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BEFORE THE STATE OF CALIFORNIA

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STATE WATER RESOURCES CONTROL BOARD

14

15 In the Matter of Cease and Desist Order No.
2011-0005 Against Woods Irrigation
16 Company -- Supplemental Public Hearing
Pursuant to State Water Resources Control
17 Board Order 2012-0012

**PRE-HEARING CONFERENCE BRIEF OF
SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY, WESTLANDS WATER
DISTRICT, MODESTO IRRIGATION
DISTRICT, AND STATE WATER
CONTRACTORS**

18

Date: January 15, 2015

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Time: 9:00 a.m.

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1 **I. INTRODUCTION**

2 San Luis & Delta-Mendota Water Authority, Westlands Water District, Modesto Irrigation
3 District, and State Water Contractors (collectively, the “Water Agencies”) submit this joint brief for
4 the January 15, 2015, Pre-Hearing Conference for the Supplemental Public Hearing regarding Cease
5 and Desist Order (“CDO”) No. 2011-0005 against Woods Irrigation Company (“Woods”).

6 On November 10, 2014, the State Water Resources Control Board (“State Water Board”) issued a
7 “Notice of Supplemental Public Hearing and Pre-Hearing Conference” (“Hearing Notice”).

8 The Hearing Notice indicates that the scope of the Supplemental Public Hearing is to obtain
9 supplemental information from Woods’ landowners that specifically addresses the following issues:

10 (1) whether the original terms of Order No. 2011-0005 should be modified or re-adopted based on
11 supplemental evidence, cross examination, or arguments that arise as a result of the supplemental
12 hearing; and (2) what, if any, evidence is available to substantiate valid water rights held by Woods’
13 landowners beyond the evidence that was provided during the hearing in 2010. Hearing Notice at p.

14 3. The Hearing Notice further provides that Woods’ landowners will be allowed to present
15 evidence at the Supplemental Public Hearing and that participation by “current parties” (including
16 the Water Agencies) will be limited to cross-examination and rebuttal of new evidence and any
17 redirect examination permitted by the hearing officers. *Id.* at p. 4. However, the Hearing Notice
18 also indicates that the scope and procedure of the Supplemental Public Hearing is not yet confirmed,
19 as the Hearing Notice states the purpose of the Pre-Hearing Conference is to discuss those issues.

20 *Id.* at p. 4.

21 As the State Water Board is well aware, certainty about water rights is essential to effective
22 water use management and enforcement. The dire water shortages in recent years, particularly
23 2014, have underscored the need for this certainty. The State Water Board had an opportunity (and
24 obligation) to make water rights determinations in Order No. 2011-0005, thereby arriving at needed
25 certainty about the water rights at issue in this matter, but did not do so. More specifically, in Order
26 No. 2011-0005, the State Water Board asserted that its assessment of alleged water rights in the
27 CDO proceeding was for a “limited purpose” and “may not be based on the same amount or quality
28 of evidence that would be required to substantiate the right” in other contexts. Order No. 2011-

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1 0005 at pp. 15. The State Water Board thereafter found, based on information less than what is
2 required to make water right determinations, that certain Woods landowners “likely” hold riparian
3 water rights, and that Woods and/or Woods’ landowners “likely” hold pre-1914 appropriative water
4 rights. The State Water Board thus concluded, in light of these findings of “likely” rights, that it
5 would not exercise its prosecutorial discretion and order Woods to cease and desist diversions from
6 Middle River up to 77.7 cfs. Order No. 2011-0005 at pp. 19-27, 27-36. Not only did these
7 equivocal “likely” findings under a relaxed burden of proof and evidentiary standard not resolve the
8 issue of whether and to what extent Woods and/or Woods’ landowners have any valid water rights,
9 but they were contrary to the evidence and law and became the subject of a lawsuit by the Water
10 Agencies challenging Order No. 2011-0005.

11 Accordingly, the Water Agencies respectfully contend that the scope and procedures of the
12 Supplemental Public Hearing should enable the State Water Board to make definitive
13 determinations about the alleged water rights Woods relies upon to make its diversions, and correct
14 Order No. 2011-0005’s failure to do so. The mechanics of any needed enforcement order, and its
15 purported effect on Woods or Woods’ landowners, can be bifurcated from the issue of whether
16 valid water rights do or do not exist, and taken up after the State Water Board makes those
17 determinations. It is important to highlight here that, in making definitive determinations about the
18 water rights alleged in this matter, the starting point is not the 77.7 cfs diversion rate that Order No.
19 2011-0005 concluded “do not likely constitute unauthorized diversions.” That is because the
20 Prosecution Team elected “not to further investigate the claim of right to divert up to 77.7 cfs,” and
21 only to seek enforcement of Woods’ diversions in excess of 77.7 cfs. Order No. 2011-0005 at p. 30.
22 Thus, the 77.7 cfs figure in Order No. 2011-0005 does not represent any sort of water rights
23 determination, and whether valid water rights exist to support Woods’ diversions of *any* amount
24 should be determined through the Supplemental Public Hearing.¹

25 ¹ Even Order No. 2011-0005 recognizes that Woods’ evidence did not establish that “Woods actually developed and put
26 to beneficial use the full 77.7 cfs within a reasonable time, or that the diversion facilities as they existed at the time were
27 capable of delivering the full amount,” only that there was evidence of an “intent to develop up to 77.7 cfs,” and that “a
28 significant amount of the water was diverted prior to 1914.” Order No. 2011-0005 at p. 30. Further, Order No. 2011-
0005 did not discern whose alleged water rights Woods’ evidence might support. *See id.* at p. 30, fn 11 (“It is
unnecessary for the purposes of this order to determine whether Woods, individual landowners, or some combination of
the two hold the pre-1914 water right”).

1 In order to make definitive determinations about the alleged water rights at issue here, the
2 State Water Board must consider all relevant and admissible evidence bearing on the alleged water
3 rights implicated by this proceeding. To this end, the State Water Board may need evidence and
4 testimony that is beyond the “supplemental information” the Hearing Notice states the State Water
5 Board is seeking from Woods’ landowners. The Water Agencies anticipate that the evidence and
6 direct testimony the State Water Board will need to make the necessary water rights determinations
7 will be provided by current parties, whose participation is presently limited to cross-examination
8 and rebuttal of new evidence and any redirect examination that may be permitted by the hearing
9 officers. Thus, the State Water Board should allow all of the parties, new or current, the
10 opportunity to participate fully in the Supplemental Public Hearing, including offering evidence and
11 testimony that is relevant to the investigation and determination of Woods’ and/or Woods’
12 landowners’ alleged water rights, as well as submitting briefs relevant to the legal issues implicated
13 by the proceeding, and responding to briefs filed by others.

14 The Water Agencies request that the State Water Board use the Supplemental Public
15 Hearing to determine the alleged water rights of Woods and Woods’ landowners, and recommend
16 that all parties be allowed to fully participate. This request is guided by three key factors. First, the
17 State Water Board has the jurisdiction necessary to determine the alleged water rights of Woods
18 and/or Woods’ landowners. In the last 16 months, two California Appellate Courts have issued
19 decisions in accord with California Supreme Court precedent that “has consistently held that the
20 Water Board has the power or authority to make the threshold determinations necessary to execute
21 its responsibility to regulate water in the State of California.” *Young v. State Water Resources*
22 *Control Board*, 219 Cal. App. 4th 397, 405 (2013) (“*Young*”). In *Young*, the appellate court
23 rejected that argument that the State Water Board lacks jurisdiction to determine riparian or pre-
24 1914 appropriative rights. To the contrary, the appellate court held that the State Water Board may
25 make a determination for purposes of enforcement whether a diverter has the riparian or pre-1914
26 appropriative rights the diverter claims. *Id.* at 405-406. In *Millview County Water District v. State*
27 *Water Resources Control Board*, 229 Cal. App. 4th 879, 894 (2014) (“*Millview*”), the appellate
28 court held that this broad authority includes making determinations about the existence and validity

1 of alleged water rights. As stated in *Millview*, “In order to exercise the authority given to it under
2 [Water Code] section 1831 to prevent unauthorized diversion of water, the [State Water] Board
3 necessarily must have jurisdiction to determine whether a diverter’s claim under a pre-1914 right of
4 appropriation is valid”.

5 Second, as the Water Agencies understand the parties’ respective positions, Woods and
6 Woods’ landowners, themselves, seek definitive determinations about the alleged water rights they
7 claim to hold, and the relation of their respective water rights to one another. Again, such certainty
8 is essential to effective management of water use in this State. Investigating and resolving these
9 alleged water rights serves the State Water Board’s purpose of “provid[ing] for the orderly and
10 efficient administration of the water resources of the state.” Water Code § 174. Thus, the Water
11 Agencies: support the objective of Woods and its landowners to obtain that certainty regarding
12 Woods’ and Woods’ landowners’ alleged water rights; similarly seek that certitude through this
13 administrative proceeding and the pending but stayed state court litigation against Woods (discussed
14 below); and urge the State Water Board to exercise its jurisdiction to make the definitive water
15 rights determinations sought by all the parties.

16 Third, in pending litigation between the Water Agencies and Woods to which the State
17 Water Board originally was a party, the State Water Board recently specially appeared and stated
18 that the State Water Board’s pending administrative proceeding against Woods will encompass and
19 address the water rights issues that have been raised by the Water Agencies, Woods, and Woods’
20 landowners in both forums. In other words, the water rights determinations the parties are seeking
21 will be made in this proceeding.

22 The Water Agencies are amenable to discussing appropriate and reasonable means of
23 streamlining the Supplemental Public Hearing. To this end, the Water Agencies recommend that
24 the parties meet and confer, and then prepare and submit to the State Water Board in approximately
25 two months a schedule setting forth deadlines for submitting pre-hearing briefs, closing briefs,
26 submissions of stipulations as to evidence and/or legal issues, and other such matters that will
27 facilitate the Supplemental Public Hearing process.

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1 **II. RELEVANT BACKGROUND FACTS**

2 On February 1, 2011, the State Water Board issued Order No. 2011-0005. In March 2011,
3 the Water Agencies timely filed a petition for writ of mandate and complaint against the State Water
4 Board and Woods in Sacramento County Superior Court (the “State Court Litigation”). Woods’
5 landowners are not parties to the State Court Litigation. The Water Agencies’ lawsuit challenges
6 Order No. 2011-0005, particularly the State Water Board’s equivocal findings of “likely” water
7 rights on the part of Woods, or Woods’ landowners, or both, as being contrary to the evidence and
8 law. The Water Agencies’ lawsuit also seeks a conclusive adjudication of Woods’ alleged water
9 rights.

10 On August 7, 2012, the State Water Board issued Order No. 2012-0012. In that
11 reconsideration order, the State Water Board rescinded a portion of Order No. 2011-0005; ordered a
12 further hearing to allow Woods’ landowners to participate in the CDO proceedings against Woods;
13 and stated that the findings and conclusions of law in Order No. 2011-0005 (and Order No. 2012-
14 0012) were not to be given preclusive effect, and were subject to reevaluation and revision based on
15 additional evidence and argument that may be presented at the further hearing.

16 On July 16, 2013, in light of the State Water Board’s issuance of Order No. 2012-0012, and
17 its effect on the finality of Order No. 2011-0005, the Water Agencies agreed to dismiss without
18 prejudice the State Court Litigation as against the State Water Board only. However, the State
19 Court Litigation continued to proceed as against Woods. Thus, as presently postured, the State
20 Court Litigation is focused on Woods’ claimed water rights and seeks a conclusive determination as
21 to those claimed water rights.

22 In October 2014, Woods filed a motion in the State Court Litigation to compel joinder of
23 Woods’ landowners, or alternatively have the Water Agencies’ lawsuit dismissed for failure to join
24 necessary and indispensable parties, i.e., Woods’ landowners. The essence of Woods’ motion was
25 that the alleged water rights of Woods and/or Woods’ landowners, and the relationship of those
26 rights to one another, had never been established, and that Woods’ own water rights could not be
27 conclusively adjudicated without a determination of Woods’ landowners’ alleged water rights. This
28 argument has been previously raised by Woods and/or Woods’ landowners in this CDO proceeding.

1 The Water Agencies understand the State Water Board agrees there is need to make
2 definitive determinations about the water rights alleged here, and the State Water Board has stated
3 as much in Court. Specifically, on November 10, 2014, the State Water Board issued its Hearing
4 Notice describing the purpose and scope of the Supplemental Public Hearing and the roles of the
5 parties thereto, as described above. That same day, November 10, 2014, the State Water Board
6 addressed the issue of the scope of the Supplemental Public Hearing in the State Court Litigation.
7 In an apparent response to Woods’ joinder/dismissal motion, the State Water Board filed in the
8 State Court Litigation an “Application of the State Water Resources Control Board to Appear and
9 File Brief as Amicus Curiae and [Proposed] Order” (“Amicus Curiae Application”) and an “Amicus
10 Curiae Brief of State Water Resources Control Board Informing Court of Ongoing Administrative
11 Proceedings” (“Amicus Brief”). **Exhs. 1 and 2** hereto. The State Water Board’s Amicus Curiae
12 Application stated that:

13 3. The State Water Board believes that there is a necessity of
14 provision of additional information to the court, because proceeding
15 with the instant action may result in a waste of judicial resources.
16 The same claims and issues are currently under consideration before
17 the State Water Board. A resolution of these issues by the State
18 Water Board would serve the interests of judicial economy and avoid
19 duplication burdening this court’s calendar.

18 **Exh. 1** hereto, Amicus Curiae Application at 2:1-5. In its Amicus Brief, the State Water Board
19 stated the pending administrative proceeding and the State Court Litigation had overlapping issues,
20 and that the State Water Board would, in the “reopened proceedings,” “review the water rights
21 exercised by Woods, including any rights held by the Landowners.” **Exh. 2** hereto, Amicus Brief at
22 2:18-20. The State Water Board reiterated these sentiments at the December 11, 2014, hearing on
23 Woods’ joinder/dismissal motion. E.g., **Exh. 3** hereto [Hearing Transcript on Woods’
24 Joinder/Dismissal Motion] at 19:27-20:7 (“the Water Board is better placed to make these kinds of
25 determinations than the Court is”). After denying Woods’ motion, the Court—persuaded by the
26 State Water Board’s comments—ordered the State Court Litigation stayed. **Exh. 4** hereto [Order on
27 Woods Irrigation Company’s Motion to Compel Joinder or in the Alternative dismiss Action].

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1 **III. DISCUSSION**

2 **A. The State Water Board Has Authority To Determine The Alleged Water Rights**
3 **of Woods and Woods’ Landowners**

4 In 2013 and 2014, two separate appellate court decisions confirmed that the State Water
5 Board possesses the authority necessary to determine the water rights alleged in the CDO
6 proceeding against Woods.

7 First, in *Young*, a case and decision that arose from the CDO proceeding against Woods,
8 some of Woods’ landowners successfully sought a writ of mandate in the trial court, arguing the
9 “Water Code does not provide the authority to the [State Water Board] to adjudicate the validity, the
10 extent, or the forfeiture of riparian or pre-1914 appropriative rights.” *Young*, 219 Cal. App. 4th at
11 403. The appellate court reversed. After acknowledging that the State Water Board “does not have
12 jurisdiction to regulate riparian and pre-1914 appropriative rights,” the *Young* court went on to find
13 that the “Legislature expressly vests authority in the [State] Water Board to determine if any person
14 is unlawfully diverting water; to determine whether the diversion and use of water is unauthorized,
15 it is necessary to determine whether the diversion and use that the diverter claims is authorized by
16 riparian or pre-1914 appropriative rights.” *Id.* at 406. The *Young* court found in the Water Code
17 the State Water Board’s authority to make such determinations:

18 The provisions of part 2 of division 2 of the Water Code referred to
19 in Water Code section 1831, subdivision (e) include the authority to
20 regulate the diversion and use of unappropriated water, including
21 water claimed under pre-1914 appropriative rights but never
22 perfected, and rights perfected under a pre-1914 right but lost
23 through nonuse. (Wat.Code, §§ 1201, 1202, subd. (b), 1225.) These
provisions also include the authority to regulate water claimed under
a riparian right but either not covered by an existing riparian right or
water being diverted in excess of a valid riparian right.

24 *Id.* at 406-07. Thus, *Young* made clear that the State Water Board indeed has the jurisdiction
25 needed to render determinations about the validity of alleged riparian or pre-1914 rights.

26 Second, in *Millview*, the State Water Board issued a CDO to an assignee of a pre-1914
27 appropriative right substantially restricting its diversion of water under the right, finding it had been
28 largely forfeited by a period of diminished use from 1967 through 1987. *Millview*, 229 Cal. App.

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1 4th at 885. Petitioners successfully challenged the CDO at the trial court level contending, among
2 other things, that the “Water Code does not provide the authority to the [State Water Board] to
3 adjudicate the validity, the extent, or the forfeiture of riparian or pre–1914 appropriative rights.” *Id.*
4 at 893. However, the appellate court, following *Young*, rejected this particular argument:

5 *Young’s* reasoning is straightforward and persuasive. In order to
6 exercise the authority given to it under section 1831 to prevent
7 unauthorized diversion of water, the [State Water] Board necessarily
8 must have jurisdiction to determine whether a diverter’s claim under
9 a pre–1914 right of appropriation is valid. . . . Because section 1831,
10 subdivision (e) does not protect from regulation water purportedly
11 diverted under a claimed pre–1914 right that does not actually
12 authorize such diversion, the subdivision does not preclude the [State
13 Water] Board from determining the proper scope of a claimed pre–
14 1914 right.

11 *Id.* at 894. *Millview* also makes clear that the State Water Board can make water rights
12 determinations without judicial intervention:

13 Plaintiffs’ further argument that the [State Water] Board must file a
14 judicial proceeding to determine the proper scope of a pre–1914
15 water right is both inconsistent with the plain language of section
16 1831 and unsupported by relevant authority. . . . ¶ The
17 Legislature’s intent to expand the [State Water] Board’s authority
18 into territory formerly occupied by the courts is made clear from the
19 progression of legislation in this area. As originally enacted in 1980,
20 section 1831 allowed the [State Water] Board to issue a CDO only
21 against violations of the terms of a permit, leaving other types of
22 misuse of water outside the Board’s presumed CDO authority.
23 (Stats. 1980, ch. 933, § 13, p. 2958.) When the Legislature expanded
24 section 1831 by amendment in 2002 (Stats. 2002, ch. 652, § 6, pp.
25 3604–3605), it added subdivision (d)(1), which expressly authorizes
26 the [State Water] Board to issue a CDO against violations of “[t]he
27 prohibition set forth in Section 1052 against the unauthorized
28 diversion or use of water...” At the time, although section 1052
directed the [State Water] Board to prevent the unauthorized
diversion of water, the [State Water] Board could do so only by
requesting the Attorney General to commence an action to enjoin
such diversion. (§ 1052, subd. (b).)[fn] Subdivision (d)(1) of section
1831 therefore expanded the [State Water] Board’s authority into the
adjudication of unauthorized diversion, which was previously vested
in the courts.[fn]

27 *Id.* at 895-96. Thus, the State Water Board is vested with the authority to determine alleged water
28 rights.

1 *Young* and *Millview* eliminate any doubt that the State Water Board has the jurisdiction
2 necessary to render determinations about Woods’ claimed water rights in the context of the present
3 CDO proceedings against Woods. Further, because Woods and Woods’ landowners contend that
4 the State Water Board’s determination of Woods’ alleged water rights necessarily implicates
5 Woods’ landowners’ alleged water rights, *Young* and *Millview* support the State Water Board’s
6 exercise of its plenary authority to make definitive determinations of these alleged water rights in
7 the pending CDO proceeding.

8 **B. Woods and Woods’ Landowners Seek A Determination Of Their Water Rights**

9 As the Water Agencies understand the parties’ respective positions, Woods and Woods’
10 landowners, themselves, seek definitive determinations about the alleged water rights they claim to
11 hold, and the relation of their respective water rights to one another. In fact, Woods and Woods’
12 landowners have long argued that their alleged water rights are related, and need to be considered at
13 the same time. Consistent with that position, certain Woods landowners attempted to intervene in
14 the original CDO proceeding against Woods but were unsuccessful. Following the State Water
15 Board’s reconsideration order, and Hearing Notice inviting Woods’ landowners to participate, a
16 substantial number of Woods’ landowners filed Notices of Intent to Appear (“NOI”) indicating they
17 intend to participate in the Supplemental Public Hearing, depending on its scope.

