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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of: WATER RIGHT HEARING REGARDING ADOPTION OF DRAFT ORDER ISSUING A CEASE AND DESIST ORDER AGAINST WOODS IRRIGATION COMPANY FOR THREATENED VIOLATION OF THE PROHIBITION AGAINST THE UNAUTHORIZED DIVERSION OR USE OF WATER; DRAFT ORDER WR 2011-XXXX	WOODS IRRIGATION COMPANY COMMENTS TO DRAFT CDO ORDER WR 2011-XXXX

INTRODUCTION

The draft decision/CDO (hereinafter the "draft CDO") evidences that the SWRCB seeks to take the most restrictive and punitive approach when dealing with 100 year plus old water rights in the Delta. That approach is ill advised, contrary to the law, and contrary to its handling of other in-Delta issue.

First, it should be noted that even after the Board recognized its previously stated policy of interpreting evidence of 1914 rights in a light most favorable to the party asserting the right (Cal-Am, WR95-10) it proceed in the draft CDO to interpret every piece of evidence and law against WIC. It is not clear why the Board would take this approach, especially in light of its

recognition that all of the evidence is not currently before it. That missing evidence is illustrated by two portions of the draft CDO, each of which will be dealt with in more detail later. However, the first such missing information includes those pieces of evidence presented during the concurrent hearings for Pak and Young and Mussi. Knowing that this evidence exists, the Board has decided to not allow it to be part of the record in this proceeding, even though a significant part of the argument regarding the existence of other channels conferring water rights (e.g. Duck Slough) is apparently resolved by that information.[1]

Second, the draft CDO recognizes that other information may exist which would allow both WIC and the farmers within its service area to present additional information to the Board (through the assistant director of water rights) for the purpose of supporting diversions in excess of the 77.7 recognized in the draft CDO. If the Board acknowledges that other parties and other information exists which may result in an increase in the "authorized" diversion of 77.7 cfs, then why not allow for that information (and other parties) to be discussed and put forth before taking the extreme action of imposing a CDO.

Cease and Desist Orders should be viewed as extraordinary measures in the same manner that injunctive relief is viewed where irreparable injury is apparent. The draft CDO notes on page 15 that the level of proof needed for a showing of riparian and pre-1914 rights is lower for purposes of avoiding a CDO, yet after a significant showing of such, the draft CDO seeks to shut down all diversions except the ones (77.7) absolutely shown.

This approach is even more troubling in light of the SWRCB's ongoing handling of other in-Delta issues. In 2009, the Board held a hearing on the DWR and USBR's urgency permit request to temporarily amend their permits regarding Delta outflow, or the X2 standard. The evidence at the hearing clearly showed that the projects diverted approximately one-third of the minimum fishery flow in effect, thus violating their permits while likely adversely affecting

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[1] Mussi R-30 and R-40 are maps which show the existence of Duck Slough well beyond the date the MSS parties witness concluded it no longer existed. WIC requests the Board take judicial notice of these documents.

fisheries already in crisis.[2]

In addition, for a period of time the projects were not allowed to export any JPOD water during times when the southern Delta salinity standards were being violated pursuant to the 2006 CDO against DWR and USBR. During 2008 and 2009, the projects did indeed pump JPOD water and the standards were violated most of the summer. However, the SWRCB made no attempt to enforce the CDO, or enforce the standards.[3] Instead, the CDO was amended to the benefit of the export projects. Why then would the SWRCB take a hard line (recall, that none of the evidentiary or legal positions of WIC are adopted in the draft CDO) when dealing with riparian and pre-1914 rights which relate to WIC, and to other parties who have not even been given notice of the proceeding?

The more reasonable approach would be for the Board to direct staff to work with representatives of WIC, and with landowners within WIC's service area to determine what additional evidence exists to support diversions above the 77.7 limit. Such an approach would better protect parties who are faced with having to prove actions, activities and intent from 100 years ago. It should be recalled that this entire process began when the MSS witness Wee authored a report which alleged large areas of the southern Delta had no apparent water rights. That report (http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/strategic_plan/comments/appendixc_wee_report_maps.pdf) indicated that there were apparently no water rights associated with the area in and around WIC. The Board finds out two and hundreds of thousands of dollars later that a water supply company for that area was begun in 1909 and that at least one parcel of 710.85 acres (MSS R-14A, 7A) is clearly riparian. We now know Mr. Wee's initial allegations left much to be desired with regard to completeness and accuracy.

