-32 [Phelps

water applied to beneficial use March 1, 1963]; WR 3-33 [Inspection of Phelps parcel indicating that in 1963 use of water had not begun]; WR 3-29 [parcel adjacent to Phelps property sharing point of diversion states water applied to beneficial use on or about December, 1962]; WR 3-30 [progress report for parcel adjacent to Phelps showing no water use as of 1960]:) So even if the properties at one time had secured a pre-1914 right, it appears that no water was being used long before the owners filed water right applications, indicating that any pre-1914 rights were forfeited. In addition, on each application, pre-1914 rights are not listed as claimed prior rights. (WR 3-20, Item 12 [no claim of pre-1914 rights]; WR 3-25, Item 12 [no claim of pre-1914 rights]; WR 3-27, Item 12 [no claim of other rights]; WR 3-32, Item 12 [no claim of other rights].) Once forfeited or abandoned, a right cannot be revived by subsequent use. (*Kirman v. Hunnewill* (1892) 93 Cal. 519, 529 [29 P. 124].)

IV. CONCLUSION

At the hearing, the Permitting Team submitted evidence that licensees were diverting water during the periods when Term 91 makes water unavailable, and that the ACL amounts were calculated in a reasonable manner. These facts were uncontested in the hearing. SDWA has not adequately established that licensees hold riparian or pre-1914 water rights that serve as an alternate water supply during the Term 91 curtailment periods. As discussed above, all the evidence submitted suffers from similar flaws: it is uncorroborated or not specific to the subject parcels. Therefore, we recommend that the SWRCB affirm the ACL Complaints as proposed. In addition, the SWRCB should urge the licensees to take immediate steps to secure a contract for an alternative water supply for future Term 91 curtailment periods.

I declare that the foregoing is true and correct. Executed this 18th day of April, 2003, at Sacramento, California.

Samantha K. Olson
Staff Counsel
STATE WATER RESOURCES CONTROL BOARD

PROOF OF SERVICE BY MAIL

IN RE: Closing Brief of Division of Water Rights Permitting Team in the Matter of Hearing on Proposed Administrative Civil Liability Complaints Nos. 262.5-28., 262.5-29 and 262.5-30.

I, Meri Kaye Schmidgall, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, Sacramento, CA 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100.

On April 18, 2003, following ordinary business practices, I placed for full payment of postage, collection, and mailing at the offices of the State Water Resources Control Board, located at the above address, a copy of the Closing Brief of Division of Water Rights Permitting Team in the above-entitled case in sealed envelopes addressed to each of the persons listed on the attached service list. In addition, I sent via fax copies of the Closing Brief and hand delivered a copy to Ruben Mora, of the Division of Water Rights.

I am readily familiar with the State Water Resources Control Board's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be stamped with full prepaid postage and deposited with the United States Postal Service on the day on which it is collected at the State Water Resources Control Board.

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

Dated:

Meri Kaye Schmidgall

MERI KAYE SCHMIDGALL
Legal Secretary