18 The certainty that Woods and Woods’ landowners appear to seek about their alleged water
19 rights is essential to the State Water Board’s effective management of water use in this State. For
20 this reason, the Water Agencies support Woods and Woods’ landowners desire to obtain that
21 certainty as respects their water rights. Indeed, the Water Agencies also seek that certitude through
22 this administrative proceeding, and the pending, but stayed, State Court Litigation. Making
23 determinations on these alleged water rights will serve the State Water Board’s purpose of
24 “provid[ing] for the orderly and efficient administration of the water resources of the state” (Water
25 Code § 174) and is consistent with the State Water Board’s broad jurisdiction (*see Young*, 219 Cal.
26 App. 4th at 406-07; *Millview*, 229 Cal. App. 4th at 894, 95-96).

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C. The State Water Board Has Stated That Woods and Woods’ Landowners’ Water Rights Will Be Determined In This Administrative Proceeding

The Water Agencies and Woods are currently parties to the State Court Litigation which seeks to conclusively adjudicate the issue of Woods’ alleged water rights. The State Water Board was previously a party to that lawsuit, but was dismissed without prejudice after the State Water Board issued Order No. 2012-0012, making way for the Supplemental Public Hearing. Notwithstanding its dismissal from the State Court Litigation, the State Water Board recently applied and was granted leave to file an amicus curiae brief in that action to advise the Court about this pending administrative proceeding, and to inform the Court about “Some Alternatives Available to The Court,” including staying the State Court Litigation. In its Amicus Curiae Application, Amicus Brief, and at the hearing on Woods’ joinder/dismissal motion, the State Water Board repeatedly stated that the water rights issues implicated by the State Court Litigation (or allegedly implicated, in the case of Woods’ landowners’ purported water rights) would be encompassed and addressed during the Supplemental Public Hearing, and that the State Water Board was in a superior position to resolve these water rights issues. The State Water Board’s statements about the scope and parallelism of the State Court Litigation and Supplemental Public Hearing satisfied the Court that the State Court Litigation should be stayed pending the disposition of the administrative proceeding, and the Court issued such an order.

The State Water Board’s statements about the scope of the Supplemental Public Hearing is consistent with the parties’ shared intent and interest in having the State Water Board make definitive determinations about the alleged water rights of Woods and/or Woods’ landowners through this CDO process.

IV. RECOMMENDED SCOPE AND PROCEDURE FOR SUPPLEMENTAL PUBLIC HEARING

Based on the foregoing, the Water Agencies respectfully submit that the scope of the Supplemental Public Hearing should address and the State Water Board should determine the following issues:

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1. As to Woods:

- Whether Woods has any riparian rights (and if so, to what water source). Order No. 2011-0005 concluded Woods has no riparian rights relevant to the proceeding. Order No. 2011-0005 at p. 20 (“Given Woods’s admission that it owns no property on which it is using the water, it can own no riparian rights that are relevant to this proceeding”). However, Woods has asserted the claim, albeit inconsistently, in the State Court Litigation, and thus it remains an unresolved issue.
- Whether Woods has any pre-1914 appropriative rights, and if so, the terms and conditions of the right(s).

2. As to Woods’ landowners who receive water through Woods’ facilities:

- Which Woods landowners have riparian rights (and if so, to what water source).
- Which Woods landowners have pre-1914 rights, and terms and conditions of each right.
- Which Woods landowners have both riparian and pre-1914 rights.
- Which Woods landowners do not have any water rights.

The presentation of testimony and evidence needed to resolve these issues are likely to exceed the 1-hour the State Water Board is allocating to each party as reflected in the Hearing Notice. However, the Water Agencies intend to work with Woods and Woods’ landowners, and any other party to the hearing, to reach stipulations of fact and presentation of evidence whenever possible. The Water Agencies also intend to work with the other parties to address any legal issues the CDO proceedings give rise to, such as whether the State Water Board may determine Woods’ landowners’ water rights in the pending CDO proceeding without issuing draft CDOs to each individual landowner, something the Water Agencies understand Woods’ landowners have raised. To this end, as discussed above, the Water Agencies recommend the parties meet and confer, and prepare and submit to the State Water Board in approximately two months a schedule setting forth deadlines for submitting pre-hearing and closing briefs, submissions of stipulations as to evidence and/or legal issues, and other such matters to facilitate the Supplemental Public Hearing process.

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1 **V. OTHER MATTERS**

2 On December 12, 2014, Woods and Woods’ landowners filed a “Joint Petition to Clarify
3 Scope of Proceedings and Remove from Proceedings Landowners Not Receiving Water from
4 Woods Irrigation Company” (“Petition for Clarification”). The thrust of the Petition for
5 Clarification is that, as Woods and Woods’ landowners understand the scope of the Supplemental
6 Public Hearing, that hearing “is not intended to address the water right claims of diversion rights of
7 any lands that do not divert or receive water through the Woods facilities.” Thus, lands and/or
8 Woods landowners who do not receive water through the Woods facilities, but are drainage-only
9 customers, should be removed from the proceedings. The Water Agencies are supportive of
10 reasonable and appropriate actions that serve to increase the efficiency of the Supplemental Public
11 Hearing. However, the Petition for Clarification and requested relief pose two issues that require
12 further consideration and discussion.

13 First, in the original CDO hearing, there was conflicting testimony and evidence about
14 whether and to what extent Woods’ canal systems provided irrigation water, or drainage, or both. It
15 is therefore possible that water drained from a “drainage-only” landowner’s parcel can be used by
16 other Woods’ landowners. The implication of such activities, and the effect the removal of
17 “drainage-only” landowners from the proceedings, must be considered before a decision can be
18 made to remove those parties.

19 Second, eliminating Woods’ “drainage-only” landowners from the proceeding is potentially
20 contrary to the certainty about water rights that the Supplemental Public Hearing should provide.
21 As discussed above, Woods and Woods’ landowners have long argued that their water rights are
22 related, and that Woods’ water rights cannot be determined without also determining the water
23 rights of Woods’ landowners. Thus, unless Woods’ “drainage-only” landowners have no water
24 rights of their own that could be impaired by a CDO against Woods, removing them from this
25 proceeding risks drawing the due process and procedural objections that Woods and Woods’ other
26 landowners made during the original CDO hearing. The State Water Board’s Division of Water
27 Rights Prosecution Team (“State Water Board Prosecution Team”) appears to recognize this issue.
28 On December 19, 2014, the State Water Board Prosecution Team authored a letter stating:

{00442192; 6}

1 So long as the lands/owners listed on Exhibit A to that petition
2 neither receive water from Woods nor claim to have a right to
3 receive water from Woods under any basis of right (their own or any
4 right held by Woods), removing those lands/owners from this
5 proceeding would aid the Board in efficiently resolving pertinent
6 hearing issues and we would not expect their removal to have any
7 adverse impact on the Board reaching a comprehensive resolution of
8 the matters being addressed by this proceeding.

9 Dec. 19, 2014 E-Mail re: Joint Petition of R.D.C. Farms, Inc., et al. and Woods to Clarify Scope of
10 Proceedings and Remove from Proceedings Landowners Not Receiving Water from Woods
11 Irrigation Company (emphasis added). Thus, it appears the State Water Board Prosecution Team
12 would condition removal of Woods' "drainage-only" landowners on their disclaimer of any right to
13 receive water from Woods under any basis of right, including their own. Absent such assurances,
14 the order the State Water Board issues following the Supplemental Public Hearing would be
15 undermined by uncertainty about the water rights of Woods' "drainage-only" landowners, and the
16 effect of those alleged rights on a CDO against Woods. Thus, as the Water Agencies understand the
17 State Water Board Prosecution Team's position on this issue, the Water Agencies agree with it.

18 **VI. CONCLUSION**

19 For the above stated reasons, the Water Agencies respectfully request that the State Water
20 Board use the Supplemental Public Hearing to determine the alleged water rights of Woods and
21 Woods' landowners. To do so, the State Water Board should allow all of the parties to participate
22 fully in the Supplemental Public Hearing, including offering evidence and testimony that is relevant
23 to the investigation and determination of Woods' and/or Woods' landowners' alleged water rights,
24 as well as submitting briefs relevant to the legal issues implicated by the proceeding, and
25 responding to briefs filed by others.

26 Dated: January 9, 2015

DIEPENBROCK ELKIN LLP
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

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Dated: January 9, 2015

O'LAUGHLIN & PARIS LLP

By: 
VALERIE C. KINCAID
Attorneys for
MODESTO IRRIGATION DISTRICT

Dated: January __, 2015

STATE WATER CONTRACTORS, INC.
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

By: _____
STEFANIE MORRIS
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1 Dated: January __, 2015

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6 Dated: January 9, 2015

STATE WATER CONTRACTORS, INC.
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Exhibit 1

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SACRAMENTO
11

12
13 **MODESTO IRRIGATION DISTRICT,
SAN LUIS & DELTA-MENDOTA WATER
14 AUTHORITY, WESTLANDS WATER
DISTRICT, AND STATE WATER
15 CONTRACTORS, INC.,**

16 **Petitioners,**

17 **v.**

18 **WOODS IRRIGATION COMPANY,**

19 **Defendant.**
20
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Case No. 34-2011-80000803-CU-WM-GDS

**APPLICATION OF THE STATE WATER
RESOURCES CONTROL BOARD TO
APPEAR AND FILE BRIEF AS AMICUS
CURIAE AND [PROPOSED] ORDER**

Date: November 21, 2014
Time: 2:00 p.m.
Dept: 53
Judge: Hon. David I. Brown
Action Filed: March 2, 2011
Trial Date: August 10, 2015

22
23 This application of the State Water Resources Control Board (State Water Board)
24 respectfully shows:

- 25 1. Applicant is a state agency having the statutory authority to regulate and enforce
26 water rights pursuant to the California Water Code.
27 2. The proposed brief of the State Water Board is attached.
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3. The State Water Board believes that there is a necessity for provision of additional information to the court, because proceeding with the instant action may result in a waste of judicial resources. The same claims and issues are currently under consideration before the State Water Board. A resolution of these issues by the State Water Board would serve the interests of judicial economy and avoid duplication burdening this court's calendar.

WHEREFORE, the State Water Resources Control Board respectfully requests leave to file a brief as amicus curiae in the above-entitled cause.

Dated: November 10, 2014

Respectfully Submitted,
KAMALA D. HARRIS
Attorney General of California
GAVIN G. MCCABE
Supervising Deputy Attorney General



MATTHEW G. BULLOCK
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Water Resources Control Board*

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ORDER

The application of the State Water Resources Board to appear and file a brief as amicus curiae having been read and filed, and good cause appearing therefore,

IT IS ORDERED that the applicant state agency be, and hereby is, permitted to appear and file a brief as amicus curiae herein.

Dated:

Judge of the Superior Court

DECLARATION OF SERVICE BY EMAIL & U.S. MAIL

Case Name: *Modesto Irrigation District et al. vs.
State Water Resources Control Board, et al.*

Case No.: 34-2011-80000803

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On November 10, 2014, I emailed the attached **APPLICATION OF THE STATE WATER RESOURCES CONTROL BOARD TO APPEAR AND FILE BRIEF AS AMICUS CURIAE AND [PROPOSED] ORDER** to the list below. In addition, I placed a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 10, 2014, at Sacramento, California.

James J. Mirarchi
Declarant

Signature

Exhibit 2

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO

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13 **MODESTO IRRIGATION DISTRICT,
SAN LUIS & DELTA-MENDOTA WATER
14 AUTHORITY, WESTLANDS WATER
DISTRICT, AND STATE WATER
15 CONTRACTORS, INC.,**

16 **Petitioners,**

17 **v.**

18 **WOODS IRRIGATION COMPANY,**

19 **Defendant.**
20
21

Case No. 34-2011-80000803-CU-WM-GDS

**AMICUS CURIAE BRIEF OF STATE
WATER RESOURCES CONTROL
BOARD INFORMING COURT OF
ONGOING ADMINISTRATIVE
PROCEEDINGS**

Date: November 21, 2014
Time: 2:00 p.m.
Dept: 53
Judge: Hon. David I. Brown
Action Filed: March 2, 2011
Trial Date: August 10, 2015

22
23 The State Water Resources Control Board (State Water Board) files this brief as a friend
24 of the court, informing the court of ongoing administrative proceedings in front of the State Water
25 Board involving parallel issues to those before the court in the instant matter, and providing the
26 court with information on procedural options it has moving forward in the instant case.
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HISTORY OF ADMINISTRATIVE PROCEEDINGS IN FRONT OF THE STATE WATER BOARD

On December 28, 2009, the State Water Board issued notice of a proposed Cease and Desist Order to Woods Irrigation Company (Woods), the defendant in the instant case, for the alleged violation and threatened violation of the prohibition against the unauthorized diversion or use of water.

Following administrative hearings, on February 1, 2011, the State Water Board issued Cease and Desist Order WR 2011-0005 against Woods (the Cease and Desist Order). The Cease and Desist Order required Woods to cease and desist from diverting water from Middle River at a rate in excess of 77.7 cubic feet per second (cfs) unless Woods meets certain requirements.

The Complaint in the instant case was filed March 2, 2011. Around the same time, a group of individuals who receive water through Woods and who are shareholders of Woods (the Landowners) petitioned the State Water Board to reconsider the Cease and Desist Order against Woods and allow the Landowners to participate in the reopened hearing. On August 7, 2012, the State Water Board issued Order WR 2012-0012 (the Reconsideration Order), granting the Landowners' reconsideration request and reopening the administrative hearing on Woods' water right.¹ A copy of the Reconsideration Order, providing further background on the administrative proceeding, is attached hereto as Exhibit A.

The State Water Board has set a pre-hearing conference for January 15, 2015 in the reopened proceeding to review the water rights exercised by Woods, including any rights held by the Landowners. Administrative hearing on the merits is set to commence on June 8, 2015, with potential continuation through June 11, 2015. The notice of hearing is attached hereto as Exhibit B. The State Water Board understands trial in the instant matter is currently set for August 2015.

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¹ The State Water Board was initially named as a respondent in the instant action. Plaintiff/Petitioners challenged certain of the findings in the Cease and Desist Order. The Reconsideration Order rescinded the Cease and Desist Order. This rendered the claims in the instant action against the State Water Board moot. Accordingly, the State Water Board was dismissed from the instant case on July 16, 2013.

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**CONCURRENT JURISDICTION, AND SOME
ALTERNATIVES AVAILABLE TO THE COURT**

On October 29, 2014, Woods moved the court to compel joinder of the Landowners or to dismiss the instant case. Inclusion of the Landowners in the instant litigation would make for nearly identical issues in the instant case and the State Water Board's administrative proceedings.

The Superior Court and the State Water Board have concurrent jurisdiction over questions of water rights. (*National Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419, 426.) Parallel proceedings are procedurally permitted, but can lead to conflicting decisions and a waste of judicial resources. Any decision reached in the State Water Board's administrative proceedings will be subject to the court's review under an independent judgment standard. (Wat. Code, § 1126, subd. (c).)

With this in mind, the court may wish to consider, in the interest of conservation of court resources, staying the instant case pending resolution of the parallel State Water Board proceedings. Alternatively, the court could refer the matter or some part thereof to the State Water Board, as provided for in the Water Code. (Wat. Code, §§ 2000, 2001; *Fleming v. Bennett* (1941) 18 Cal.2d 518.)

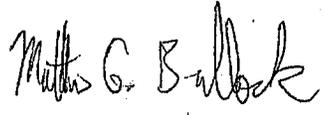
The State Water Board has "experience and expert knowledge, not only in the intricacies of water law but in the economic and engineering problems involved in implementing water policy. The board, moreover, is charged with a duty of comprehensive planning, a function difficult to perform if some cases bypass board jurisdiction." (*National Audubon Society v. Super. Ct., supra*, 33 Cal.3d at p. 450.) Moreover, the "scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts." (*Id.*, at p. 451, fn. 1, quoting *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.* (1977) 20 Cal.3d 327, 344.) The State Water Board is already addressing the water rights at issue in the instant case. Any decisions it makes will be subject to independent judgment review by the court. It may not make sense for the court to expend limited judicial resources on the matter at this time under those circumstances.

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If it can be of further assistance to the court with regards to this matter, the State Water Board is at the court's disposal.

Dated: November 10, 2014

Respectfully Submitted,
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Attorney General of California
GAVIN G. MCCABE
Supervising Deputy Attorney General



MATTHEW G. BULLOCK
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*Attorneys for Amicus Curiae State
Water Resources Control Board*

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Exh. A

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0012

In the Matter of
Petitions for Reconsideration of
Cease and Desist Order Against
Unauthorized Diversions by
Woods Irrigation Company

Source: Middle River

County: San Joaquin County

ORDER GRANTING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

On February 1, 2011, the State Water Resources Control Board (State Water Board) issued a Cease and Desist Order (CDO), Order WR 2011-0005, against the Woods Irrigation Company (Woods). Order WR 2011-0005 required Woods to cease and desist from diverting water from Middle River at a rate in excess of 77.7 cubic feet per second (cfs) unless Woods meets certain requirements. (*Id.* at p. 61.) The State Water Board received two timely petitions for reconsideration; the first was filed by R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC, Dianne E. Young, and Warren P. Schmidt, Trustee of the Schmidt Family Revocable Trust (collectively referred to as the "Customers"), and the second was filed by Woods, the South Delta Water Agency (SDWA), and the Central Delta Water Agency (CDWA). The main issue to be reconsidered is whether the Customers were improperly precluded from participating in the hearing for lack of notice and status as parties. The issues raised by the petitioners (the Customers, Woods, SDWA and CDWA) are addressed below.

2.0 GROUNDS FOR RECONSIDERATION

California Code of Regulations, title 23, section 768 provides that any interested person may petition for reconsideration based on any of the following causes:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

Following review of the petitions and other relevant material, the State Water Board may refuse to reconsider the decision if the petitions fail to raise substantial issues related to the causes for reconsideration in section 768. The State Water Board may also deny the petitions upon a finding that the decision was appropriate, set aside or modify the decision, or take other appropriate action. (Cal. Code Regs., tit. 14, § 769.)¹

3.0 LEGAL AND FACTUAL BACKGROUND

3.1 Facts

Woods is an irrigation company that diverts water from Middle River in San Joaquin County, conveys the water to its customers in a service area on Middle Roberts Island, and provides drainage services to a slightly larger area on Middle Roberts Island. While Woods owns the pumps and operates the irrigation and drainage system, it does not have title to any irrigated lands within its service area.²

On February 18, 2009, the Division of Water Rights (Division) requested by letter that Woods submit information supporting its right to divert water. From March to October of 2009, Woods and the Division communicated regarding information to support water rights for Woods' diversions at Middle River, and the Division staff inspected the facilities twice. Division staff measured a diversion rate of 90 cfs during the second inspection.

On December 28, 2009, the Assistant Deputy Director for Water Rights issued notice of a proposed CDO, including a draft of the CDO, to Woods for the alleged violation and threatened violation of the prohibition against the unauthorized diversion or use of water. By letter dated January 11, 2010, Woods requested a hearing. On April 7, 2010, the State Water Board issued a notice for a hearing to be held on June 7, 2010. On May 12, 2010 the State Water Board received two letters, one from Vierra Farms, LLC, and one from Dino Del Carlo and RDC Farms, Inc., each of whom are Woods' customers served by Woods and the petitioners herein. Both of the parties requested leave to intervene in the Woods CDO hearing, and requested that the hearing be postponed until at least August 20, 2010. In response, the State Water Board Hearing Officer declined "to continue the hearing or to allow late intervention of your clients at this point." (State Water Board's Hearing Officer's May 24, 2010 "Continuance Response" to South Delta's May 13, 2010 letter at p. 1). The Hearing Officer did not, however, completely preclude the participation of additional parties, or the submission of evidence that might demonstrate that the Woods' customers within Woods' service area exercised their water rights through Woods' system:

¹ The Water Code directs the State Water Board to act on a petition for reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (SWRCB Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; SWRCB Order WQ 98-05-UST at pp. 3-4.)