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[2] The projects began diverting approximately 4,000 cfs when the standard became 11,400 cfs for outflow, when the actual outflow was approx. 7,000 cfs. The actual numbers are part of the record of that proceeding.

[3] The SWRCB has yet to consider an SDWA complaint regarding water quality violations for over a year now.

This becomes even more important given the other requirements in the draft CDO regarding measuring and reporting. Instead of having until 2012 to purchase, install and operate measuring devices as other diverters must by that date, the draft CDO forces WIC to do that within 60 days. This is clearly an unrealistic and unfair burden. Similarly under the draft CDO, WIC is to identify the rights under which water is delivered to each of its shareholders, when that information has simply not been developed. It is unfair and unrealistic to expect such a comprehensive review of local water rights be completed within 60 days.

Lastly, the SWRCB should not take such a hard line approach for one last, and controlling reason. In-Delta farmers are protected by the area of origin and Delta Protection statutes (Water Code sections 11460 et seq. and 12200 et seq.) Under these laws, local water users can either get priority (over exports) contracts for the delivery of water from DWR and/or USBR, or can apply for a water right with a priority over DWR and USBR rights to store or export water. At this time, WIC has directed counsel to prepare and file just such an area of origin application. At the same time, WIC's counsel is currently attempting to negotiate a priority contract with DWR. Thus, a CDO would only adversely affect diverters who may already have a valid water right, or are in the process of acquiring a water right.

THERE IS NO BASIS IN THE EVIDENTIARY RECORD FOR CONCLUDING WIC HAS OR MAY DIVERT MORE THAN 77.7 CFS.

The draft Order concludes that based on the staff's measured flow of 90 cfs, WIC is and threatens to exceed the 77.7 cfs limit. This evidence however does not support a CDO. There is no dispute that diversions for a pre-1914 right, as well as those under a permit or license is a 30 day average. Obviously that means a diverter can exceed any permitted or licensed or pre-1914 rate of diversion as long as the average of that diversion does not exceed the limit over any thirty day period.

In this case, the SWRCB prosecution team presented evidence of a diversion rate of 90 cfs for one moment (or short time frame). There is no evidence that this rate of diversion was maintained for any length of time, or that it represented the typical rate of diversion for WIC. The Board thus does not know if this measured rate reflects an exceedence of the 77.7 limit, or

when averaged with diversion rates over 30 days equals or is less than the 77.7 limit. This lack of necessary evidence adds further support to the WIC recommendation that instead of issuing a CDO, the Board should direct its staff to work with WIC to resolve the many outstanding issues.

The Board Does Not Have Statutory or Inherent Authority to Adjudicate Pre-1914 and Riparian Water Rights Through a CDO Proceeding And It Has Provided No Meaningul Basis For Doing So.

The Board Relies on Circular Reasoning and Unsupported Conclusions to Justify Its Effort to Issue a CDO Against Woods.

During opening statements, as part of the presentation of evidence during the hearing, and in closing briefs Woods et al and the County have challenged the Board to provide the asserted authority which would allow it to issue and enforce a CDO in response to evidence which clearly indicate the existence of pre-1914 and riparian rights. The Board has failed to do so. Rather the Board essentially concludes that it simply must be able to adjudicate pre-1914 and riparian rights because it is, in fact, the State Water Resources Control Board. However, it is well understood that the Board's powers are those specifically delegated by the Legislature.

For example, page 11 of the Draft Order contains a fairly accurate description of Woods et al's and the County's lack of authority argument regarding the fact that riparian and pre-1914 rights are not subject to regulation under division 2 of the Water Code which includes part 2, and therefore, Water Code section 1831 does not authorize the Board to issue a CDO against a diverter who demonstrates evidence of a riparian or pre-1914 right. In responding to this argument, the Draft CDO contends that Woods et al's argument is flawed because it "begs the question", namely whether a given diversion claimed to be authorized by such a right is in fact authorized by a valid pre-1914 or riparian right. The Draft CDO is incorrect. The argument does not beg any question other than under what specific statutory authority does the Board find its power to issue a CDO against diverters who put forth substantial evidence of riparian and pre-1914 rights?