² The record reflects that Woods Irrigation Company is a corporation, and that the landowner/customers are also its shareholders. (Order WR 2010-0005, p.33, sec. 4.3.2.1; Woods, SDWA/CDWA Joint Closing Brief, pp. 18:4-7, 19:22, 20:8, 21:24-27; MSS Parties Joint Closing Brief, p. 2:23-28, p. 3:9-21, p. 5:3-8, p. 6:3-5 and 25-28; RT. , Vol. 1, pp. 11:17 to 12:10; p. 24:13-17; pp. 97:22-25 to 98:1-3; p. 162:10-14.)

The Woods CDO hearing will not bind non-parties to the hearing. Whether landowners who receive water through Woods would be otherwise impacted by the proceeding will depend upon the terms of an order either issuing or not issuing a CDO against Woods. The Hearing Officers may, if appropriate or necessary, hold open the hearing to allow for submission of additional evidence or to allow for participation of additional parties.

(*ibid.*)

As stated above, the right of Woods to divert water had been under investigation since February 2009. If Woods' right to divert water was derivative of its customers' water rights, there was ample time for Woods to notify its customers, who are also Woods' shareholders, and involve them in the entire investigation that led to the scheduled hearing. Woods received notice of the proposed CDO in December, 2009; yet it was not until May 2010, less than a month before the scheduled hearing, that some of the Woods' customers sought to intervene. The hearing began as scheduled on June 7, 2010, and continued on June 10, 24, 25, 28 and July 2, 2010. (April 7, 2010, Notice of Public Hearing; April 23, 2010, Service List of Participants; May 12, 2010, Eddie Vierra Farms, Inc. and Dino Del Carlo and RDC Farms Inc. Letters of Request to Intervene and Request for Continuance; June 10, 2010 and June 29, 2010, Notices of Continuance of Public Hearing.)

3.2 Order WR 2011-0005

On February 1, 2011, the State Water Board issued Order WR 2011-0005, which is the subject of these petitions for reconsideration. Order WR 2011-0005 was not binding upon the Woods' customers.

3.3 Litigation

In addition to the pending petitions for reconsideration, the Customers filed suit against the State Water Board.³ The Superior Court ruled in favor of the Customers, and the State Water Board has filed an appeal, which has the effect of staying the Superior Court's decision.

The need to respond to the litigation has undermined the State Water Board's ability to act promptly on the petitions for reconsideration, but does not relieve the State Water Board of responsibility to act on the petitions for reconsideration. One of the petitions was filed by parties who have not filed litigation, and they are entitled to have the State Water Board act on their petition. Treating the filing of an action in Superior Court as ousting the State Water Board of jurisdiction to act on petitions for reconsideration could have the effect of some parties filing

³ *Young v. State Water Resources Control Board* (Super. Ct. San Joaquin County, 2011, No. 39-2011-00259191-CU-WM-STK.) The plaintiffs alleged that the hearing and CDO violated the Customers' procedural due process rights to a fair hearing because they were not individually noticed and were not granted party status at the hearing. The plaintiffs also alleged that the State Water Board lacked jurisdiction to determine whether allegedly unauthorized diversions are in fact unauthorized if the diverters claim they have riparian or pre-1914 appropriative rights. The court issued an Amended Judgment and Peremptory Writ of Mandamus on June 13, 2011. The court ruled that the State Water Board had denied the Customers right to procedural due process by denying them "notice and an opportunity to prove [their] claims." The court also determined that the State Water Board "lacked jurisdiction to determine the extent of riparian and pre-1914 appropriative water rights through the use of its limited cease and desist order authority pursuant to Water Code §1931."

actions in court for the purpose of preventing the State Water Board from acting on pending petitions for reconsideration.

In addition, the State Water Board's completion of its review on reconsideration will not unreasonably interfere with the proceedings in court. Indeed, completion of the review on reconsideration may serve to clarify some issues, and moot others, while making for a more complete administrative record and more complete explanation of the State Water Board's reasoning. Also, completion of administrative reconsideration ordinarily will not take any longer than is required for preparation of the administrative record, meaning that completion of administrative reconsideration should not disrupt or unduly delay proceedings in court.⁴ Although in some cases there may be a need for the Superior Court to act on a stay request or other preliminary motion before the State Water Board completes action on reconsideration, there is no need for the court to issue final judgment any sooner than the State Water Board acts.

We proceed to address the issues raised in the petitions for reconsideration.

4.0 PETITION OF THE CUSTOMERS

The Customers' contentions are addressed below.

4.1 Authority to Evaluate Claims of Riparian or Pre-1914 Appropriative Rights

Contention: The Customers contend that State Water Board has no authority to issue a CDO for an unauthorized diversion if the diverter alleges that the diversion is authorized under a riparian or pre-1914 appropriative right.

Response: The State Water Board has authority to issue a CDO for the unauthorized diversion and use of water. A diverter who claims but does not have a riparian or pre-1914 right authorizing the diversion is subject to this authority, and, in a proceeding to determine whether to issue a CDO, the State Water Board has authority to determine whether the diversion is in fact authorized. This issue was thoroughly addressed in the main order in this case, Order WR 2011-0005 at pages 9-16. In addition, the State Water Board recently issued Order WR 2012-0001, a precedential order that thoroughly addressed this issue.

Water Code section 1831, subdivision (d)(1) authorizes the State Water Board to issue a CDO in response to the actual or threatened unauthorized diversion or use of water "subject to this division [division 2 of the Water Code (commencing with section 1000)]." The petitioners' argument that the State Water Board lacks jurisdiction to adjudicate claims of riparian or pre-1914 appropriative right is flawed because it begs the question, namely whether a given diversion claimed to be authorized by a valid riparian or pre-1914 appropriative right is in fact authorized by a valid riparian or pre-1914 appropriative right. If it is not, the diversion is unauthorized and subject to enforcement action. To the extent that the diversion of water is consistent with a valid riparian or pre-1914 appropriative right the diversion does not constitute an unauthorized diversion of water subject to division 2 of the Water Code. (See Wat. Code, §§ 1201, 1202.) If the claimed riparian or pre-1914 appropriative right in question is not valid, however, then the diversion of water under the claimed right would constitute an unauthorized diversion of water subject to part 2 of division 2 of the Water Code, and the diversion would be subject to enforcement pursuant to Water Code sections 1052 and 1831, subdivision (d)(1).

⁴ In this case, the Superior Court took the unusual approach of issuing a writ of administrative mandate without reviewing the administrative record.

Similarly, a diversion would be unauthorized and subject to enforcement action to the extent that it exceeds the amount of water that may be diverted under a valid right, or is otherwise inconsistent with the parameters of the right. Put simply, the claim that a diversion is authorized under riparian or pre-1914 right is no different from any other argument that there has been no unauthorized diversion; the argument does not deprive the State Water Board of the authority to determine whether an unauthorized diversion has in fact occurred or is threatened.

The Customers also contend that Water Code section 1831 subdivision (e) does not permit the State Water Board to regulate riparian or pre-1914 appropriative rights. Water Code section 1831, subdivision (e) specifies that the power to issue a CDO does not authorize the State Water Board to regulate the diversion or use of water not otherwise subject to regulation by the State Water Board under specified provisions of part 2 (commencing with section 1200) of division 2 of the Water Code. But those provisions include the authority to regulate the diversion and use of unappropriated water, including water claimed under pre-1914 right but never perfected, and rights perfected under a pre-1914 right but lost through non-use. (Wat. Code, §§ 1201, 1202, subd. (b), 1225.) The provisions also include the authority to regulate water claimed under a riparian right but either not covered by an existing riparian right or water being diverted in excess of a valid riparian right. Because the State Water Board has regulatory authority over water subject to appropriation – including diversions claimed to be diverted under riparian, pre-1914 or other right but not in fact authorized under valid riparian, pre-1914, or other rights – section 1831, subdivision (e) is not a limitation on the State Water Board's authority to issue a CDO under the circumstances presented here. The Customers' argument simply begs the question that the State Water Board must determine before issuing a CDO: is the claimed riparian or pre-1914 right valid and is the diversion authorized under that right?⁵ The Board undoubtedly has the authority to ascertain the answer to that question. (Wat. Code, § 1051.)

4.2 Customers' Notice and Due Process Claims

Contention: The Customers contend that the Order violates petitioners' due process rights by curtailing their supply of water without providing them with notice and an opportunity for a hearing.

Response: In the interest of expediting completion of these proceedings and of achieving a more comprehensive result, the State Water Board will rescind Order WR 2011-0005, at pp. 61-63, and reopen the hearing to allow the Woods' customers to participate as parties.

In so doing, the State Water Board is not conceding that due process requires this result. Indeed, it is questionable whether constitutional due process requires individual notice and an opportunity for a hearing to every individual customer of a diverter before the State Water Board can determine the validity of the diversion. Under normal circumstances, if the diverter draws water in reliance on the water right of one or more of its customers, the diverter should be able to prove that right when it has its hearing regarding the validity of its diversion.

⁵ Because unauthorized diversions within the meaning of section 1831 necessarily involve diversions subject to part 2 of division 2 of the Water Code, this order need not address the applicability the State Water Board's cease and desist order authority to other kinds of violations, such as violations of State Water Board orders issued to prevent waste or unreasonable use. (See Wat. Code, § 1831, subd. (d)(3).) We note, however, that while part 2 of division 2 is focused primarily on diversions that have or need a permit or license, (see *id.*, §§ 1201, 1202), it also includes provisions that apply to riparian or pre-1914 appropriative rights. (See, e.g., Wat. Code, §§ 1707 [authorizing the State Water Board to approve a petition to change any type of right for purposes of protecting instream, beneficial uses].)

In this case, Order WR 2011-0005 did not curtail the rights of the Woods' customers to divert water. Woods may divert up to 77.7 cfs. Since Woods does not own or operate any land under irrigation, this water can be delivered to the Woods' customers. If this rate is insufficient for all of the Woods' customers in the Woods service area, Order WR 2011-0005 provided an expedited process for the Woods' customers to obtain additional deliveries, if they hold water rights that would authorize those deliveries. The State Water Board delegated approval to the Deputy Director for Water Rights, and the Deputy Director's decision is subject to reconsideration pursuant to Water Code section 1122. Notwithstanding this expedited process, the Customers contend that Order WR 2011-0005 has the effect of denying them of property without due process of law.

While the State Water Board could await a ruling from the Court of Appeal on the due process issue, it may take years before the court acts, longer than it would take for the State Water Board to reopen the hearing to allow participation by the Woods' customers. Although it might otherwise prove unnecessary to reopen the hearing – should the Court of Appeal rule in the State Water Board's favor on this issue – reopening the hearing now is more expeditious. In addition, any order issued after allowing the Woods' customers to participate will have a more complete effect, because it will be binding on the Woods' customers. It may avoid the need for further proceedings, as would occur under the adopted order if Woods seeks to deliver additional water based on a showing that the Woods' customers have additional rights.

The State Water Board will re-open the hearing to allow the Woods' customers to present evidence, cross-examine witnesses who have already testified, and present arguments.⁶

4.3 Legal issues

Contention: The Customers contend that all lands in the Delta are riparian. The Customers argue that under natural conditions waters in the Delta were not confined to the definite channels in which they currently flow, but were instead subject to regular overflows, and that the lands that were subject to those overflows should be considered riparian.

Response: The Customers rely on the distinction between flood flows and ordinary overflows, contending that lands in the Delta should be considered riparian because they were inundated by ordinary overflows. This argument is flawed in several respects. The distinction between flood flows and ordinary overflows is no longer applicable to the California law of water rights. (Hutchins, *The California Law of Water Rights* (1955) at p. 26; *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368.) Moreover, even when the distinction was in use, it concerned the issue of which waters a riparian was entitled to use, as against an appropriator, not the determination of whether a particular parcel was riparian. (See, Hutchins, *supra* at pp. 25-26.)⁷ The riparian right is based on contiguity with a defined stream channel; it is not enough that the land is subject to overflows from the channel. (SWRCB Order WR 2004-0004 at p. 11, citing *Lux v.*

⁶ The Customers also contend that because they did not receive individual notice, there is relevant evidence that could not have been produced in the exercise of reasonable diligence. (See Cal. Code Regs., tit. 23, § 768, subd. (c)). Because this order allows the Customers to present evidence, however, any issue whether reconsideration should be granted based on the alleged availability of relevant evidence that could not have been produced is moot.

⁷ The Customers rely on *Miller & Lux v. Madera Canal & Irrigation Co.* (1909) 155 Cal. 59, 77 (*Miller & Lux*), overruled by *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368. But *Miller & Lux* involved a dispute between an admittedly riparian user and an appropriator who claimed that the riparian user had no right to the water at issue, because it was not part of the ordinary flow of the right but which should instead be classified as flood flows. (*Id.* at pp. 66, 74.)

Haggin (1886) 69 Cal. 255, 413.) The Customers' argument also ignores the fact that reclamation has substantially reconfigured the Delta channels. Even if riparian rights could be based on overflows, without abutting any defined channel, the Customers provide no explanation as to why riparian rights should be defined based on the channel condition before reclamation, even though the well-defined channels that were created through reclamation have been treated as the watercourses in the Delta for over a century. (See Order WR 2011-0005 at p. 40.)

Contention: The Customers contend that lands that are riparian to any of the channels surrounding Roberts Island should be treated as riparian to all of the channels surrounding Roberts Island.

Response: The Customers contend that because of the interconnection among Delta channels, diverting from one channel instead of another does not materially affect other water right holders, and that therefore someone who has maintained a riparian right to divert from one channel may exercise the right by diverting from any other channel. The Customers argue, without citation to authority, that: "A riparian or pre-1914 right holder can change his point of diversion so long as the change does not injure another right holder." But the rule allowing changes in point of diversion, place of use or purposes of use, so long as other legal users of water are not injured, is the rule for appropriative rights only, not riparian rights. (See Wat. Code, § 1706.)

The contention that all land in the Delta is riparian to all of the Delta streams and channels was raised during the hearing process, and extensively analyzed in Order WR 2011-0005. [See Section 4.4.2, pp. 38-41]. The Customers have raised no new issues in their Petition for Reconsideration. As a result, the Customers' arguments concerning riparian rights in the Delta do not raise any substantial issue appropriate for review at this time. If the Customers have any more specific evidence or argument concerning any riparian rights they claim to hold, that evidence can be presented at the reopened hearing.

5.0 PETITION OF WOODS, THE SOUTH DELTA WATER AGENCY, AND THE CENTRAL DELTA WATER AGENCY

5.1 Procedural Issues

Contention: Woods, SDWA and CDWA contend that the State Water Board failed to consider relevant evidence. Specifically, Woods, SDWA and CDWA argue that the draft order (December 14, 2010) contained a footnote stating that a certain Atwater map was not in the record. When Woods pointed out in comments that the map was, in fact, in the record, the footnote was removed from the final order. Because the substance of Order WR 2011-0005 did not change, Woods, SDWA and CDWA contend that the State Water Board failed to consider the map.

Response: The existence of the map in the record does not require reconsideration. The map was offered to prove the existence and alignment of Duck Slough, a slough which no longer exists. Woods argued that Duck Slough was a historic slough that once carried irrigation water to and drainage water from lands on the interior of Roberts Island, thus allegedly conferring riparian rights to lands abutting the slough. Woods claims that Duck Slough provides riparian rights to the landowners that abut the historic slough. In Order WR 2011-0005, after closely analyzing the evidence regarding Duck Slough, the State Water Board found the evidence

regarding the existence and alignment of Duck Slough presented by Woods to be unconvincing. (See Order WR 2011-0005, id., pages 51-54.) The State Water Board concluded in its analysis:

As a whole, the evidence that Duck Slough never extended to Middle River is more convincing than the evidence that it did. Even if Duck Slough did at one point intersect with Middle River there is evidence that any such connection would have been dammed off before any irrigation began, and before the land on Robert's Island was subdivided and purchased by the Woods Brothers. (Exhibits MSS-R-14, pp. 6-7; MSS-R-14, exh. 6; MSS-R-14A, exhs. 21, 22.) Therefore, there is no reason to believe that such reclamation was not intended as a permanent, avulsive change in the waterbody. Moreover, Duck Slough no longer exists, and therefore any riparian rights to Duck Slough have been lost. (*Rancho Santa Margarita v. Vail, supra*, 11 Cal.2d at pp. 548-549; *Wholey v. Caldwell, supra*, 108 Cal. At pp. 100-101.) For the foregoing reasons, historic contiguity to Duck Slough cannot provide the basis for a valid water right.

(Order WR 2011-0005, p. 54.) The existence of the map in the record does not overcome the balance of the evidence that indicates that Duck Slough, even if it did exist at one time, does not provide riparian rights to water from Middle River to property owners on Roberts Island. The existence of the map in the record, pointed out to the State Water Board before it voted to adopt the final order, did not tip the evidence toward a finding of valid riparian rights.

The difference between the publicly-reviewed draft and the final order does not demonstrate an irregularity in the proceedings. On the contrary, it demonstrates that the process works. In its comments, Woods indicated that the map was indeed in the record. The statement to the contrary that had been in the draft was removed, making the final order more accurate. It did not, however, convince the State Water Board to give more weight to Woods' arguments regarding riparian rights derived from Duck Slough.⁸ The map does not provide cause to reconsider Order WR 2011-0005.

Contention: Woods, SDWA and CDWA contend that the electronic versions of some Exhibits in the record are unreadable.

Response: The State Water Board maintains a complete set of the original paper exhibits. They are available to each State Water Board Member as he or she reviews the hearing and the record, and they are available for review to the parties and the public. The electronic records are maintained online for convenience.

Contention: Woods, SDWA and CDWA contend that because each of the State Water Board Members who adopted Order WR 2011-0005 did not attend every day of the hearing, and did not personally review the paper documentary exhibits as they were submitted, the State Water Board must reconsider Order WR 2011-0005. Woods, SDWA and CDWA contend that since State Water Board Member Walt Pettit, one of the two Hearing Officers, is no longer on the State Water Board, and State Board Member Frances Spivy-Weber, the other Hearing Officer failed to attend a majority of the hearing days, the State Water Board could not fairly evaluate the demeanor of the witnesses.

⁸ Woods, SDWA and CDWA also contend that the footnote in the draft order indicates that the State Water Board was confused about the colors on the map. The footnote was not included in the final order, however, and the findings in Order WR 2011-0005 regarding Duck Slough were based on the record as a whole, not any specific concerns about the colors on the map.

Response: There is no requirement that all members of a State Water Board responsible for an adjudicative decision attend every day of the hearing before voting on the decision. There is a presumption that a fair and complete hearing process provides the parties with the opportunity to have a hearing regardless of the attendance, and the presumption must be overcome with evidence that the voting members did not have a "substantial understanding of the record." See Revised State Water Board Decision 1644, pp. 152-153, where the State Water Board stated:

Settled authority establishes that neither constitutional due process nor any provision of the Government Code requires all of an agency's members be present at each and every day of the administrative proceedings. As the California Supreme Court has explained:

The requirement of a hearing may be satisfied, however, even though the members of the commission do not actually hear (citations omitted), or even read, *all* of the evidence. (Citations omitted.) Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. (Citations omitted.) The obligation of the panel members was to achieve a substantial understanding of the record by any reasonable means, including the use of the referee's summary.

(*Allied Comp. Ins. Co. v. Ind. Acc. Com.* (1961) 57 Cal.2d 115, 119, emphasis in original.) Moreover, there is a presumption that agency members have performed their official duties and have fully familiarized themselves with the evidence before them. (Evid. Code, § 664; *Old Santa Barbara Pier Co. v. State of California* (1977) 71 Cal.App.3d 250, 257.)

Petitioners have not cited any evidence showing that the State Water Board Members did not have a "substantial understanding of the record" and therefore have not rebutted the presumption that the State Water Board Members regularly performed their duties in adopting Revised Decision 1644. (*Allied Comp. Ins. Co.*, *supra*, 57 Cal.2d at p. 119; *Old Santa Barbara Pier Co.*, *supra*, 71 Cal.App.3d at p. 257.)