It is significant that the Draft CDO does not disclaim the fact that division 2 of the Water Code does not provide authority to regulate riparian and pre-1914 rights. Instead, the Draft CDO

simply and incorrectly concludes that the Board simply has to have authority to determine the validity and extent of riparian and pre-1914 rights through a CDO process and that such authority is somehow inherent.

Moreover, The Draft Order recognizes that Woods holds a valid pre-1914 water right and delivers water to property that holds a valid riparian water right. CDO p. 4. In response to Woods, et al., and the County's argument that the Board lacks the specific authority to issue a CDO against riparian and pre-1914 water right, the Draft Order states: "The State Water Board's authority to evaluate the validity of a riparian or pre-1914 appropriative claim of right is inherent to the State Water Board's statutory authority to investigate and take enforcement action in response to the actual or threatened unauthorized diversion or use of water." Draft Order p. 10, (Underlining added). The ability to issue a CDO, cannot be based on any "inherent" or even inherently desired authority by the Board, but must be based on specific statutory authority.

Woods et. al do not challenge the State Board's limited ability authority to "investigate" riparian and pre-1914 water rights pursuant to the Board's authority specified in Water Code section 1051 and this includes the ability to "ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State." However, this investigative authority does not include the power to issue a CDO. A CDO is issued by the Board pursuant to the authority specifically provided to the Board by the Legislature pursuant to Water Code section 1831. Water Code section 1831 does not grant the Board authority over riparian and pre-1914 water rights in the situation at issue in the pending proceeding.

Water Code section 1831 includes two provisions, subsections (d)(1) and (e), which are crucial in evaluating the proper, authorized, power of the Board to issue a CDO in this proceeding. Careful evaluation of the specific authority granted to the Board in subsection (d)(1) together with the limitation expressed in subsection (e) supports the Woods at the County's argument that the Board lacks authority to issue a CDO against Woods, who the Board has always recognized held a pre-1914 water right (The Prosecution Team's case in chief acknowledged and recognized that Woods held a pre-1914 water right and recognized Woods could be delivering riparian water rights.). The power to issue a CDO by the Board cannot be an

"inherent power" but must be a statutorily authorized power. Such power simply does not exist in this proceeding.

The 2002 Statutory Amendment Did Not Extend

The Board's Authority to Issue a CDO Against Woods

The Board's CDO authority was statutorily enlarged and streamlined in 2002 pursuant to AB 2267. However, this legislative enlargement of the Board's cease and desist authority specifically did not enlarge the Board's authority over riparian and pre-1914 water rights. To understand the Board's limited CDO authority and the extent of the legislative enactment in 2002 it is important to understand both the Board's historical authority over riparian and pre-1914 water rights. The Draft Order does not dispute the Board's past limitation of authority and the Woods et al's presentation of historic Board decisions. Rather the Draft Order indicates that these historical Board decisions, including the dicta in the 1986 court decision *United States of America v. State Water Resources Control Board ("Racanelli")* 182 Cal. App. 3d 82, are not relevant because it was not until 2002 that Water Code section 1831 was amended to provide the Board the authority to "issue a CDO in response to an unauthorized diversion or use of water." CDO p. 14 and p. 16.

These past decisions are still relevant and are valid presentations of the Board's authority over riparian and pre-1914 water rights. This is made clear due to the specific legislative changes to the Board's CDO authority as enumerated in subsection (e) of section 1831 which was added by the Legislature in 2002 by AB 2267. Subsection (e), enacted in 2002, states in full as follows: "This article shall not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board under this part." Stats. 2002, ch. 652, §6. Subsection (e) was added on the Senate Floor on August 12, 2002 and that was the only amendment made to the bill on that date. See Attachment A to County's comments located at http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_bill_20020812_amended_sen.html. The Senate Rules Committee Bill Analyses dated August 19, 2002, clearly states that the 2002 amendments to the CDO procedures do not

expand the powers of the Board stating:

> Senate Floor Amendments of 8/12/02 clarify that by streamlining the administrative process for issuing CDOs the bill does not also expand the powers of the SWRCB.
>
> See Attachment B to Woods et al's and County's comments located at http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_cfa_20020820_153745_sen_floor.html. Clearly, the Board's powers prior to 2002 did not include the ability to determine riparian or pre-1914 water rights and the Board did not then gain such powers in 2002 over such riparian and pre-1914 water rights.

At page 13 of the Draft Order the Board attempts to minimize the language in Racanelli which recognized the Board's limited authority over riparian and pre-1914 rights by referring to same as dicta. The dicta in *Racanelli* continues to accurately describe the Board's authority, and lack of authority, over pre-1914 and riparian water rights. The Board's historic decisions and orders characterizing the Board's limited authority over pre-1914 and riparian water rights are still relevant and reflect the Court's understanding of the Board's limited authority, which was not extended by the 2002 statutory amendments.

The CDO also argues that the Board does have the authority over riparian and pre-1914 water rights because it has taken certain action regarding riparian and pre-1914 water rights in recent Board decisions including Order WR 2001-22, Order WRO 2004-0004, Order WR 2006-0001, and Order WR 2009-0060. However, past decisions by the Board involving different parties in which the Board may have exceeded its CDO authority does not legitimize the process and does not preclude Woods et al from challenging such authority nor does it somehow vest authority in the Board where none exists.

The Draft CDO does not address or refute Woods et al and the County's thorough review of Part 2 of Division 2 of the Water Code for purposes of interpreting subsection (e) of Water

Code section 1831 nor the careful review of the entire Division 2 for purposes of interpreting subsection (a) of Water Code section 1052 which is referenced in subsection (a) of Section 1831 authorizing the Board to issue cease and desist orders. A careful review of the specific authority vested in the Board clearly indicates that the Board has no authority to issue a cease and desist order regarding pre-1914 and riparian water rights and no authority to determine the existence or validity of claimed riparian or pre-1914 water rights in a cease and desist proceeding.

Recall that subsection (e) specifically limits the Board's ability to "**regulate in any manner" water not otherwise subject to regulation by the Board. Riparian and pre-1914 water rights, absent waste or unreasonable use and outside the public trust doctrine, are not subject to regulation by the Board. Thus, even after 2002 and the legislative changes to the Board's cease and desist authority, the provisions of section 1831 do not authorize the Board to regulate riparian and pre-1914 water rights.**

Prior to 2002 the Board's authority to issue a CDO was limited to a "person holding a permit or license to appropriate water pursuant to this division." Stats. 1980, ch. 933, § 13. In 2002, AB 2267 amended this provision of section 1831 to allow a CDO against the "unauthorized diversion of use of water subject to this division." Water subject to the referenced division 2 of the Water Code does not include riparian and pre-1914 water rights. *People v. Shirokow* (1980) 26 Cal.3d 301, 309. **Thus, the legislative changes in 2002 enlarged the power of the Board to issue a cease and desist order beyond only those persons "holding" valid water rights permits and licenses to include those persons who do not have a valid water right; however, this did not expand the Board's authority over riparian and pre-1914 water rights.**

The CDO asserts that the Woods et al and the County's interpretation of the Board's authority to issue a CDO pursuant to section 1831 begs the question whether a claimed authorized riparian or pre-1914 appropriative right is in fact authorized by a valid riparian or pre-1914 appropriative right. CDO p. 11. It is circular that the Board needs the authority to determine if a use is authorized; however, such authority is limited when riparian and pre-1914 water rights are at issue given the specific language and limitation of 1831(e) and the Board's

lack of regulation of riparian and pre-19014 water rights. If after 2002 the Board can now determine the existence, validity and nature of a pre-1914 or riparian water right in a cease and desist proceeding, then the authority of the Board to regulate riparian and pre-1914 water rights has been expanded. The Board couldn't do such prior to 2002. This outcome would be a direct conflict with the limitations enumerated in subsection (e) of Water Code section 1831 which prohibits the Board from regulating in any particular manner the use of water "not otherwise subject to regulation" by the Board. A CDO proceeding determining the scope of Woods' pre-1914 water rights and determining the extent of riparian water rights allows the Board to control and "regulate" those pre-1914 and riparian water rights. This the Board cannot do.