Similarly, Woods, SDWA and CDWA have not cited any authority nor pointed to any evidence for its contention that reconsideration is required in this case. There is nothing to overcome the presumption that the State Water Board Members regularly performed their duties when they adopted Order WR 2011-0005.

In addition, even though it is not required, the facts of this case demonstrate that the co-hearing officer, Vice Chair Spivy-Weber made every effort to attend or watch the five-day hearing. She was present on days one and five. In addition, even though she did not attend due to illness, on days two and three she watched the live webcast. On day four she was unavailable to watch the live video, and so she watched the hearing on DVD. Her commitment to and familiarity with the testimony and evidence in this case is unquestioned. Additionally, all of the DVD recordings and paper record have been available to all of the State Water Board Members as they reviewed the evidence, the record, the draft order and the public comments in this case. Woods, SDWA and CDWA cite no case law, statute or facts that require reconsideration.

Contention: Woods, SDWA and CDWA contend that evidence from several other enforcement hearings should have been included in the record. Additionally, Woods, SDWA and CDWA contend that the failure of the attorney for a different party to coordinate exhibits from other proceedings requires reconsideration.

Response: This matter was thoroughly addressed in Order WR 2011-0005 at pages 57-59. During the hearing itself, the Hearing Officer made clear that the State Water Board would not admit the entire hearing record from other similar enforcement hearings into the record of this case. The attorney for Woods was given ample opportunity to present the evidence that he believed was germane, as other parties did. Woods complains that an attorney for another party offered to prepare a stipulation that specified portions of the other records that the parties agreed were relevant to the Woods hearing. Woods, SDWA and CDWA now claim that the second attorney's failure to do so constitutes grounds for reconsideration.

This is simply incorrect. As the State Water Board determined in Order WR 2011-0005: 1) the parties to the different proceedings were not identical; 2) the enforcement action in each case was directed at a different party; 3) the parties in this case were given ample opportunity to present evidence, and other parties took advantage of that capability; and 4) the failure of the parties to finalize a stipulation cannot be blamed on anyone but the party that seeks the benefit of the stipulation, Woods. Clearly the evidence was available, and counsel's failure to coordinate the inclusion of the evidence into the record was not a failure of either the prosecution team or the Hearing Officer. This issue does not present a valid reason for reconsideration.

5.2 Rate of Diversion

Contention: Woods, SDWA and CDWA argue that the 77.7 cfs limitation in its diversion should not be based on instantaneous diversion rate but instead should be set as a 30-day average.

Response: Woods', SDWA's and CDWA's contention fundamentally misconstrues the nature of this proceeding and the state of the evidence in the record. Woods, SDWA and CDWA argue that "all other permits and licenses contain averaging limitations which take into account the variables associated with most all water needs." (Petition for Reconsideration at p. 9.) Woods, SDWA and CDWA claim that by the nature of its use (mostly agricultural) it is entitled to a monthly average limit instead of a maximum instantaneous limit. This proceeding does not involve consideration of whether to issue a permit or license, and in what amount, but instead concerns issuance of a CDO to ensure that Woods does not divert more water than it is entitled to divert under rights that do not include a permit or license. The issue is not the manner in which the State Water Board may define a new right Woods may seek; but what are the limitations of Woods' rights or the rights of Woods' customers.

Beneficial use is the measure of an appropriative right,⁹ but diversion rate is also a limitation. (Hutchins, *supra*, at p. 133.) Because the key question in defining appropriative rights is whether the flow of a stream is adequate to satisfy all of the demands made at a particular time, the diversion rate component of an appropriative right has traditionally been defined in terms of instantaneous flow, not averages. (See generally Gould, *Water Rights Transfers and Third-Party Effects* (1988), 23 Land & Wat. L. Rev. 1, 5-6.)

In this case, the diversion rate of 77.7 cfs recognized in Order WR 2011-0005 is based on a pre-1914 claim of right. It is the rate at which Woods agreed to deliver to lands within its service area pursuant to the 1911 water service agreements. (Exhibits WIC 6O; WIC 6P.) As explained in section 4.3.2 of Order WR 2011-0005, the 1911 agreements and other evidence in the record indicate that, to the extent that water could not be delivered to the Woods' customers

⁹ As noted by Mr. Neudeck's testimony, Woods records are unable to reveal any direct measurements of the amounts of water applied to Woods' lands prior to 1914. (WIC-4, p.3).

pursuant to their own water rights, Woods planned to develop a pre-1914 appropriative right to divert up to 77.7 cfs.

Woods, SDWA and CDWA contend that there is no evidence to support the conclusion that a maximum diversion rate, as opposed to a monthly average, was intended. But the service agreements refer to diversion rates in cfs. A measurement in cfs is consistent with the interpretation that a relatively instantaneous measurement of flow is intended. The use of relatively instantaneous measures of diversion rates measured as cfs or miner's inches in making claims of appropriative rights was standard practice for pre-1914 appropriations. (See Civ. Code, § 1415 [provision first enacted in 1872, providing for posting of claims limited by miner's inches].) Woods, SDWA and CDWA cite no evidence to support an argument that the measurement in cfs as specified in the 1911 water service agreements was intended as a measure of the average rate diverted over a 30 day period instead of an instantaneous rate.

Contention: Woods, SDWA and CDWA contend that the State Water Board is required to view the evidence in the record in a light most favorable to Woods. Specifically, Woods, SDWA and CDWA argue that the State Water Board was required to make findings in agreement with the evidence Woods offered concerning historic channels in the Woods service area.

Response: This issue of the weight to be given to evidence offered by a party claiming a pre-1914 right was addressed at length in Order WR 2011-0005:

In State Water Board Order WR 95-10 ("Cal-Am Order"), the State Water Board adopted the posture, for the purposes of that Order, of evaluating evidence in the hearing record in the light most favorable to the party claiming a pre-1914 water right, Cal-Am. (*Id.* at p. 17.) In the Cal-Am proceeding, the State Water Board heard evidence regarding Cal-Am's diversions and public trust impacts from those diversions on the Carmel River, and contemplated enforcement action. Cal-Am submitted extensive documents, including deeds and notices of appropriation relating to Cal-Am's water rights. (*Id.* at p. 18.) Even looking at these in the light most favorable to Cal-Am, the State Board found these notices alone insufficient to determine that any of the claimed rights were actually developed and maintained by continuous use. (*Id.* at pp. 18-21.) Rather, the order looked to information submitted to the Railroad Commission in 1914 and to a 1915 engineering report as the "best evidence" to establish the amount of water actually developed under Cal-Am's pre-1914 water rights. (*Id.* at pp. 21-22.) Thus, even viewing evidence in the light most favorable to Cal-Am, and in the posture of considering enforcement action against Cal-Am, the State Water Board still carefully reviewed the available evidence, evaluated which evidence was most reliable, and did not make the broadest possible inferences regarding Cal-Am's submissions.

The State Water Board will take into account the difficulty of providing historical evidence in evaluating Woods' claims regarding development of a pre-1914 right. The State Water Board may require less evidence regarding such rights than it would for establishing rights perfected more recently, such as proof of use under a permit for the purposes of licensure. This is not to say, however, that the State Water Board will make every possible inference on behalf of Woods, or that mere hypotheses regarding what may have happened 100 years ago are sufficient.

(Order WR 2011-0005 at pages 29-30.) The Cal-Am Order did not establish a new rule of law requiring the State Water Board to make its findings consistent with the evidence offered by a party claiming pre-1914 right, ignoring all evidence to the contrary.

Specifically with respect to historic channels, the evidence was not uncontroverted. There was contrasting expert testimony regarding the existence of Duck Slough after Roberts Island was reclaimed in 1875. The main issue was whether Duck Slough, if it existed, ran from Burns Cutoff to Middle River, and if so, whether the connection with Middle River was (and remains) sufficient to provide flow from the River at certain times and drainage to the River at other times, influenced by rainfall and the tides. After thoroughly reviewing all of the evidence regarding the possible existence and alignment of Duck Slough (see Order WR 2011-0005 at pp. 51-54), the State Water Board found that the best interpretation of the evidence regarding Duck Slough was that after reclamation in the 1870's, Duck Slough did not run to Middle River, if it existed at all. It thus conferred no riparian rights to adjacent landowners.

The State Water Board found:

As a whole, the evidence that Duck Slough never extended to Middle River is more convincing than the evidence that it did. Even if Duck Slough did at one point intersect with Middle River there is evidence that any such connection would have been dammed off before any irrigation began, and before the land on Robert's Island was subdivided and purchased by the Woods Brothers. (Exhibits MSS-R-14, pp. 6-7; MSS-R-14, exh. 6; MSS-R-14A, exhs. 21, 22.) Therefore, there is no reason to believe that such reclamation was not intended as a permanent, avulsive change in the waterbody. Moreover, Duck Slough no longer exists, and therefore any riparian rights to Duck Slough have been lost. (*Rancho Santa Margarita v. Vail*, supra, 11 Cal.2d at pp. 548-549; *Wholey v. Caldwell*, supra, 108 Cal. at pp. 100-101.) For the foregoing reasons, historic contiguity to Duck Slough cannot provide the basis for a valid water right.

(Order WR 2011-0005 at p.54.)

Although the State Water Board did not adopt the view in Order WR 2011-0005 that it must find in favor of a party claiming a riparian or pre-1914 right if there is some evidence to support the claim, even if there is other, more convincing evidence to the contrary, Order WR 2011-0005 viewed the evidence in a light favorable to Woods in several respects. The State Water Board observed that, in an enforcement action, the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation. (Order WR 2011-0005 at pp. 28-30.) Despite the absence of any records of direct measurements of the amounts of water applied to Woods' lands prior to 1914, the State Water Board inferred that a pre-1914 right had been perfected at a rate authorizing diversions of up to 77.7 cfs.

6.0 CONCLUSION

In the exercise of its discretion and to expedite completion of these proceedings, the State Water Board will grant reconsideration of Order WR 2011-0005 and re-open the hearing for the limited purpose of allowing the Woods' customers to produce evidence, call witnesses, and cross-examine witnesses that have already testified on behalf of other parties. In all other respects, the petitions for reconsideration are denied.

This order addresses the principal issues raised by the petitions. To the extent that this order does not either moot or specifically address any issues raised by the petitions, the State Water Board finds that either these issues are insubstantial or that the petitioners have failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (Cal. Code Regs., tit. 23, §§ 768-769, 1077.)

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are granted in part and denied in part:

1. The CDO adopted by Order WR 2011-0005, at pp. 61-63, is hereby rescinded. A hearing shall be scheduled to allow Woods' customers to participate as parties, call witnesses, and cross-examine witnesses that have already testified on behalf of other parties in order to supplement the evidentiary record with evidence of water rights held by the Woods' customers. The additional evidence will be used for the purpose of considering whether to adopt an order revising Order WR 2011-0005.
2. The Woods' customers in the Woods service area shall be given notice of the hearing and may file a Notice of Intent to Appear. The Woods' customers in the Woods service area who may file a timely Notice of Intent to Appear may present evidence, cross-examine witnesses who have testified in the hearing, and present arguments.
3. The findings and conclusions of law in this order and Order WR 2011-0005 shall not be given preclusive effect, and are subject to reevaluation and revision based on additional evidence and argument that may be presented at the hearing.
4. The petitions for reconsideration are otherwise denied.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 7, 2012.

AYE: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Felicia Marcus

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

Exh. B



EDMOND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

**NOTICE OF SUPPLEMENTAL PUBLIC HEARING
and
PRE-HEARING CONFERENCE**

Pursuant to State Water Resources Control Board Order 2012-0012
A Supplemental Public Hearing will be held for Order WR 2011-0005
which issued a

**Cease and Desist Order (CDO)
against
Woods Irrigation Company**

Middle River in San Joaquin County

**The Pre-Hearing Conference
will commence on
Thursday, January 15, 2015, at 9:00 a.m.**

**The Public Hearing will commence on
June 8, 2015 and continue, if necessary,
on June 9, 10, 11, 2015
at 9:00 a.m.**

in the Coastal Hearing Room
Joe Serna, Jr.-Cal/EPA Building
1001 I Street, Second Floor
Sacramento, CA

PURPOSE OF HEARING

The purpose of this hearing is for Woods Irrigation Company's (Woods) customers¹ to participate as parties, call witnesses, and cross-examine witnesses that have already testified on behalf of other parties, in order to supplement the evidentiary record with evidence of water rights held by the Woods' customers. The additional evidence will be used for the purpose of considering whether to adopt an order revising Order WR 2011-0005.

¹ In Order WR 2012-0012, although the State Water Board referred to petitioners R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC, Dianne E. Young, and Warren P. Schmidt, Trustee of the Schmidt Family Revocable Trust, as Woods' "Customers", participation in the proposed hearing will not be limited to only these petitioners. Woods' customers include landowners within Woods' service area.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

BACKGROUND

Woods is an irrigation company that diverts water from Middle River in San Joaquin County, conveys the water to its customers within a service area on Middle Roberts Island, and provides drainage services to a slightly larger area on Middle Roberts Island. Woods owns the pumps used to divert water from the Middle River and operates the irrigation and drainage system.

On December 28, 2009, the Assistant Deputy Director for Water Rights issued notice of a proposed Cease and Desist Order (CDO) to Woods. By letter dated January 11, 2010, Woods requested a hearing. On June 7, 10, 24, 25, 28 and July 2, 2010, the State Water Resources Control Board (State Water Board) held a hearing on the proposed CDO. On February 1, 2011, the State Water Board adopted Order WR 2011-0005, which was not binding upon the Woods' customers. However, Order WR 2011-0005 was the subject of petitions for reconsideration filed by certain Woods' customers (see footnote 1), and by Woods, the South Delta Water Agency (SDWA) and the Central Delta Water Agency (CDWA). On August 7, 2012, the State Water Board adopted Order WR 2012-0012 granting, in part, reconsideration of Order WR 2011-0005. Condition No.1 of the Order states:

The CDO adopted by Order WR 2011-0005, at pp. 61-63, is hereby rescinded. A hearing shall be scheduled to allow Woods' customers to participate as parties, call witnesses, and cross-examine witnesses that have already testified on behalf of other parties in order to supplement the evidentiary record with evidence of water rights held by the Woods' customers. The additional evidence will be used for the purpose of considering whether to adopt an order revising Order WR 2011-0005.

Litigation: Certain Woods' customers also filed suit against the State Water Board. (*Young v. State Water Resources Control Board* (Super. Ct. San Joaquin County, 2011, No. 39-2011-00259191-CU-WM-STK).) The plaintiffs alleged that the State Water Board violated their procedural due process rights in the hearing and CDO adoption because they were not individually noticed and were not granted party status at the hearing. The State Water Board rendered the due process issue moot by granting, in part, the petition for reconsideration to reopen the hearing in the enforcement proceeding against Woods to allow the customers of Woods to present new evidence and cross-examine witnesses.

The plaintiffs also alleged that the State Water Board lacked jurisdiction to determine whether allegedly unauthorized diversions are in fact unauthorized, if the diverters claim they have riparian or pre-1914 appropriative rights.² The Superior Court granted petition for writ of mandate. The State Water Board appealed the Superior Court's judgment on the merits. All parties agreed to postpone reopening the hearing until the appeals process was completed. On September 4, 2013, the Third District Court of Appeal issued an opinion upholding the State Water Board's authority and reversed the Superior Court's judgment.³ The *Young* petitioners

² The *Young* case was a challenge to the CDO adopted by State Water Board Order WR 2011-0005. In the CDO, the State Water Board evaluated Woods' claims that its diversions were authorized by riparian and pre-1914 appropriative rights, determined that Woods' diversion of water at a rate in excess of 77.7 cubic feet per second (cfs) was not authorized by valid water rights, and directed Woods not to divert water from the Middle River at a rate in excess of 77.7 cfs.

³ The Third District Court of Appeal decision was based primarily on the plain language of Water Code section 1831, which authorizes the State Water Board to issue an administrative CDO when the State Water Board determines that a person is violating or threatening to violate certain requirements, including the statutory prohibition against the unauthorized diversion or use of water. The Court pointed out that section 1831 expressly vests authority in the State Water Board to determine whether a diversion and use is unauthorized, and reasoned that in order to make this
(footnote continued on next page)

sought review by the California Supreme Court or, alternatively, de-publication of the Court of Appeal's decision to limit its precedential effect. In November 2013, the California Supreme Court denied review of the Court of Appeal's decision.

Accordingly, the administrative proceeding ordered by Order WR 2012-0012 can now move forward.

KEY ISSUES

The State Water Board seeks supplemental information from Woods' customers that specifically addresses the following issues:

- 1) Should the original terms of Order WR 2011-0005 be modified or re-adopted based on supplemental evidence, cross examination, or arguments that arise as a result of the supplemental hearing; and
- 2) What, if any, evidence is available to substantiate valid water rights held by Woods' customers beyond the evidence that was provided during the hearing in 2010?

HEARING OFFICERS AND HEARING TEAM

State Water Board Vice-Chair Frances Spivy-Weber and Member Steven Moore will preside as the hearing officers for this proceeding. A hearing team will assist the hearing officers by providing legal and technical advice. The hearing team members will be Marianna Aue, Staff Counsel, and Ernest Mona, Staff Engineer. The hearing team and their supervisors will assist the hearing officers and other members of the State Water Board throughout this proceeding.

SEPARATION OF FUNCTIONS

A staff prosecution team may be a party to this hearing.

The prosecution team is separated from the hearing team and is prohibited from having *ex parte* communications with any members of the State Water Board and any members of the hearing team regarding substantive issues and controversial procedural issues within the scope of this proceeding. This separation of functions also applies to the supervisors of each team. (Gov. Code, §§ 11430.10-11430.80.)

HEARING PARTICIPATION

As ordered in WR 2012-0012, the Woods Irrigation Company CDO Hearing is being reopened for the limited purpose of permitting Woods' customers to present additional evidence. The Woods' customers within Woods' service area shall be given notice of the hearing and may file a **Notice of Intent to Appear**. The Woods' customers who file a timely Notice of Intent to Appear, may present evidence, cross-examine witnesses who have testified in the hearing, and present arguments.

(footnote continued from previous page)

determination it may be necessary for the State Water Board to make the threshold determination whether the diversion and use is authorized by a valid riparian or pre-1914 appropriative right. (*Young v. State Water Resources Control Board* (2013), 219 Cal.App.4th 397, 405-07.)

IF YOU ARE A CUSTOMER OF WOODS IRRIGATION DISTRICT AND WANT TO TAKE PART IN THIS HEARING, you should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearings." As stated in that enclosure, Woods' customers wishing to present evidence at the hearing must submit a **Notice of Intent to Appear**. All Notices of Intent to Appear must be **received** by the State Water Board no later than the deadline listed below.

Within one week after the deadline to submit Notices of Intent to Appear, the State Water Board will mail out a revised list of hearing participants and a copy of all Notices of Intent to Appear that the State Water Board timely received. The List of Participants is provided in order to facilitate exchange of written testimony, exhibits, and witness qualifications in advance of the hearing. Parties identified on the List of Participants will be required to attend the pre-hearing conference discussed below. Woods' customers are the only parties who will be allowed to present evidence. Participation by current parties will be limited only to cross-examination and rebuttal of new evidence, and any redirect examination permitted by the hearing officers. Copies of witnesses' proposed **testimony, exhibits, lists of exhibits, qualifications, and statement of service** must be **received** by the State Water Board and served on each of the parties who have indicated their intent to appear, no later than the deadline listed below.

SUBMITTAL DEADLINES

12:00 noon, Monday, December 15, 2014

Deadline for receipt of Notice of Intent to Appear.

12:00 noon, Friday, May 8, 2015

Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service.

PRE-HEARING CONFERENCE

The hearing officers will conduct a pre-hearing conference to discuss the scope of the hearing and any other procedural issues on **Thursday, January 15, 2015 at 9:00 a.m.** The goal of the pre-hearing conference is to ensure that the hearing proceeds in an orderly and expeditious manner. The pre-hearing conference will not be used to hear arguments on, or determine the merits of, any hearing issues, other than procedural matters, unless the parties agree to resolve a hearing issue by stipulation. Following the pre-hearing conference, the hearing officers may, at their discretion, modify the hearing procedures or issues set forth in this notice in whole or in part. All parties to the hearing must attend the pre-hearing conference. Failure to attend the pre-hearing conference may result in exclusion from participation in the hearing.