It is recognized that a mere assertion of a riparian or pre-1914 water right should not be adequate to preclude the Board from an investigation of the validity of such claim. The Board clearly has the authority to investigate such pursuant to Water Code section 1051. This authority includes the authority to investigate riparian and pre-1914 water rights. However, the Board's authority to issue a CDO is far more limited. A mere assertion of a riparian or pre-1914 water right certainly should not stop the Board's investigation; however a CDO is not an authorized proceeding in this situation. A more appropriate delineation would be where there is substantial evidence which could arguably support a claim of pre-1914 or riparian water rights the Board should withhold the extraordinary measure of a CDOuntil such time as a court has ruled on the existence of such riparian and pre-1914 water rights. Courts, not the State Board, have the authority and jurisdiction to determine riparian and pre-1914 water rights. Once the courts have adjudicated such rights the Board's cease and desist authority could then be applied.

In this proceeding, the Prosecution Team recognized Woods enjoyed a pre-1914 water right and the Draft Order also recognizes a pre-1914 water right and some riparian water rights enjoyed by lands served by Woods. The Board's CDO authority does not include the power to define or regulate such valid rights. The Board should properly defer any further determination regarding the existence, validity, extent and nature of these claimed, and recognized water rights, which are property rights, not administrative permits or licenses, to a court of law with proper jurisdiction to determine the nature and extent of these property rights.

In addition the role of the Board in determining the availability of water for appropriation is not justification for adjudicating pre-1914 and riparian rights. As the dicta in *Racanelli* indicates such determination by the Board does extend to some extent over riparian and pre-1914 water rights and is proper in the Board's exercise of its statutory authority to determine the availability of water to administer its water right permit system. Such water availability determination by the Board is a general rough determination as to whether or not there might be unappropriated water to grant an applicant a permit to seek a supply of water. The permit does not grant the right to divert such water but merely provides the applicant the opportunity to divert such water if the actual available water so allows. Such a permit or license is subject to the senior water rights which when adjudicated could result in no water being available to said applicant. The appropriative right authority of the Board is to establish a priority date, control the reasonableness of requested rates of diversion and quantities and monitor diligence in putting such water to use. The Board's determination of water availability does not support the Board's authority to issue the Draft Order against Woods.

Monitoring and reporting use of a pre-1914 water right is in excess of Board's authority.

Even if the Board had the authority to issue a cease and desist order against Woods, the Draft Order still goes too far. The Draft Order recognizes a valid pre-1914 water right for diversions up to 77.7 cfs and that some of the water is diverted under the riparian rights of landholders. CDO p. 4. Despite the recognition of valid pre-1914 and riparian water rights, the CDO regulates such recognized and valid water rights. Such regulation of recognized pre-1914 and riparian water rights is clearly beyond the Board's authority. There is no authority to regulate these rights and any attempt to do so is beyond the Board's cease and desist authority.

The Draft Order indicates that such measures regulating Wood's recognized pre-1914 and riparian rights is necessary to "ensure Woods complies with the CDO." (CDO p. 18) Such regulation of pre-1914 and riparian water rights is simply not authorized regardless of the justification. Requiring monitoring and reporting of the use by Woods of its recognized valid pre-1914 and riparian water right is outside the scope of the Board's CDO authority. As discussed above, Water Code section 1831 (e) specifically states that the Board cannot "regulate

in any manner" the diversion and use of water based on riparian or pre-1914 water right. Monitoring and reporting of riparian and pre-1914 water rights actual uses must be provided to the State Board on and after January 1, 2012 (See Wat. Code §5103(e)(1)); however, such reporting to the Board is not mandated until January 2012 and is required to be reported in three year intervals. The Board has no authority to require a recognized riparian or pre-1914 water right holder to monitor or report such usage beyond the statutory requirements of Water Code section 5100 *et seq.*

The fact that the Draft Order does not place limitations on the pre-1914 and riparian rights recognized in same demonstrates the logic of and supports the proper interpretation of the Board's limited CDO authority over pre-1914 and riparian water rights advanced by Woods and the County. By engaging in this proceeding regarding a water right holder alleging and presenting evidence supporting a pre-1914 and riparian water right, the Board is faced with trying to craft a CDO enforcement order against this riparian and pre-1914 water right holder to enforce the Board's delineation of the validity, nature and extent of such rights. But the Board can't regulate those valid, recognized rights, so it is impossible for the Board to regulate the use of water by these valid riparian and pre-1914 water right holders in a manner that determines any unauthorized diversions. The unauthorized diversions are unknown and unregulated by the Board, because the Board can't regulate and control the authorized diversions and use which are supported by riparian and pre-1914 water rights. When water use involves riparian and pre-1914 water rights, such disputes, enforcement and determination can't be made by the Board and necessarily must be made by the courts.

The Weinberger Case Does Not Support The Board's Assertion of Authority

The Board's reliance on Weinberger v. Hynson , Westcott and Bunning, Inc. (1997) 412 U.S. 609 (see page 12 of the draft order) is misplaced and further illustrates the difficulty the Board is faced with in attempting to justify its effort to adjudicate the pre-1914 and riparian water rights WIC and its member landowners enjoy. In Weinberger the Supreme Court considered whether the Food and Drug Administration (FDA) had jurisdiction to determine whether a certain drug was considered a "new drug" within the meaning of the Federal, Food,

Drug, and Cosmetic Act and, therefore, whether the manufacturer was exempt from the Act's requirement to submit substantial evidence of the drugs effectiveness. The manufacturer claimed the FDA lacked jurisdiction to determine if a certain drug was a "new drug" and, therefore, exempt from the FDA's jurisdiction. The Court determined that the FDA had the authority to determine what constituted a new drug and in doing so found that the FDA could not administer the Act intelligently and rationally unless it had authority to determine which drugs are new drugs and which ones are exempt. The Court further determined that FDA is the agency selected by Congress to Administer the Act.

The Board strangely argues that, "Likewise it cannot administer the water right permit system effectively, or carry out its statutory mandate to prevent the unlawful diversion of water unless it has authority to decide the validity of a diverter's claim to be exempt from the permitting system." (Draft Order p. 12). The Board cannot be more incorrect. Woods et al and the County are asserting, and have proven for that matter, pre-1914 and riparian rights which are obviously not subject to the permitting system over which the Board does have jurisdiction. Woods et al is not arguing that some other agency other than the Board has jurisdiction or pre-1914 and riparian rights, or even that the Board has no purpose in considering such rights. Rather, Wood et al contend that the Board's authority over pre-1914 and riparian water rights is limited to that which is specifically set forth by statute and that the Board has provided no statutory authority for the issuance of a CDO. Clearly, the Board is not so creatively attempting to provide and after the fact justification of an unauthorized process.

The Holding in Phelps Does Not Support The Board's Claim It has Authority to Issue a CDO

On page 13 of the draft order the Board incorrectly asserts that the Court of Appeal's holding in Phelps v. State Water Resources Control Board (2007) 157 Cal.App. 4th 89 somehow lends support to the fallacy that the Board has authority to rule on, and thus adjudicate, the validity of pre-1914 and riparian claims. Of course, Phelps involved an order imposing administrative civil liability for the purported violation of water right permit not a pre-1914 or

riparian claim. The draft order concedes this while also acknowledging that the Board's authority to decide the validity of the diverter's claims was not challenged. Yet, the draft order amazingly provides that the "conclusion that the Board did not exceed its authority by addressing individual's claims is implicit in the Court's holding."(Draft Order p. 13).

There is no logical or sincere means by one can conclude the holding in Phelps somehow provides an implicit endorsement of the Board's asserted authority over pre-1914 and riparian rights when the Phelps cases involved water rights permits and did **not** address the issue of the Board's authority. Is the Board suggesting that the Court should have raised the authority issue on its own motion? The Board's reliance on Phelps is nonsensical and disingenuous.