SUBMITTALS TO THE STATE WATER BOARD

All documents, including Notices of Intent to Appear, written testimony, and other exhibits submitted to the State Water Board should be addressed as follows:

Division of Water Rights
State Water Resources Control Board
Attention: Ernest Mona

By Mail: P.O. Box 2000, Sacramento, CA 95812-2000

By Hand Delivery: Joe Serna, Jr.-Cal/EPA Building
1001 I Street, 2nd Floor, Sacramento, CA 95814

By Fax: (916) 341-5400
By Email: wrhearing@waterboards.ca.gov
With Subject of "Woods Supplemental Hearing"

ALL HAND DELIVERED SUBMITTALS should be Date and Time stamped by the Division of Water Rights' Records Unit on the second (2nd) floor of the Joe Serna, Jr.-Cal/EPA Building at the above address prior to or at the submittal deadline. Persons delivering submittals must first check in with lobby security personnel on the first floor. Hand delivered submittals that do not have a timely Date and Time stamp by the Division of Water Rights' Records Unit will be considered late and may not be accepted by the hearing officers.

SETTLEMENTS

Please read the discussion of "Settlements" in the enclosure entitled "Information Concerning Appearance at Water Right Hearings". The prosecution team and any other parties or potential parties, at their discretion, may engage in settlement discussions. Due to the separation of functions discussed above, **the hearing team cannot participate** in settlement discussions. Should the parties reach settlement, they should notify the hearing team as soon as possible.

REQUESTS FOR DELAY

On October 15, 2014, the Hearing Officers issued a ruling on comments regarding an advance Courtesy Notice of Tentative Dates for a Supplemental Hearing and Pre-Hearing Conference related to Order WR 2012-0012. The Hearing Officers ruled that: (1) there shall be no change to the scheduled date of January 15, 2015 for the Pre-Hearing Conference; and (2) an additional opportunity will be allowed for submittal of requests to change the scheduled dates of June 8, 9, 10, 11, 2015 for the Supplemental Hearing.

The State Water Board has already rescheduled the Supplemental Hearing once. The State Water Board will only consider alternative dates for the Supplemental Hearing for good cause not previously addressed and considered by its October 15, 2014 ruling.

IF YOU HAVE ANY QUESTIONS

During the pendency of this proceeding, there shall be no *ex parte* communications regarding substantive or controversial procedural matters within the scope of the proceeding between State Water Board members or hearing team members and any of the other participants, including members of the prosecution team. (Gov. Code, §§ 11430.10-11430.80.) Questions regarding non-controversial procedural matters should be directed to Staff Counsel Marianna Aue at (916) 327-4440 (Marianna.Aue@waterboards.ca.gov), or Staff Engineer Ernest Mona at (916) 341-5359 (Ernie.Mona@waterboards.ca.gov). (Gov. Code, § 11430.20, subd. (b).)

This notice and other material related to this hearing can be found at the Division's project dedicated website:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/woods_irrigation/index.shtml

PARKING, ACCESSIBILITY AND SECURITY

A map to the Joe Serna Jr./Cal-EPA Building and parking information are available at <http://www.calepa.ca.gov/EPABldg/location.htm>. The Cal/EPA Building is accessible to people with disabilities. Individuals who require special accommodations at the Cal/EPA Building are requested to contact Tanya Cole, Equal Employment Opportunity Office, at (916) 341-5880.

Due to enhanced security precautions at the Cal/EPA Building, all visitors are required to register with security staff prior to attending any meeting. To sign in and receive a visitor's badge, visitors must go to the Visitor and Environmental Services Center, located just inside and to the left of the building's public entrance. Depending on their destination and the building's security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification card. Depending on the size and number of meetings scheduled on any given day, the security check-in could take up to fifteen minutes. Please allow adequate time to sign in before being directed to the hearing.

November 10, 2015

Date



Jeanine Townsend
Clerk to the Board

Enclosures

INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

The following procedural requirements will apply and will be strictly enforced:

- 1. HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760, as they currently exist or may be amended. A copy of the current regulations and the underlying statutes governing adjudicative proceedings before the State Water Board is available upon request or may be viewed at the State Water Board's web site: http://www.waterboards.ca.gov/laws_regulations

Unless otherwise determined by the hearing officers, each new party to the reopened hearing may make an opening statement, call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross-examination. At the discretion of the hearing officers, parties may also be afforded the opportunity to present closing statements or submit briefs. The State Water Board encourages parties with common interests to work together to make the hearing process more efficient. The hearing officers reserve the right to issue further rulings clarifying or limiting the rights of any party where authorized under applicable statutes and regulations.

Parties must file any requests for exceptions to procedural requirements in writing with the State Water Board and must serve such requests on the other parties. To provide time for parties to respond, the hearing officers will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

- 2. SETTLEMENTS:** In water right enforcement hearings, a State Water Board staff member or team prosecutes an alleged violation. In such enforcement cases, the prosecution and a party who is the subject of the proposed enforcement action may at their discretion engage in private settlement discussions, or may include other persons in those discussions. Although other persons may be authorized to participate in the hearing as parties, such a designation does not constitute a ruling that those persons must be allowed to engage in any settlement discussions between the prosecution and the party against whom the agency action is directed. The consent of other parties is not required before the State Water Board, or the Executive Director under State Water Board Resolution No. 2012-0061, can approve a proposed settlement agreement between the prosecution and a party subject to a proposed enforcement action. However, all parties will be given the opportunity to comment on any settlement submitted to the State Water Board or the Executive Director for approval.

In non-enforcement hearings involving an unresolved protest between a protestant and a water right applicant or petitioner, those persons will be designated as parties in the hearing. (Cal. Code Regs., tit. 23, § 648.1, subd. (b).) Other persons who file a Notice of Intent to Appear in the hearing, may also be designated as parties. In such cases, the parties whose dispute originates the action may at their discretion meet privately to engage in settlement discussions, or may include other persons. If the original parties resolve the dispute, the hearing officers will determine whether or not to continue the hearing, after allowing all remaining parties the opportunity to comment on any proposed settlement. The Executive Director or the State Water Board may approve a settlement in the absence of a hearing, notwithstanding the lack of consent of parties besides the protestant and the applicant or petitioner.

3. **PARTIES:** The current parties to the hearing are **Division of Water Rights Prosecution Team, Woods Irrigation Company, South Delta Water Agency, Central Delta Water Agency, San Luis and Delta-Mendota Water Authority, Modesto Irrigation District, the San Joaquin County and the San Joaquin County Flood Control and Water Conservation District, and State Water Contractors.**

Additional parties may be designated in accordance with the procedures for this hearing. The hearing officers may impose limitations on a party's participation. (Gov. Code, § 11440.50, subd. (c).) Persons or entities who do not file a timely Notice of Intent to Appear may be designated as parties at the discretion of the hearing officers, for good cause shown, and subject to appropriate conditions as determined by the hearing officers.

4. **INTERESTED PERSONS:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the State Water Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not designated as parties. A person or entity that appears and presents only a policy statement is not a party and will not be allowed to make objections, offer evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary hearing. Interested persons will not be added to the service list and will not receive copies of written testimony or exhibits from the parties, but may access hearing documents at the website listed in the hearing notice.

Policy statements are subject to the following provisions in addition to the requirements outlined in regulation. (Cal. Code Regs., tit. 23, § 648.1, subd. (d).)

- a. Policy statements are not subject to the pre-hearing requirements for testimony or exhibits, except that interested persons are requested to file a Notice of Intent to Appear, indicating clearly an intent to make a policy statement only.
 - b. The State Water Board requests that policy statements be provided in writing before they are presented. Please see section 7, for details regarding electronic submittal of policy statements.
5. **NOTICE OF INTENT TO APPEAR:** Persons and entities who seek to participate as new parties in this reopened hearing must file either an electronic copy or a paper copy of a Notice of Intent to Appear, which must be **received** by the State Water Board no later than **the deadline prescribed in the Hearing Notice**. Failure to submit a Notice of Intent to Appear in a timely manner may be interpreted by the State Water Board as intent not to appear.

Any faxed or emailed Notices of Intent to Appear must be followed by a mailed or delivered hard copy with an original signature.

Interested persons who will not be participating as parties, but instead presenting only non-evidentiary policy statements should also file a Notice of Intent to Appear.

The Notice of Intent to Appear must state the name and address of the participant. Except for interested persons who will not be participating as parties, the Notice of Intent to Appear must also include: (1) the name of each witness who will testify on the party's behalf; (2) a brief description of each witness's proposed testimony; and (3) an estimate of the time (not to exceed the total time limit for oral testimony described in section 9, below) that the witness will need to present a brief oral summary of his or her prior-submitted written

testimony. (See section 6, below.) Parties who do not intend to present a case-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear.⁴ Parties who decide not to present a case-in-chief after having submitted a Notice of Intent to Appear should notify the State Water Board and the other parties as soon as possible.

Parties who are not willing to accept electronic service of hearing documents should check the appropriate box on the Notice of Intent to Appear. (See section 7, below.)

The State Water Board will mail a service list of parties to each person who has submitted a Notice of Intent to Appear. The service list will indicate if any party is unwilling to accept electronic service. If there is any change in the hearing schedule, only those parties on the service list, and interested persons that have filed a Notice of Intent to Appear expressing their intent to present a policy statement only, will be informed of the change.

6. **WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each party proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing.⁵ Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A party who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

Each party shall submit to the State Water Board three (3) paper copies and one electronic copy of each of its exhibits. With its exhibits, each party must submit a completed Exhibit Identification Index. Each party shall also serve a copy of each exhibit and the exhibit index on every party on the service list. A statement of service with manner of service indicated shall be filed with each party's exhibits.

The exhibits and indexes for this hearing, and a statement of service, must be **received by the State Water Board and served on the other parties no later than the deadline prescribed in the Hearing Notice**. The State Water Board may interpret failure to timely submit such documents as a waiver of party status.

All hearing documents that are timely received will be posted on the hearings program webpage identified in the hearing notice.

The following requirements apply to exhibits:

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
- b. The hearing officers have discretion to receive into evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other

⁴ A party is not required to present evidence as part of a case-in-chief. Parties not presenting evidence as part of a case-in-chief will be allowed to participate through opening statements, cross-examination, and rebuttal, and may also present closing statements or briefs, if the hearing officers allow these in the hearing.

⁵ The hearing officers may make an exception to this rule if the witness is adverse to the party presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement.

evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A party offering an exhibit by reference shall advise the other parties and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the party relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.

- c. A party seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other parties prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a party waives the opportunity to obtain a copy of the exhibit, the party sponsoring the exhibit will not be required to provide a copy to the waiving party. Additionally, with the permission of the hearing officers, such exhibits may be submitted to the State Water Board solely in electronic form, using a file format readable by Microsoft Office 2003 software.
 - d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
 - e. Parties submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, parties may supply, for the hearing record, a reduced copy of a large format original if it is readable.
7. **ELECTRONIC SUBMISSIONS:** To expedite the exchange of information, reduce paper use, and lower the cost of participating in the hearing, participants are encouraged to submit hearing documents to the State Water Board in electronic form and parties are encouraged to agree to electronic service.

Any documents submitted or served electronically must be in Adobe Portable Document Format (PDF), except for Exhibit Identification Indexes, which may be in a format supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 11 megabytes in total size (incoming mail server attachment limitation) may be sent via electronic mail to: wrhearing@waterboards.ca.gov with a subject of **"Woods Supplemental Hearing"**. **Electronic** submittals to the State Water Board of documents greater than 11 megabytes in total size should be submitted on a compact disc (CD). Each electronically submitted exhibit must be saved as a separate PDF file, with the file name in lower case lettering without any spaces.

8. **PRE-HEARING CONFERENCE:** At the hearing officers' discretion, a pre-hearing conference may be conducted before the proceeding to discuss the scope of the hearing, the status of any protests, and any other appropriate procedural issues.
9. **ORDER OF PROCEEDING:** Hearing officers will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events. The time limits specified below may be changed by the hearing officers, for good cause.

- a. **Policy Statements Within the Evidentiary Hearing:** Policy statements will be heard at the start of the hearing, before the presentation of cases-in-chief. Oral summaries of the policy statements will be limited to **five (5) minutes** or such other time as established by the hearing officers.
- b. **Presentation of Cases-in-Chief:** Each party who so indicates on a Notice of Intent to Appear may present a case-in-chief addressing the key issues identified in the hearing notice. The case-in-chief will consist of any opening statement, oral testimony, introduction of exhibits, and cross-examination of the party's witnesses. The hearing officers may allow redirect examination and recross examination. The hearing officers will decide whether to accept the party's exhibits into evidence upon a motion of the party after completion of the case-in-chief.
- i. **Opening Statements:** At the beginning of a case-in-chief, the party or the party's attorney may make an opening statement briefly and concisely stating the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Oral opening statements will be limited to **(20) minutes** per party. A party may submit a written opening statement before the hearing or during the hearing, prior to their case-in-chief. Any policy-oriented statements by a party should be included in the opening statement.
- ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to **(20) minutes** to summarize or emphasize their written testimony on direct examination. Each party will be allowed up to **one (1) hour total** to present all of its direct testimony.⁶
- iii. **Cross-Examination:** Cross-examination of a witness will be permitted on the party's written submittals, the witness's oral testimony, and other relevant matters not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) If a party presents multiple witnesses, the hearing officers will decide whether the party's witnesses will be cross-examined as a panel. Cross-examiners initially will be limited to **one (1) hour** per witness or panel of witnesses. The hearing officers have discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Ordinarily, only a party or the party's representative will be permitted to examine a witness, but the hearing officers may allow a party to designate a person technically qualified in the subject being considered to examine a witness.
- iv. **Redirect and Recross Examination:** Redirect examination may be allowed at the discretion of the hearing officers. Any redirect examination and recross examination permitted will be limited to the scope of the cross-examination and the redirect examination, respectively. The hearing officers may establish time limits for any permitted redirect and recross examination.

⁶ The hearing officers may, for good cause, approve a party's request for additional time to present direct testimony during the party's case-in-chief. The hearing officers may allow additional time for the oral direct testimony of the witness if the witness is adverse to the party presenting the testimony and the hearing officers are satisfied that the party could not produce written direct testimony for the witness.

v. **Questions by State Water Board and Staff:** State Water Board members and staff may ask questions at any time and may cross-examine any witness.

c. **Rebuttal:** After all parties have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officers will allow parties to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented by another party.

Rebuttal testimony and exhibits need not be submitted prior to the hearing, although the hearing officers may require submittal of rebuttal testimony and exhibits before they are presented in order to improve hearing efficiency. Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times, if appropriate, the hearing officers may allow oral closing statements or legal arguments or set a schedule for filing legal briefs or written closing statements. If the hearing officers authorize the parties to file briefs, three copies of each brief shall be submitted to the State Water Board, and one copy shall be served on each of the other participants on the service list. A party shall not attach a document of an evidentiary nature to a brief unless the document is already in the evidentiary hearing record or is the subject of an offer into evidence made at the hearing.

10. EX PARTE CONTACTS: During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications with State Water Board members or State Water Board hearing team staff and supervisors, regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) **Any communications regarding potentially substantive or controversial procedural matters, including but not limited to evidence, briefs, and motions, must demonstrate that all parties were served and the manner of service.** Parties may accomplish this by submitting a proof of service or by other verification, such as correct addresses in an electronic-mail carbon copy list, or a list of the parties copied and addresses in the carbon copy portion of a letter. Communications regarding non-controversial procedural matters are permissible and should be directed to staff on the hearing team, not State Water Board members. (Gov. Code, § 11430.20, subd. (b).) A document regarding *ex parte* communications entitled "Ex Parte Questions and Answers" is available upon request or from our website at: http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

11. RULES OF EVIDENCE: Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

NOTICE OF INTENT TO APPEAR

_____ plans to participate in the water right hearing regarding
(name of party or participant)

Woods Supplemental Hearing

**scheduled to commence
June 8, 2015 at 9:00 a.m.
and continuing, if necessary,
on June 9, 10, and 11, 2015**

Check all that apply:

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we decline electronic service of hearing-related materials.
- I/we plan to call the following witnesses to testify at the hearing.

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

Name, Address, Phone Number and Fax Number of Attorney or Other Representative:

Signature: _____ Dated: _____

Name (Print): _____

Mailing Address: _____

Phone Number: () _____ Fax Number: () _____

E-mail: _____

DECLARATION OF SERVICE BY EMAIL & U.S. MAIL

Case Name: *Modesto Irrigation District et al. vs.
State Water Resources Control Board, et al.*

Case No.: 34-2011-80000803

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On November 10, 2014, I emailed the attached **AMICUS CURIAE BRIEF OF STATE WATER RESOURCES CONTROL BOARD INFORMING COURT OF ONGOING ADMINISTRATIVE PROCEEDINGS** to the list below. In addition, I placed a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Tim O'Laughlin, Esq.
Valerie C. Kincaid, Esq.
O'LAUGHLIN & PARIS LLP
117 Meyers Street / POB 9259
Chico, CA 95927-9259
Email: vkincaid@olaughlinparis.com
towater@olaughlinparis.com

*Attorneys for Plaintiff/Petitioners
Modesto Irrigation District*

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Water Authority and Westlands Water
District*

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Email: cschulz@kmtg.com
spowell@kmtg.com
Attorneys for State Water Contractors, Inc.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 10, 2014, at Sacramento, California.

James J. Mirarchi
Declarant

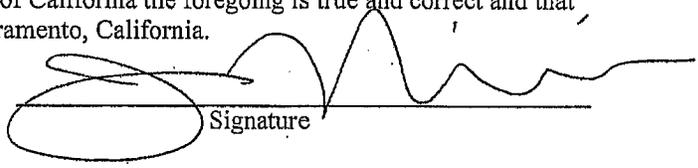

Signature

Exhibit 3

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

HONORABLE DAVID I. BROWN, JUDGE, DEPARTMENT 53

MODESTO IRRIGATION DISTRICT,)
SAN LUIS & DELTA MENDOTA WATER)
AUTHORITY WESTLANDS WATER DISTRICT,)
and STATE WATER CONTRACTORS, INC.,)

Plaintiffs,)

vs.)

STATE WATER RESOURCES CONTROL)
BOARD, et al.,)

Defendants.)

Case No.
34-2011-80000803

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TRANSCRIPT OF PROCEEDINGS

MOTION TO COMPEL JOINDER OF NECESSARY PARTIES

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DECEMBER 11, 2014

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Stephanie Adams, CSR NO. 12554

1 APPEARANCES:

2
3 For the Plaintiffs SAN LUIS & DELTA MENDOTA WATER
4 AUTHORITY, and WESTLANDS WATER DISTRICT:

5 DIEPENBROCK ELKIN

6 By: Eileen Diepenbrock
7 Attorney at Law
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9 Sacramento, CA 95814

10 By: Jonathan Marz
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14 For the Plaintiff STATE WATER CONTRACTORS, INC.:

15 KRONICK MOSKOVITZ TIEDEMANN & GIRARD

16 By: Stanley Powell
17 Attorney at Law
18 400 Capitol Mall, 27th Floor
19 Sacramento, CA 95814

20 For the Real Party in Interest WOODS IRRIGATION
21 COMPANY:

22 HARRIS PERISHO & RUIZ

23 By: Dean Ruiz
24 Attorney at Law
25 3439 Brookside Rd, Ste 210
26 Stockton, CA 95219
27
28

1 DECEMBER 11, 2014

2 AFTERNOON SESSION

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4 The matter of MODESTO IRRIGATION DISTRICT, SAN LUIS &
5 DELTA MENDOTA WATER AUTHORITY WESTLANDS WATER DISTRICT, and
6 STATE WATER CONTRACTORS, INC., Plaintiffs, versus STATE
7 WATER RESOURCES CONTROL BOARD, et al., Defendants, Case No.
8 34-2011-80000803, came on regularly before the Honorable
9 David I. Brown, Judge of the Superior Court of California,
10 County of Sacramento, Department 53.

11 The Plaintiffs, San Luis & Delta Mendota Water
12 Authority, and Westlands Water District, were represented
13 by Eileen Diepenbrock, Attorney at Law, and Jonathan Marz,
14 Attorney at Law.

15 The Plaintiff, State Water Contractors, Inc., was
16 represented by Stanley Powell, Attorney at Law.

17 The Real Party in Interest, Woods Irrigation Company,
18 was represented by Dean Ruiz, Attorney at Law.

19 The following proceedings were had:

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21 THE COURT: Item 3 on the Court's docket in the
22 matter of Modesto Irrigation District, et al. versus Water
23 Resources Board.

24 MR. MARZ: Good afternoon, Your Honor. John Marz for
25 plaintiffs San Luis and Delta Mendota Water Authority,
26 Westlands Water District.

27 THE COURT: So you represent the petitioners?

28 MR. MARZ: Correct, plaintiff. Yes.

1 MS. DIEPENBROCK: Good afternoon, Your Honor. Eileen
2 Diepenbrock, co-counsel of Mr. Marz, for petitioners.

3 MR. POWELL: Good afternoon. Stan Powell. I'm also
4 with the petitioners, the State Water Contractors.

5 MS. DIEPENBROCK: Your Honor, we have permission also
6 to speak for petitioners Modesto Irrigation District.

7 THE COURT: Anybody here for Woods?

8 MR. RUIZ: Yes, Your Honor. This is Dean Ruiz on the
9 phone for Woods Irrigation Company, real party in interest.

10 THE COURT: Okay. Mr. Ruiz, thank you. I thought I
11 missed you there for a minute.

12 MR. RUIZ: Well, due to the inclement weather and the
13 fact that I already traveled to San Andreas today, I ended
14 up doing this by Court call.

15 THE COURT: No. I think that is just fine. I
16 remember my clerk indicating that you had asked about that
17 and I thought that was fine. I just did not hear you state
18 your appearance earlier. All right.

19 MR. BULLOCK: Your Honor, this is Matthew Bullock for
20 the State Water Resources Control Board.

21 THE COURT: Spell your last name for us, please.

22 MR. BULLOCK: B, like boy, u-l-l-o-c-k.

23 THE COURT: Okay. Thank you, Mr. Bullock.

24 All right. Let me get to my memo on this, if I may.
25 All right. So the operative complaint here is not really a
26 complaint, although I called it that, and you all called it
27 that when you introduced yourselves. As I understand it,
28 the operative pleading is the amended petition, am I

1 correct, Counsel?

2 MR. MARZ: Your Honor, it's -- for plaintiffs it's an
3 amended petition and complaint. It had originally mandamus
4 cause of action against the State Water Resources Control
5 Board.

6 THE COURT: But it also says amended verified
7 petition, writ of administrative mandate, and complaint for
8 declaratory and injunctive relief.

9 MR. MARZ: That is correct. That is the type of it.

10 THE COURT: Okay. So when I called it a, quote,
11 "complaint," unquote, in the tentative ruling, this is the
12 operative pleading I was referring to.

13 MR. MARZ: Understood. That is correct.

14 THE COURT: Okay. So nobody was confused by the word
15 complaint I hope. I just wanted to make that absolutely
16 clear.

17 MR. MARZ: Okay.

18 THE COURT: Second, I recognize that Judge Frolely's
19 ruling was not final for our purposes. I'm not sure who
20 the aggrieved party is here today. Although, I understand
21 that perhaps it's you folks for our purposes today, but I
22 suspect Mr. Ruiz has something to talk about as well.

23 So who perceives themselves to be aggrieved?

24 MR. RUIZ: Your Honor, Woods Irrigation Company does.

25 THE COURT: And that is you, Mr. Ruiz.

26 MR. RUIZ: Yes, it is, sir.

27 THE COURT: That's what I thought. All right. I was
28 not sure whether you folks felt aggrieved as well.

1 MR. MARZ: Not for this, sir, no.

2 THE COURT: Not for this particular issue.

3 So let's start out with Woods, shall we, Mr. Ruiz.

4 MR. RUIZ: Yes, Your Honor.

5 THE COURT: I wanted to understand a couple of things
6 because it was important to me and these were crux issues.

7 It's been described by your opponent that the
8 administrative proceeding before the Water Board is
9 distinct from the present litigation in two important ways.

10 They made the argument that only Woods' Water rights
11 are relevant in this litigation and that the members' water
12 rights are not relevant, and, secondly, they say that as
13 the State Water Board currently frames the administrative
14 proceeding it will not reach the question of whether Woods
15 or its members have valid water rights at all. They say
16 that the Water Board only considers if there are, quote,
17 "likely," unquote, rights, and they make the argument that
18 the State Water board does not appear intent on
19 adjudicating Woods' water rights.

20 Mr. Bullock, let me start with you there. Is that
21 true?

22 MR. BULLOCK: Well, Your Honor, the Water Board does
23 have limited authority to make conclusive decisions about
24 the full and exact extent of a pre-14 right. That said,
25 there's certainly -- the focus is on those rights, and it
26 will be at the center of the administrative hearings for
27 certain. So whether there will be a conclusive
28 determination, not entirely. But that said, the only way

1 to get an actual final conclusive 100 percent determination
2 would be to do a stream wide adjudication, which the Water
3 Board is not doing, and which will not be happening in the
4 proceedings before the Court either.

5 THE COURT: But the Water Board's determination will
6 not adjudicate any of the members' rights.

7 MR. BULLOCK: Well, I have --

8 THE COURT: Or will it?

9 MR. BULLOCK: -- I have staff counsel on the line
10 with me, and she might actually be better placed to explain
11 the extent of the proceedings, if that is okay with you,
12 Your Honor.

13 THE COURT: Well, I may hear from you later then.

14 All right. Mr. Ruiz, why don't you start out.

15 MR. RUIZ: Was Mr. -- were you looking to hear from
16 staff counsel, or are you asking me on behalf of Wood, Your
17 Honor?

18 THE COURT: I am asking Woods now, Mr. Ruiz, so that
19 is your client and I will let you go. We'll have the
20 opportunity to address staff counsel in a minute or two.

21 MR. RUIZ: Okay. I'm responding with respect to your
22 question as to whether it's the same issues or in the
23 administrative proceeding as in the litigation with respect
24 to the adjudication of the members' rights.

25 THE COURT: Okay. But, I mean, there two issues
26 before the Court today and I want to find out if those are
27 being addressed this afternoon at this hearing.

28 First, there was the issue of the necessary and/or

1 indispensable party; right?

2 MR. RUIZ: Correct.

3 THE COURT: Then the next issue was the issue of the
4 stay; correct?

5 MR. RUIZ: Correct.

6 THE COURT: Okay. And I don't know if both of those
7 are issues that you wish to address to the Court. In other
8 words, you object to one and agree with the other, or you
9 agree with both, or you disagree with both.

10 MR. RUIZ: Your Honor, Woods disagrees with both.

11 THE COURT: Okay. Got it. Proceed.

12 MR. RUIZ: Okay. Your Honor, with respect to the
13 motion to compel the joinder, there are -- we acknowledge
14 that the issue is somewhat layered and somewhat complex,
15 but the fact of the matter from Woods' perspective is that
16 the landowners' rights and Woods' rights itself are
17 interlinked and intertwined. The landowners' rights have
18 not yet been adjudicated, but it clearly is part and parcel
19 of Woods' Water rights itself.

20 So far, Your Honor, through the administrative
21 proceeding that has occurred in 2010, there was a
22 determination that Woods, the company, likely had a right
23 to 77. cfs pre-1914 water right. That matter has been
24 reopened. However, the landowners did not participate in
25 that proceeding and they were not allowed to participate in
26 that proceeding, which was a due process violation which
27 was found to be as such by the court. As a result, you
28 have the supplemental hearing which is reopened and will

1 occur in June of 2015.

2 THE COURT: You mentioned in your papers that the
3 Board's failure to include the landowners in the cease and
4 desist order proceedings jeopardized their due process
5 rights.

6 MR. RUIZ: Right.

7 THE COURT: Those proceedings could have resulted, or
8 did result in an order which determined how much water
9 Woods could divert and deliver to landowners without being
10 subject to an enforcement action; right?

11 MR. RUIZ: Right.

12 THE COURT: But you also said, and this was
13 interesting to me, you said you believe that the
14 landowners, and you called them your landowners because you
15 used the prefix its landowners, each have their own
16 riparian and/or pre-1914 appropriative water rights
17 relative to their respective parcels, and, this is in the
18 declaration of Mr. Grunsky, quote, "the landowners have in
19 fact claimed these separate water rights." But you do note
20 that these rights are exercised through Woods; correct?

21 MR. RUIZ: Correct, Your Honor.

22 THE COURT: But then you say, I'm doing one of these
23 on one hand and on the other hand, then you say, landowners
24 have never assigned their water rights to Woods or given
25 Woods permission to defend the landowners' water rights in
26 the action. That is also in Mr. Grunsky's declaration as
27 well.

28 Then you indicate, in the event the Court were to

1 make a determination, and maybe not the Court necessarily,
2 but the Board, but either one would make a determination
3 that Woods does not have a valid water right, or that
4 Woods' right is limited relative to the historic
5 deliveries, compliance with that determination could
6 require Woods to curtail water deliveries to its
7 landowners, which would reduce the ability of the
8 landowners to receive water under their individual claimed
9 water rights. Not a whole lot of evidence supporting that
10 as I read it.

11 You concede in your papers that Woods and its
12 landowners don't have identical interests in the
13 litigation. That is one of the headers that you have in
14 your paperwork.

15 MR. RUIZ: Right.

16 THE COURT: And again you stated the landowners have
17 never assigned their separate water rights to Woods, or
18 given Woods any authority to defend the rights on the
19 landowners' behalf. So I guess from the standpoint of the
20 joinder, I was a little curious about the admissions in
21 your papers, and I don't know they necessarily rise to
22 quote, "admissions," unquote, but they certainly seem to
23 sound like concessions suggesting that, hey, the landowners
24 have their own rights independent of us.

25 Although, I do understand that to some degree if your
26 water rights are curtailed, you might not be able to give
27 them as much as you've historically given them, but does
28 that in your mind affect their independent rights as

1 described earlier with respect to their own riparian and
2 pre-1914 appropriative rights?

3 MR. RUIZ: Your Honor, it could because the specific
4 extent of the landowners' own water rights have yet to be
5 determined, and those landowners with Woods Irrigation
6 Company are completely dependent upon the district, or the
7 company, I should say, to deliver their water.

8 THE COURT: So absent Woods, they can't drain a drop?

9 MR. RUIZ: They have all of the -- the delivery
10 system which they depend upon all comes through Woods.

11 THE COURT: Okay. So the delivery system is all
12 yours?

13 MR. RUIZ: Correct.

14 THE COURT: Other than the water that falls from the
15 sky, if they are going to get anything else, it comes
16 through you.

17 MR. RUIZ: It does.

18 THE COURT: Okay.

19 MR. RUIZ: It does. They are completely dependent
20 upon that, so if there were a determination that Woods has
21 a right to -- a limited right or right to an amount less
22 than they have historically diverted to the landowners,
23 then the landowners' ability to continue to irrigate to
24 their parcels is going to be directly affected and directly
25 in jeopardy, which is why the position has taken we believe
26 that the landowners need to be in this action to protect
27 their own interests simply because they are dependent on a
28 Woods system.

1 Now, the arguments have been made by plaintiffs
2 consistently, and I believe in good faith, they don't
3 believe that -- the intention of this is not to bind Woods'
4 landowners. It's just to bind Woods, or determine what
5 Woods' water right is, but if Woods has a limited right,
6 then the landowners are in fact affected because they would
7 have -- would not have the ability to utilize Woods'
8 facilities to some extent, and --

9 THE COURT: How -- stop there for a second. How are
10 Woods' facilities affected, because you said the delivery
11 system comes through your client; right?

12 MR. RUIZ: Well --

13 THE COURT: But they have their independent pre-1914
14 rights and their own riparian rights, how are those
15 necessarily affected by the 77 cfs limitation if indeed
16 hypothetically that is what it turns out to be?

17 MR. RUIZ: Well, because the Woods Irrigation Company
18 service area was developed and formed based on an agreement
19 to furnish water between Woods Irrigation Company and its
20 landowners, and in the 77.7, or whatever that number turns
21 out to be, is based on what it takes or has historically
22 taken to reasonably irrigate those crops on which those
23 landowners farm. So they would be limited in the sense
24 that now 77.7, or whatever the number ends up being, that
25 is to basically serve the service area. You can't stack
26 on, you can't have, you know, the landowners saying they
27 have 77 and Woods has 77, and all of a sudden you're
28 diverting two and three times the amount which has

1 historically been diverted.

2 THE COURT: So as you said, you can't stack it up.

3 MR. RUIZ: You can't double stack. That is right,
4 Your Honor. They are dependent. Plaintiffs have indicated
5 that, well, that Woods -- the landowners themselves would
6 not be bound by this because they are not parties to this.

7 THE COURT: Let me ask you this. Let's assume I buy
8 your argument, and I have not heard from your opponents yet
9 here, but let's assume I buy your argument that they are
10 necessary and/or indispensable parties, how does that
11 implicate the other piece of the Court's decision, which is
12 the stay? Even if I were to buy your argument and stay it,
13 that puts it just where it is. Nothing is going to happen
14 until after the Water Board determines what is going on.

15 MR. RUIZ: Yes, Your Honor, and that gets somewhat
16 back to the questions you had for Mr. Bullock.

17 My response to that is the stay in the administrative
18 proceeding, it's a cease and desist order proceeding, it's
19 simply to determine whether or not the State Board ought to
20 issue a cease and desist order against Woods. That is
21 different than a determination of the rights, the specific
22 water rights of the landowners, or of Woods, or of both
23 relative to each other.

24 THE COURT: And that does not implicate the
25 plaintiffs' lawsuit, the folks who are seated in Court
26 here; right?

27 MR. RUIZ: Pardon me, Your Honor?

28 THE COURT: Well, whatever they decide at the state

1 level if they -- you're still going to have to fight the
2 lawsuit that is before us here; correct?

3 MR. RUIZ: Yes. Yes. But what is before you here is
4 the actual determination of Woods' water rights, and if my
5 argument were to be successful, and it would compel a
6 determination of the landowners' water rights relative to
7 Woods' water rights, that is a completely different animal
8 than what is happening at the State Board, which is simply
9 just to determine whether or not a cease and desist order
10 should be issued.

11 THE COURT: So nothing that happens at the state
12 level is going to implicate anything that happens in this
13 lawsuit?

14 MR. BULLOCK: Your Honor, this is Matthew Bullock. I
15 did not mean to cut anybody off. I will wait my turn.

16 THE COURT: We have got an amended verified petition
17 and complaint for declaratory and injunctive relief here,
18 Counsel. It consists of, according to my reading, about 10
19 causes of action. The first seven are directed against the
20 State Water Board. They all sound kind of sort of the
21 same. The first one, for example, says that it's against
22 the Board, and the State Board's determination that
23 riparian rights are likely not supported by law. The
24 second is also against the State Water Board, and addresses
25 their determination that riparian rights are likely
26 amounts, meaning their determination, of riparian rights
27 are, quote, "likely amounts to a prejudicial abuse of
28 discretion," and that goes on until we reach the eighth

1 cause of action. At the eighth cause of action it's
2 against Woods, saying that Woods' unlawful diversions
3 amount to nuisance and trespass and must be enjoined. The
4 ninth cause of action is against the State Board and Woods
5 for declaratory relief saying that Woods' diversions are
6 unlawful. And the last cause of action, the tenth, is
7 against the State Water Board and Woods for injunctive
8 relief, also saying that Woods' diversions are unlawful.

9 Are you telling me that nothing at the State Water
10 Board is going to implicate those issues, Mr. Ruiz?

11 MR. RUIZ: Your Honor, I'm not -- I wouldn't go that
12 far. The findings at the State Water Board will have an
13 impact. They likely will be, if any prior history is
14 consistent, will likely be even appealed I would
15 acknowledge to the Court.

16 THE COURT: Then that puts us in a position where we
17 have another writ proceeding; right?

18 MR. RUIZ: Yes, it does.

19 THE COURT: It's almost like --

20 MR. RUIZ: Circular here.

21 THE COURT: It's somewhat tautological. I agree.

22 MR. RUIZ: My point is the proceeding at the State
23 Board is not a determination of the landowners' water
24 rights and how specifically they -- how much those are, how
25 they specifically relate to Woods in terms of a water
26 rights adjudication vis-a-vis Woods and its landowners. It
27 is simply a cdo proceeding as to whether or not the State
28 Board should issue a cease and desist order against Woods.

1 And the reason the landowners are in that proceeding is
2 because the previous cease and desist order proceeding
3 which resulted in a determination that Woods Irrigation
4 Company would likely have a right 77.7 cfs as an
5 appropriative right did not include the landowners, and
6 this is a way that the Board fashions to cure the previous
7 due process violation.

8 THE COURT: So the landowners are indeed before the
9 state Board on this issue?

10 MR. RUIZ: In this matter, yes. The landowners
11 through a supplemental hearing notice that went out last
12 month have been invited to participate in the proceeding at
13 this point, which we believe is a violation of the due
14 process again because they are coming into proceeding four
15 months later. It's a limited reopening of the hearing for
16 the purposes of allowing the landowners to present any
17 evidence, cross-examine witnesses, et cetera.

18 THE COURT: They have been invited to participate.
19 That's the extent of it. I don't know what that means.

20 Maybe Mr. Bullock or his research attorney can help
21 me.

22 What does that mean, Mr. Bullock?

23 MR. BULLOCK: They have been essentially brought in
24 as full parties.

25 THE COURT: As full parties.

26 MR. BULLOCK: Right. The proceedings are not going
27 to start over, but they have been reopened and will
28 continue with the opportunity for landowners to

1 cross-examine old witnesses, and provide their own
2 witnesses and make argument.

3 THE COURT: Present evidence, be represented by
4 counsel.

5 MR. BULLOCK: Correct.

6 THE COURT: Is there any discovery or limited
7 discovery in those administrative proceedings?

8 MR. BULLOCK: They will have the same ability for
9 discovery as any of the other parties would, which is
10 because it's an administrative proceeding it's not the same
11 as if it were in court, but they will have the exact same
12 process as any of the other parties.

13 THE COURT: Why is that a denial, Mr. Ruiz, of due
14 process? Why is it any different from any other party
15 being brought late into a lawsuit? As long they have
16 sufficient time to do what they need to do, why is that
17 improper? I mean, in lawsuits plaintiffs sometimes name
18 Doe defendants, you know, six months before trial, five
19 months before trial, even later. So why would that be
20 inappropriate at the administrative level?

21 MR. RUIZ: Your Honor, I think it would be
22 inappropriate at the administrative level because this
23 hearing occurred over almost five years ago, and by the
24 time it happens again, you know, the ability to
25 meaningful -- meaningly cross-examine witnesses, et cetera
26 should be contemporaneous, and you also have the landowners
27 faced with -- I mean, the order was modified only to the
28 extent to allow the landowners to come in as parties. You

1 still have findings that were made in the previous
2 administrative order through the administrative proceeding
3 in which they have to now come into a process that's, you
4 know, four full days of evidence four and a half years
5 later and have to deal with that.

6 THE COURT: That makes a certain amount of sense.
7 Are you talking about the order 2011 0005?

8 MR. RUIZ: Yes.

9 THE COURT: Okay. What about that, Mr. Bullock? Are
10 the landowners kind of caught by that? In other words, are
11 they stuck with the findings in that order?

12 MR. BULLOCK: They're not stuck with them. The way
13 that the previous order has been partially rescinded is
14 essentially to leave open what was done, but all of the
15 determinations have been rescinded. And so essentially it
16 is saying we are taking back all of the decisions that were
17 made based on that, but leaving open the taking of
18 evidence.

19 THE COURT: Okay. Why don't you finish up, Mr. Ruiz,
20 I'd like to get to these folks in front of me eventually.
21 They have been very patient.

22 MR. RUIZ: I understand, Your Honor.

23 Well, I know that Your Honor studied the issues in
24 the briefs in detail and I'm not going to go through
25 everything again because I know you have done that.

26 THE COURT: Tell me why you think I'm wrong in terms
27 of staying the action, please.

28 MR. RUIZ: I think you're wrong in terms of staying

1 the action because they are not -- the things that are
2 going on in both venues are different. They are not --
3 they're not the same thing at all, and I think that
4 obviously the Court with regard to water rights issues has
5 the ability in such a case to issue a deferral to the State
6 Board for assistance with regard to fact finding, and with
7 regard to the State Board expertise.

8 THE COURT: Are you implicating Water Code 2000 and
9 2001?

10 MR. RUIZ: I believe that is it, Your Honor. Yes.
11 It's quite different than to fully stay the proceedings. I
12 mean, the --

13 THE COURT: If I said the Water Board, I meant the
14 Water Code. You know what I was talking about.

15 MR. RUIZ: I do.

16 THE COURT: Okay.

17 MR. RUIZ: The court proceedings started right after
18 the orders came out. Nothing happened with respect to the
19 administrative hearing for quite some time, and that was
20 largely in part due to litigation, but Woods and its
21 landowners requested the state Board not reissue or reopen
22 the hearing at this point due to the pending matter before
23 this Court. And given that they are two separate --

24 THE COURT: Don't both have concurring jurisdiction?

25 MR. RUIZ: There is. There is. I would agree with
26 that. But given that the State Board from our view has
27 created due process issues in the past, and the way they
28 are proceeding in this regard is also in our view a

1 violation of due process, and given that the proceedings
2 are different, we don't feel that a stay is in order.

3 THE COURT: Thank you. All right. Let's hear from
4 the folks here.

5 Mr. Marz, violation of due process or not by the
6 Water Board?

7 MS. DIEPENBROCK: Your Honor, if I may, this is
8 Eileen Diepenbrock, I'll address that.

9 THE COURT: All right. Ms. Diepenbrock.

10 MS. DIEPENBROCK: We don't think that there's going
11 to be or has been a violation of the landowners' due
12 process rights before the State Board but honestly we are
13 neutral on that issue. We're going to be a participant
14 before the State Board, and we are going to be certainly a
15 participant here, and we can accept the Court's decision
16 either way on the stay.

17 We don't think that the proceedings are exactly the
18 same as currently phrased, or, excuse me, as currently set
19 up, but more will be --

20 THE COURT: There is some overlap.

21 MS. DIEPENBROCK: There is a lot of overlap, yes. We
22 can respect the rationale that the Court provided in its
23 tentative ruling on the stay.

24 THE COURT: All right.

25 MR. POWELL: We concur.

26 MR. MARZ: I'll concur with my co-counsel. Yes.

27 THE COURT: Okay. So we have that situation.

28 How about you, Mr. Bullock? I know you don't have

1 really a dog in the hunt anymore. The footnote in your
2 amicus brief made it clear that the Water Board is not a
3 party to these proceedings.

4 So what is your thought? Violation of due process,
5 or am I simply asking the wrong person?

6 MR. BULLOCK: Well --

7 THE COURT: You have a little bit of a bias here
8 representing the Board.

9 MR. BULLOCK: Sure. Of course we don't think that is
10 a violation of due process. And to the extent that it were
11 determined at some point that that had happened, there
12 certainly will be an opportunity for the parties to argue
13 that both in front of the Board, and in all likelihood
14 there will be litigation following the Board proceedings.

15 THE COURT: So, Mr. Ruiz, if I may, what's the evil
16 to be perceived if the Court retracks its ruling regarding
17 the stay? Then this litigation proceeds forward, the Water
18 Board action proceeds forward, and now you have two
19 entities, the courts and the administrative tribunal, that
20 are proceedings with concurrent jurisdiction on overlapping
21 issues. It seems like a waste of judicial resources.

22 MR. RUIZ: That is a very fair argument and something
23 we considered strongly, which is why we requested
24 consistently that the State Board not reopen this at this
25 time while the matter is pending before the Court.

26 THE COURT: How likely is that, Mr. Bullock?

27 MR. BULLOCK: I don't think it's very likely, Your
28 Honor. My understanding is that the Water Board feels it's

1 appropriate for them to move forward.

2 And as the Court pointed out in its tentative, there
3 a general feeling that overall, just to cite to the
4 National Audubon case, that generally speaking the Water
5 Board is actually, despite concurrent jurisdiction, the
6 Water Board is better placed to make these kinds of
7 determinations than the Court is.

8 THE COURT: One thing I have not heard from anybody
9 really does implicate the Water Code Sections 2000 and
10 2001. Is there anything that you perceive the Court should
11 be asking the Water Board to do that they're not going to
12 do on their own anyway when they hear these matters? I'm
13 not sure. Anybody?

14 MS. DIEPENBROCK: Your Honor, if I may, this is
15 Eileen Diepenbrock again. If I may respond to that. We
16 have a very important prehearing conference coming up in
17 January before the State Water Board.

18 THE COURT: I saw that.

19 MS. DIEPENBROCK: That will be an opportunity for the
20 parties, the participants, the landowners who are all
21 filing notices of intent to appear on Monday, or at least
22 by Monday, that is the deadline for doing so, that will be
23 an opportunity for everybody to sit down with the State
24 Water Board and determine the full scope of the resumed
25 proceedings. That will be a chance where, if you like, we
26 can report back to the Court after that point in time.

27 THE COURT: That is a great idea. I think that that
28 is a really good idea. You could also report back with

1 recommendations if you feel that the Board needs to be
2 addressed under 2000 and 2001 for investigation of physical
3 facts or issues to the Board as the referee; right?

4 MS. DIEPENBROCK: Yes.

5 THE COURT: Of course, if they are going to decide
6 those things anyway, then it seems kind of irrelevant to
7 ask them to do what they are already going to do because
8 you're going to know that at the hearing; right?

9 MS. DIEPENBROCK: Well, we know, Your Honor, at a
10 minimum what they are going to do at the hearing. They've
11 told us.

12 THE COURT: But you can ask them to do more stuff.

13 MS. DIEPENBROCK: That is certainly a possibility and
14 certainly one of the issues that we anticipate will be
15 addressed at the prehearing conference and the discussions
16 leading up to it. And if it would be appropriate to have
17 guidance from the Court in this case to give direction, or
18 at least request to the State Board to help make things a
19 more adjudicatory process, we can certainly work with Your
20 Honor on that issue. So that is as far as the stay is
21 concerned.

22 THE COURT: It doesn't really change that at this
23 point but it's certainly something the Court will consider.

24 How about you, Mr. Ruiz? Doesn't that sound like a
25 swell idea?

26 MR. RUIZ: It's not a bad idea.

27 The other thing I wanted to request is I realize the
28 Court obviously has its discretion and on its own motion

1 can issue a stay, but none of the parties requested a stay.
2 Given the importance of the issues particularly to Woods, I
3 would request that in conjunction with seeing what happens
4 with the hearing on January 15th before the State Board
5 that the parties be at least allowed to brief the issue of
6 a stay. If somebody didn't bring a motion, I would like to
7 have the ability to flush this out further.

8 THE COURT: Well, that's certainly fair, but the
9 issue of the stay was raised, in all fairness, in the
10 amicus brief filed by the Water Board, wasn't it?

11 MR. RUIZ: It was raised in that issue. It was
12 raised there for the first time, yes.

13 THE COURT: Did anybody file anything --

14 MS. DIEPENBROCK: Yes.

15 THE COURT: -- against it?

16 MR. RUIZ: Yes. Plaintiffs responded, and I'll let
17 them speak for their response. Woods also responded to it
18 opposing it.

19 THE COURT: Well, that is what I remember reading, so
20 I was kind of curious when you said that there has been no
21 briefing on it. I thought there had been briefing on the
22 issue.

23 MR. RUIZ: Well, it was a simple amicus brief sort of
24 informing the Court of the Board's position that the issues
25 are similarly parallel. Plaintiffs took a little different
26 exception to the terms of the parallelism as they termed,
27 as did Woods, but that was not a, you know, request by a
28 party in this action. The State Board is not a party in

1 this action before this Court.

2 THE COURT: Yeah. I noted that. It's in the foot
3 note in the amicus brief.

4 MR. BULLOCK: Your Honor, with regard to us not being
5 a party, I think it's -- in terms of whether the two
6 proceedings are parallel -- I think it's important to note
7 that we were a party. The Water Board issued an order, and
8 immediately after that order was issued --

9 THE COURT: Well, according to what I understand you
10 were initially named as a respondent in this case. You
11 challenged -- the plaintiffs challenged certain findings of
12 the cease and desist order.

13 MR. BULLOCK: Exactly.

14 THE COURT: The reconsideration order rescinded that
15 cease and desist order, and then that was ultimately
16 determined and rendered the claims in the case we have here
17 against the Water Board moot, and the Water Board was
18 dismissed in July of '13.

19 MR. BULLOCK: Correct. I think that that kind of
20 underscores the decree that the two proceedings are
21 parallel. That initially the action taken by Board in its
22 proceedings that are now reopened were a basis for the
23 litigation in front of the Court. We were dismissed as a
24 party when those proceedings were reopened. So, again, I
25 think that underscores the parallel between the two cases.

26 THE COURT: How does that implicate the instant
27 motion and inform the Court?

28 MR. BULLOCK: I don't think it necessarily does. I

1 just wanted to clarify. There seems to be a disagreement
2 about the degree to which the two proceedings are similar.
3 I think from the Board's perspective they are very similar.

4 THE COURT: That is what I was looking for and you
5 gave me that.

6 All right. I heard from everybody several times.
7 Anybody else want to talk some more?

8 MS. DIEPENBROCK: Your Honor, have we -- have you had
9 a chance -- do you have any questions for us on the motion
10 to join? To dismiss for failure to join? We hadn't
11 specifically responded to the arguments that were made
12 today on that so my colleague would address that to the
13 extent you have any questions.

14 MR. MARZ: Your Honor, I would just note, Jonathan
15 Marz, that as the Court in its discussion it was zeroing in
16 on something that is obvious through Woods' discovery
17 responses, through its motion and through representations
18 made in a prior motion before the Court, which is it has
19 its own rights, it has its own rights, and that is what we
20 are here to discuss and here to litigate in this lawsuit.

21 THE COURT: When you say "it," you're talking about
22 Woods.

23 MR. MARZ: Woods.

24 THE COURT: As opposed to its members.

25 MR. MARZ: Anybody else. Just Woods. And so the
26 issue that is teed up by this litigation are Woods' water
27 rights. Woods says it has those rights. Plaintiffs
28 dispute that and that is what we are trying to adjudicate.

1 The Court has appropriately zeroed in on that.

2 And the issue about Woods' landowners' rights, as
3 Woods has repeatedly said, they are separate and distinct.
4 Woods is acknowledging that. So trying to bring the two
5 together, especially to make the joinder arguments, it just
6 does not work.

7 THE COURT: All right. Last word on that, Mr. Ruiz.

8 MR. RUIZ: Yes, Your Honor. Just because they are
9 separate and distinct does not also mean they are
10 interlinked and dependent on one another.

11 Plaintiffs take the position that if the issue -- the
12 order they seek, a determination with respect to Woods
13 would not be binding on landowners in any way, Woods'
14 landowners, if that is the case then complete relief cannot
15 be afforded. If it is in fact the opposite, and it is
16 binding in any way on the landowners, then their interests
17 are clearly at stake and they are necessary parties.

18 THE COURT: Very interesting.

19 MR. MARZ: Can I respond to that, Your Honor?

20 THE COURT: No, Counsel, I think I heard enough. We
21 have been going over the better part of an hour on this
22 matter. Although interesting, it can't go on forever. The
23 Court is inclined to affirm the tentative ruling and will
24 do so as it stands with the additional provision ala
25 Ms. Diepenbrock's recommendation and suggestion to the
26 Court that, and you can draft this up if you'd like to put
27 it in a formal order, Ms. Diepenbrock, I will request that.

28 MS. DIEPENBROCK: Okay.

1 THE COURT: So you can draft a formal order off of
2 this order that the Court is now affirming. But also
3 providing, just like you said, that the parties, any of the
4 parties may petition the Court pursuant to Water Code
5 Section 2000 and 2001 following the -- did you say
6 precedent to the January hearing or following the hearing?

7 MS. DIEPENBROCK: I was thinking we could report back
8 after the hearing, but I can meet and confer with counsel.

9 THE COURT: That's what I thought too.

10 MS. DIEPENBROCK: It might be better to do it before.
11 I'm just not sure yet.

12 THE COURT: I don't know. The hearing is on
13 January 15th, but it's not the trial. It's just a hearing;
14 right?

15 MS. DIEPENBROCK: It's to set the ground rules
16 essentially as I think of it for the trial -- for the
17 resumed hearings which are not until June.

18 THE COURT: How does that work in real life,
19 Mr. Bullock? Can the parties come back and make additional
20 recommendations after the ground rules are set, or once
21 they are set are they set in stone?

22 MR. BULLOCK: You mean --

23 THE COURT: After the hearing.

24 MR. BULLOCK: Could this hearing affect the scope?
25 Is what you are asking?

26 THE COURT: In other words, if Counsel came back
27 after the hearing on January 15th and said, well, we have
28 got some more things we want to address, would the Water

1 Board tell them, no, we've already had our hearing?

2 MR. BULLOCK: My understanding is that it would be
3 very difficult after that point.

4 THE COURT: So maybe it should be before,
5 Ms. Diepenbrock.

6 MS. DIEPENBROCK: That's fine, Your Honor.

7 THE COURT: So the hearing is around mid-January,
8 isn't it?

9 MR. BULLOCK: 15th.

10 THE COURT: So would I suggest somewhere around the
11 first or second week of January at the latest; right?

12 MS. DIEPENBROCK: Okay. And understanding, Your
13 Honor, we will absolutely work on that, and it's possible
14 we will need to have something before you on shortened time
15 given our schedule where we are.

16 THE COURT: That is fine, but I would suggest you
17 meet and confer with your opponents here, Mr. Ruiz, and
18 craft something up because this is for his benefit too.

19 MS. DIEPENBROCK: Yes.

20 THE COURT: Right, Mr. Ruiz?

21 MR. RUIZ: Yes, Your Honor.

22 THE COURT: Okay. Then I will expect an order from
23 you, Counsel. You're going to conform that with Counsel's
24 approval; okay?

25 MS. DIEPENBROCK: Yes, Your Honor.

26 THE COURT: Thank you, Counsel. That will be the
27 Court's determination. Thank you.

28 MS. DIEPENBROCK: Thank you.

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MR. RUIZ: Thank you Your Honor.
MR. BULLOCK: Thank you, Your Honor.
(Whereupon, the matter was concluded)

1 CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

2
3 STATE OF CALIFORNIA)
4 COUNTY OF SACRAMENTO) ss.

5
6 I, STEPHANIE ADAMS, hereby certify that I am an
7 Official Certified Shorthand Reporter, and that at the
8 times and places shown, I recorded verbatim in shorthand
9 writing all the proceedings in the following described
10 action completely and correctly, to the best of my ability:

11 Court: Superior Court of California,
12 County of Sacramento

13 Judge: David I. Brown, Department 53

14 Case: MODESTO IRRIGATION DISTRICT, SAN LUIS & DELTA
15 MENDOTA WATER AUTHORITY WESTLANDS WATER DISTRICT, and STATE
16 WATER CONTRACTORS, INC., Plaintiffs, versus STATE WATER
17 RESOURCES CONTROL BOARD, et al., Defendants.

18 Case No. 34-2011-80000803

19 Date: December 11, 2014

20 I further certify that my said shorthand notes
21 have been transcribed into typewriting, and that the
22 foregoing pages, 1 through 28, constitute an accurate and
23 complete transcript of all of my shorthand writing for the
24 dates and matter specified.

25 Dated: December 23, 2014

26 _____
27 STEPHANIE ADAMS, CSR NO. 12554
28

|Exhibit 4

FILED
ENDORSED
JAN - 6 2015
By E. BROWN
Deputy Clerk

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13 COUNTY OF SACRAMENTO

14
15 MODESTO IRRIGATION DISTRICT, SAN
LUIS & DELTA-MENDOTA WATER
16 AUTHORITY, WESTLANDS WATER
DISTRICT, AND STATE WATER
17 CONTRACTORS, INC.,

18 Petitioners/Plaintiffs,

19 v.

20 STATE WATER RESOURCES CONTROL
BOARD, et al.,

21 Respondents/Defendants,

22
23 WOODS IRRIGATION COMPANY, et al.,

24 Real Party In Interest/
25 Defendant.

CASE NO. 34-2011-80000803

~~PROPOSED~~ ORDER ON WOODS
IRRIGATION COMPANY'S MOTION TO
COMPEL JOINDER OR IN THE
ALTERNATIVE TO DISMISS ACTION

Date: December 11, 2014

Time: 2:00 p.m.

Dept: 53

Judge: David Brown

Complaint Filed: March 2, 2011



DIEPENBROCK

{00440613; 1}

ELKIN LLP

[PROPOSED] ORDER ON WOODS' MOTION FOR JOINDER OR DISMISSAL

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1 The "Motion to Compel Joinder of Necessary Parties or in the Alternative to Dismiss the
2 Action," filed by Defendant/Real Party in Interest Woods Irrigation Company ("Woods") came on
3 regularly for hearing on December 11, 2014, before the Honorable David I Brown, Department 53,
4 of the Sacramento County Superior Court. Plaintiffs San Luis & Delta-Mendota Water Authority
5 and Westlands Water District were represented at the hearing by Eileen M. Diepenbrock and
6 Jonathan R. Marz, of Diepenbrock Elkin LLP. Plaintiff State Water Contractors was represented at
7 the hearing by Stanley C. Powell of Kronick, Moskovitz, Tiedemann & Girard. Woods was
8 represented at the hearing by S. Dean Ruiz of Harris, Perisho & Ruiz. Amicus Curiae State Water
9 Resources Control Board ("State Water Board") was represented at the hearing by Deputy Attorney
10 General Matthew G. Bullock.

11 Having reviewed and considered the papers on file herein, and counsel's oral arguments, and
12 good cause appearing, the Court hereby incorporates by reference the minute order issued following
13 hearing on Woods' motion, issued on December 11, 2014, and attached hereto as **Exhibit A**, as
14 further modified by this Order. It is further ORDERED that:

15 1) Woods' motion is DENIED.

16 2) The matter is ordered STAYED, pending resolution of the administrative
17 proceedings to review the water rights exercised by Woods, including any rights held by Woods'
18 "Landowners."

19 3) Notwithstanding the stay order, any of the parties may petition the Court for a
20 referral pursuant to Water Code section 2000 and 2001, and/or for any guidance or instructions they
21 would like the Court to submit to the State Water Board.

22 **IT IS SO ORDERED.**

23 JAN - 6 2015



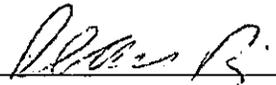
24 _____
25 Hon. David I. Brown
26 Judge of the Superior Court
27
28

1 **APPROVED AS TO FORM:**

2 Dated: December 16th, 2014

HARRIS, PERISHO & RUIZ

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By: 

S. Dean Ruiz, Esq.
Attorneys for Defendant/Real Party In Interest
Woods Irrigation Company

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 12/11/2014

TIME: 02:00:00 PM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: E. Higginbotham

REPORTER/ERM: S. Adams CSR# 12554

BAILIFF/COURT ATTENDANT:

CASE NO: **34-2011-80000803-CU-WM-GDSC**CASE INIT.DATE: 03/02/2011

CASE TITLE: **Modesto Irrigation District vs. State Water Resources Control Board**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion to Compel - Other - Civil Law and Motion

APPEARANCES

Jonathan R Marz, counsel, present for Petitioner(s).

Stanley C Powell, counsel, present for Petitioner(s).

Matthew G Bullock, counsel, present for Respondent(s) telephonically.

S Dean Ruiz, counsel, present for Real Party In Interest (RpII)(s) telephonically.

Eileen Diepenbrock, counsel, present for Petitioner

Nature of Proceeding: Motion to Compel Joinder of Necessary Parties

TENTATIVE RULING

Real Party in Interest Woods Irrigation Co.' s Motion to Compel Joinder of Necessary parties or in the Alternative to Dismiss the Action is **DENIED**. The Court orders the entire action **STAYED**, pending resolution of the administrative proceedings to review the water rights exercised by Woods, including any rights held by the Landowners.

Woods is an irrigation district, formed in 1909, that diverts water from the Middle River in San Joaquin County and conveys the water to its landowner shareholder members on Middle Roberts Island. Woods asserts that it has pre-1914 appropriative and riparian water rights to divert water from Middle River for delivery to its members. Woods also asserts that its members have their own riparian and/or appropriative water rights to divert water.

Procedural History

In 2009, the State Water Board commenced an investigation of the legality of certain "in-Delta" water diversions, including Woods' diversions. In December 2009, the State Water Board issued a draft cease and desist order against Woods. Woods requested a hearing. In June and July of 2010, the State Water Board held hearings on the draft cease and desist order. After the hearings, the Water Board revised its draft cease and desist order.

In February 2011, the State Water Board adopted the revised cease and desist order against Woods (Order 2011-0005). Finding that Woods "likely" has a right to divert up to 77.7 cubic feet per second (cfs) from Middle River, Order 2011-0005 ordered Woods to cease and desist from diverting water from Middle River at a rate in excess of 77.7 cfs unless Woods meets certain requirements.

DATE: 12/11/2014

MINUTE ORDER

Page 1

DEPT: 53

Calendar No.

In March 2011, plaintiffs Modesto Irrigation District, San Luis & Delta-Mendota Water Authority, Westlands Water District, and State Water Contractors, Inc. filed their Amended Verified Petition for Writ of Administrative Mandate and Complaint for Declaratory and Injunctive Relief against defendant/respondent State Water Resources Control Board. The Amended Complaint names Woods as the Real Party in Interest.

The Amended Complaint includes ten causes of action. The first seven causes of action challenge the validity of the State Water Board's Order 2011-0005, seeking to have the Order declared unlawful and set aside. The ninth and tenth causes of action, against the Water Board and Woods, seek a judgment declaring that Woods does not hold any diversion rights and enjoining Woods from diverting water based on such alleged water rights. The eighth cause of action, against Woods, alleges that Woods' diversions from Middle River constitute a nuisance and trespass, and should be enjoined.

Various members of Woods also filed suit against the State Water Board, contending that the State Water Board lacks jurisdiction to issue a cease and desist order for an illegal diversion of water when the diverter claims riparian or pre-1914 appropriative rights. The members argued that the Water Board must first file a civil lawsuit to adjudicate a diverter's water rights before it brings an enforcement action to prevent the unlawful diversion of water. The trial court granted the members' petition for a writ of mandamus, but the Water Board appealed. (See *Young v. State Water Resources Control Bd.* (2013) 219 Cal. App. 4th 397, 400.) In 2013, the Court of Appeal reversed the lower court determination, concluding that the Water Board can make a preliminary determination for purposes of enforcement, as to whether a diverter has either riparian or pre-1914 appropriative rights without filing a lawsuit. (*Ibid.*)

At about the same time that Woods' members filed suit, they also filed a petition for reconsideration of Order 2011-0005 with the Water Board, arguing that the Water Board's Order violated their due process rights by curtailing their supply of water without adequate notice or opportunity for hearing. In August 2012, the Water Board granted the members' request for reconsideration (Order 2012-0012), thereby reopening the hearing to allow the members an opportunity to submit evidence and cross-examine witnesses. (*Ibid.*; see also State Water Resources Control Board's January 24, 2013, Request for Judicial Notice in Support of Demurrer, Exhibit A.)

In July 2013, Plaintiffs voluntarily dismissed their claims against the State Water Board. As a result, the only claims still pending in this action are the sixth, eighth, ninth and tenth causes of action against Woods. These causes of action seek a court declaration that Woods does not hold any rights of its own to divert water from Middle River, to judicially estop Woods from claiming it has such rights, and to enjoin any diversions made by Woods pursuant to such claimed rights.

On March 14, 2014, based on review of the pleadings, and the dismissal of all mandamus claims against the State Water Resources Board, Judge Frawley determined that as this action is no longer a writ proceeding, it should not remain in his department and it has since been reassigned by the Presiding Judge.

The only remaining claims are against Woods for declaratory and injunctive relief, judicial estoppel, trespass and nuisance.

Motion to Join Necessary Parties

Woods now moves for an order requiring plaintiffs to join its members as necessary and indispensable parties to this litigation.

Code of Civil Procedure section 389, subdivision (a) defines the persons who ought to be joined if

possible, often referred to as "necessary parties." It provides:

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." Code Civ. Proc. § 389(a)

Code of Civil Procedure section 389(b) states that if a necessary party cannot be joined, the court "shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable." As noted in *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal. App. 4th 1290, 1298-1299, "The controlling test for determining whether a person is an indispensable party is, 'Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party. [Citation.] [Citation.] More recently, the same rule is stated, 'A person is an indispensable party if his or her rights must necessarily be affected by the judgment. [Citations.] [Citation.]' (*Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 692-693.)"

In this case, Woods declares that it believes that its Landowners each have their own riparian and/or pre-1914 appropriative water rights relative to their respective parcels located within the WIC service area. The Landowners have in fact claimed these separate and independent water rights. These Landowner rights are exercised through the WIC diversion facilities. The Landowners have never assigned their water rights to WIC or given WIC permission to defend the Landowners' water rights in the Action. (Grunsky Decl., para. 4.)

Woods asserts that it has historically diverted amounts of water necessary to serve its Landowners' reasonable agricultural needs. Woods' Landowners rely on those diversions as a means to effectuate their own claimed water rights. (Grunsky Decl., para. 2.) In the event the Court were to make a determination that WIC does not have a valid water right, or that Woods' right is limited relative historic deliveries, compliance with that determination could require Woods to curtail water deliveries to its Landowners, which would reduce the ability of the Landowners to receive water under their individual claimed water rights. (Grunsky Decl., para. 4.)

However, the Amended Complaint seeks only a judicial determination of Woods' alleged diversion rights and an order prohibiting Woods from diverting water pursuant to its own claimed water rights. The Amended Complaint does not seek to adjudicate the alleged water rights of Woods' members, to adjudicate the rights of members to use Woods' facilities, or to prohibit Woods from diverting water pursuant to its members' individual water rights (assuming such rights exist). Woods' claimed rights to divert water are independent and distinct from those of its members. Thus, the members are not necessary to adjudicate Woods' alleged water rights.

The motion to compel the joinder of the Woods landowners as necessary parties is therefore denied.

Amicus Brief

The State Water Resources Control Board was granted leave to submit an amicus brief, which was filed on Nov. 26, 2014, and has been considered by this Court. The Court has also considered WIC's opposition to that brief filed Dec. 4, 2014.

On December 28, 2009, the State Water Board issued notice of a proposed Cease and Desist Order to Woods Irrigation Company (Woods), the defendant in the instant case, for the alleged violation and threatened violation of the prohibition against the unauthorized diversion or use of water. Following administrative hearings, on February 1, 2011, the State Water Board issued Cease and Desist Order WR 2011-0005 against Woods. The Cease and Desist Order required Woods to cease and desist from diverting water from Middle River at a rate in excess of 77.7 cfs unless Woods meets certain requirements.

The Complaint in the instant case was filed March 2, 2011. Around the same time, a group of individuals who receive water through Woods and who are shareholders of Woods (the Landowners) petitioned the State Water Board to reconsider the Cease and Desist Order against Woods and allow the Landowners to participate in the reopened hearing.

On August 7, 2012, the State Water Board issued Order WR 2012-0012 (the Reconsideration Order), granting the Landowners' reconsideration request and reopening the administrative hearing on Woods' water rights.

The State Water Board has set a pre-hearing conference for January 15, 2015 in the reopened proceeding to review the water rights exercised by Woods, including any rights held by the Landowners. An administrative hearing on the merits is set to commence on June 8, 2015, with potential continuation through June 11, 2015.

The Superior Court and the State Water Board have concurrent jurisdiction over questions of water rights. (*National Audubon Society v. Super. Ct.* (1983) 33 Cal.3d 419, 426.) Parallel proceedings are procedurally permitted, but can lead to conflicting decisions and a waste of judicial resources. Any decision reached in the State Water Board's administrative proceedings will be subject to the court's review under an independent judgment standard. (Water Code, § 1126, subd. (c).)

The State Water Board has "experience and expert knowledge, not only in the intricacies of water law but in the economic and engineering problems involved in implementing water policy. The board, moreover, is charged with a duty of comprehensive planning, a function difficult to perform if some cases bypass board jurisdiction." (*National Audubon Society v. Super. Ct.*, *supra*, 33 Cal.3d at p. 450.) Moreover, the "scope and technical complexity of issues concerning water resource management are unequalled by virtually any other type of activity presented to the courts." (*Id.*, at p. 451, fn. 1, quoting *Environmental Defense Fund, Inc. v. East Bay Mun. Util. Dist.* (1977) 20 Cal.3d 327, 344.)

The State Water Board is already addressing the water rights at issue in the instant case. Any decisions it makes will be subject to independent judgment review by the court. In actions raising questions within the scope of a regulatory agency's purview, the courts should defer to the agency's expertise. (*Pacific Bell v. Superior Court* (1986) 187 Cal. App. 3d 137, 140; *E.B. Ackerman Importing Co. v. City of Los Angeles* (1964) 61 Cal. 2d 595.) Application of this doctrine in the underlying action will serve several salutary purposes. First, when the regulatory proceeding is completed, the court will have the benefit of the agency's views on the issues. Secondly, a stay until administrative proceedings are concluded will minimize the risk that the court's rulings will hinder or frustrate the agency's policies, orders, or decisions. (See, e.g. *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 4, 11.) Finally, a stay will conserve judicial and other resources which would otherwise be consumed in litigation of some issues which will likely be resolved by administrative action.

This Court therefore concludes that the action should be stayed to permit the Board to exercise its expert knowledge, and to avoid the expenditure of limited judicial resources on the matter at this time under these circumstances. The Court has inherent authority to control its docket. Courts routinely stay

matters where circumstances warrant. *Friberg v City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489.

In the event that this tentative ruling becomes the final ruling of the court, this order shall be effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice shall be required.

COURT RULING

The matter was argued and submitted. After hearing oral argument the Court affirmed its tentative ruling with the following modification: Any of the parties may petition the court for a referral pursuant to Water Code section 2000 and 2001. Petitioner to submit a formal order for the Court's signature.

1 Re: *Modesto Irrigation District, et al. v. State Water Resources Control Board*
2 *Sacramento County Superior Court Case No. 34-2011-80000803*

3
4 **PROOF OF SERVICE**

5 I, the undersigned, declare:

6 I am a citizen of the United States, employed in the City and County of Sacramento,
7 California. My business address is 500 Capitol Mall, Suite 2200, Sacramento, California 95814. I
8 am over the age of 18 years and not a party to the within action.

9 On December 22, 2014, I caused to be served a copy of the following document(s):

10 **[PROPOSED] ORDER ON WOODS IRRIGATION COMPANY'S MOTION TO COMPEL
11 JOINDER OR IN THE ALTERNATIVE TO DISMISS ACTION**

12 on the following interested parties in the above-referenced case number to the following:

13 **SEE ATTACHED SERVICE LIST**

14 BY MAIL [CCP 1013]
15 By following ordinary business practice, placing a true copy thereof enclosed in a sealed
16 envelope, for collection and mailing with the United States Postal Service where it would be
17 deposited for first class delivery, postage fully prepaid, in the United States Postal Service
18 that same day in the ordinary course of business.

19 CERTIFIED MAIL
20 Certified Mail Return Receipt Requested; Receipt No. [] (attached)

21 BY FACSIMILE [CRC 2.306]
22 at _____ a.m./p.m. to the fax number(s) listed above. The facsimile machine I used
23 complied with California Rules of Court, rule 2.300 and no error was reported by the
24 machine. Pursuant to CRC rule 2.306, a copy of the transmission record is attached to this
25 declaration.

26 BY OVERNIGHT DELIVERY
27 Depositing copies in an envelope or package of the above documents in a box or other
28 facility regularly maintained by Federal Express, with delivery fees paid, as indicated below.

PERSONAL SERVICE
I arranged for personal delivery at the address through a service that customarily delivers
documents in a sealed envelope to the address printed on the envelope.

ELECTRONIC SERVICE [CRC rule 2.251]
I emailed at the address listed below as indicated, provided to me by that counsel and in
which that counsel has agreed upon for this type of service of documents.

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct and that this declaration was executed on December 22, 2014 at
Sacramento, California.



SERENA ALBAECK

SERVICE LIST

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p>	<p>Attorneys For Petitioner/Plaintiff Modesto Irrigation District Tim O'Laughlin, Esq. William C. Paris, Esq. Valerie C. Kincaid, Esq. O'LAUGHLIN & PARIS, LLP 117 Meyers Street, Suite 110 Chico, CA 95928 Telephone: (530) 889-9755 Facsimile: (530) 899-1367 Email: towater@olaughlinparis.com vkinaid@olaughlinparis.com tbrooks@olaughlinparis.com</p>	<p>Attorneys For Petitioners/Plaintiffs San Luis & Delta-Mendota Water Authority; Westlands Water District Daniel J. O'Hanlon, Esq. Rebecca E. Akroyd, Esq. KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD 400 Capitol Mall, 27th Floor Sacramento, CA 95814 Telephone: (916) 321-4500 Facsimile: (916) 321-4555 Email: dohanlon@kmtg.com rakroyd@kmtg.com</p>
<p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p>	<p>Attorneys For Petitioner/Plaintiff San Luis & Delta-Mendota Water Authority Jon D. Rubin, Esq. General Counsel 400 Capitol Mall, 27th Floor Sacramento, CA 95814 Telephone: (916) 321-4519 Facsimile: Not available Email: jon.rubin@sldmwa.org</p>	<p>Attorneys For Petitioner/Plaintiff State Water Contractors, Inc. Stanley C. Powell, Esq. KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD 400 Capitol Mall, 27th Floor Sacramento, CA 95814 Telephone: (916) 321-4500 Facsimile: (916) 321-4555 Email: spowell@kmtg.com</p>
<p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p>	<p>Attorneys For Petitioner/Plaintiff State Water Contractors, Inc. Stefanie Morris, Esq. STATE WATER CONTRACTORS, INC. 1121 L Street, Suite 1050 Sacramento, CA 95814 Telephone: (916) 447-7357 Email: smorris@swc.org</p>	<p>Attorneys for Real Party in Interest Woods Irrigation Company John H. Herrick, Esq. LAW OFFICE OF JOHN HERRICK 4255 Pacific Ave., Suite 2 Stockton, CA 95207 Telephone: (209) 956-0150 Facsimile: (209) 956-0154 Email: jherrlaw@aol.com</p>
<p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>Attorneys for Real Party in Interest Woods Irrigation Company S. DEAN RUIZ, Esq. HARRIS PERISHO & RUIZ 3439 Brookside Road. Suite 210 Stockton. CA 95219 Telephone: (209) 957-4254 Facsimile: (209) 957-5338 Email: deanf@hprlaw.net</p>	

1 **PROOF OF SERVICE**

2 I, the undersigned, declare:

3 I am a citizen of the United States, employed in the City and County of Sacramento,
4 California. My business address is 500 Capitol Mall, Suite 2200, Sacramento, California 95814. I
am over the age of 18 years and not a party to the within action.

5 On January 9, 2015, I caused to be served a copy of the following document(s):

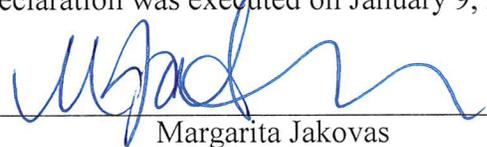
6 **PRE-HEARING CONFERENCE BRIEF OF SAN LUIS & DELTA-MENDOTA**
7 **WATER AUTHORITY, WESTLANDS WATER DISTRICT, MODESTO**
8 **IRRIGATION DISTRICT, AND STATE WATER CONTRACTORS**

9 on the following interested parties in the above-referenced case number to the following:

10 **SEE ATTACHED SERVICE LIST**

- 11 BY MAIL [CCP 1013]
By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business.
- 12 CERTIFIED MAIL
Certified Mail Return Receipt Requested; Receipt No. [] (attached)
- 13 BY FACSIMILE [CRC 2.306]
at _____ a.m./p.m. to the fax number(s) listed below. The facsimile machine I used complied with California Rules of Court, rule 2.300 and no error was reported by the machine. Pursuant to CRC rule 2.306, a copy of the transmission record is attached to this declaration.
- 14 BY OVERNIGHT DELIVERY
Depositing copies in an envelope or package of the above documents in a box or other facility regularly maintained by Federal Express, with delivery fees paid, as indicated below.
- 15 PERSONAL SERVICE
I arranged for personal delivery at the address through a service that customarily delivers documents in a sealed envelope to the address printed on the envelope.
- 16 ELECTRONIC SERVICE [CRC rule 2.251]
I emailed at the address listed below as indicated, provided to me by that counsel and in which that counsel has agreed upon for this type of service of documents.

17
18
19
20
21 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 9, 2015 at Sacramento, California.

22
23
24
25 
26 _____
Margarita Jakovas

SERVICE LIST

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p><i>Attorneys for Woods Irrigation Company; South Delta Water Agency; Central Delta Agency</i> S. DEAN RUIZ, Esq. HARRIS PERISHO & RUIZ 3439 Brookside Road. Suite 210 Stockton, CA 95219 Telephone: (209) 957-4254 Facsimile: (209) 957-5338 Email: deanf@hprlaw.net</p> <p><i>Attorney for Group A – Represented Landowners</i> Jennifer L. Spaletta, Esq. Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 Telephone: Facsimile: Email: jennifer@spalettalaw.com david@spalettalaw.com</p> <p><i>San Joaquin County and the San Joaquin County Flood Control and Water Conservation District</i> DeeAnne M. Gillick Kurtis C. Keller Nuemiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 Telephone: Email: dgillick@neumiller.com kkeller@neumiller.com</p> <p><i>Attorneys for Modesto Irrigation District</i> Tim O’Laughlin, Esq. Valerie C. Kincaid, Esq. O’LAUGHLIN & PARIS, LLP 117 Meyers Street, Suite 110 Chico, CA 95928 Telephone: (530) 889-9755 Facsimile: (530) 899-1367 Email: towater@olaughlinparis.com vkincaid@olaughlinparis.com</p> <p><i>Attorneys for San Luis & Delta-Mendota Water Authority</i> Jon D. Rubin, Esq. General Counsel 400 Capitol Mall, 27th Floor Sacramento, CA 95814 Telephone: (916) 321-4519 Facsimile: Email: jon.rubin@sldmwa.org</p>	<p><i>Attorneys for Woods Irrigation Company; South Delta Water Agency</i> John H. Herrick, Esq. LAW OFFICE OF JOHN HERRICK 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Telephone: (209) 956-0150 Facsimile: (209) 956-0154 Email: jherrlaw@aol.com</p> <p><i>Attorney for Group B – Represented Landowners</i> Kurtis C. Keller Nuemiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 Telephone: Facsimile: Email: kkeller@neumiller.com</p> <p><i>Division of Water Rights Prosecution Team</i> David Rose State Water Resources Control Board 1001 I Street Sacramento, CA 95814 Telephone: Facsimile: Email: David.Rose@waterboards.ca.gov John.O’Hagan@waterboards.ca.gov</p> <p><i>Attorneys for San Luis & Delta-Mendota Water Authority</i> Daniel J. O’Hanlon, Esq. Rebecca E. Akroyd, Esq. KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD 400 Capitol Mall, 27th Floor Sacramento, CA 95814 Telephone: (916) 321-4500 Facsimile: (916) 321-4555 Email: dohanlon@kmtg.com rakroyd@kmtg.com</p> <p><i>Attorneys for State Water Contractors, Inc.</i> Stanley C. Powell, Esq. KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD 400 Capitol Mall, 27th Floor Sacramento, CA 95814 Telephone: (916) 321-4500 Facsimile: (916) 321-4555 Email: spowell@kmtg.com</p>
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<i>Attorneys for State Water Contractors, Inc.</i> Stefanie Morris, Esq. STATE WATER CONTRACTORS, INC. 1121 L Street, Suite 1050 Sacramento, CA 95814 Telephone: (916) 447-7357 Email: smorris@swc.org	