The Board Should Resist Political Influences And Not Act As Advocate For Specific Interest Groups By Attempting To Expand Its Authority.

The Draft Order extends into the adjudication of the pre-1914 and riparian water rights. This determination extends well beyond settled law to the point of advocacy of new legal interpretations. These interpretations and this dispute disparage or destroy the pre-1914 and riparian rights in the Delta. The State Board should not be extending its authority into the adjudication of pre-1914 and riparian water rights. In addition, the Board should not cast itself in such an anti-Delta advocacy role. If there are disputes between water right holders beyond Board authorized permit terms and conditions, such disputes among property owners, must be determined by a court of law. The Board should not thrust itself into such disputes, and it is improper for the Board to do so.

SECTION 4.3.2.1 OF THE DRAFT ORDER INCORRECTLY ANALYZES THE EVIDENCE FOR A PRE-1914 WATER RIGHT IN EXCESS OF 77.7.

The draft Order in section 4.3.2.1 on pages 33-34 dismisses the internal, and apparently inconsistent portions of one of the two 1911 Agreements to Furnish Water in order to minimize the pre-1914 water right. First the draft Order concludes that since the diversion rates were "expressed to the hundredth of a cubic foot" there is no indication that there was an error in totaling the diversions. WIC previously argued that the total water needed/promised in one

agreement was apparently and incorrectly calculated without regard to the total acres described in that agreement. The draft Order's argument proves the opposite of what the draft Order concludes. If one agreement (Agreement to Furnish Water to Wilhoit Douglas lands, see WIC 6P) specifies it will provide 32.86 cfs for 3,286.37 acres of land (obviously based on 1 cfs per 100 acres), one cannot reasonably conclude that the parties intended in the other agreement (Agreement to Furnish Water to E.W.S. Woods, see WIC 6O) to provide 44.80 cfs for 4,892.06 acres (yielding 1 cfs per 109.19 acres). Recall, only one of the parcels in that other agreement had 4,480 acres while the total acres were 4,892.06. Can the Board actually conclude that the parties to the agreements were able to calculate the needs of 3,286.37 acres ***to be exactly 32.86 cfs***, but when calculating the diversion rate for 4,892.06 acres, it coincidently worked out to 1/100th of the exact acreage of only one of three parcels? Such an interpretation is illogical and incorrect on its face.

Secondly, the draft Order attempts to argue that since the agreements to furnish water reference lands that may not be capable of irrigation, that reinforces the conclusion that the misleading diversion rate could be explained by the parties estimation that they would not need the same 1 cfs per 100 acres as in the other agreement. This justification too must fail. Both agreements refer to lands that are not then currently capable of irrigation (though both anticipate efforts to make them so). (See WIC 6O page 7 and WIC 6P page 5). Therefore one cannot conclude that one agreement lowered the total amount of diversions needed and one did not.

Again, it is not reasonable to conclude that the lower diversion rate in the E.W.S. Woods agreement was intended. In the Wilhoit Douglas agreement, the diversion rate is exactly one hundredth of the total acreage; ***down to the hundredth of a cubic foot per second.*** In the E.W.S. Woods agreement, the diversion rate is exactly one hundredth of the total acreage of ***one*** of three parcels, down to the hundredth of a cubic foot per second. It is no coincidence that this parcel is the last of the three listed parcels, and thus one who looked at the very end of the legal descriptions for all the lands could easily mistake the total for this parcel to be the total for all three parcels. No other interpretation is reasonable, much less logical; the scrivener mistakenly calculated the diversion rate based on one of the three parcels instead of all three. The E.W.S.

Woods agreement (just like the Wilhoit Douglass agreement) clearly attempts to provide water to all the lands described, not just one of three parcels. The fact that the documents were "enrolled" (recorded) as the draft Order emphasizes, has no bearing on whether the numbers were incorrect or on what the parties intentions were.

Here is another example of the draft Order failing to interpret the evidence in a light most favorable to WIC, as required by the Board's own policy set forth in Cal-Am, WR95-10. Instead of interpreting this evidence in a light most favorable to WIC, the draft Order interprets the issues in the most narrow, unfavorable manner. Hence, at the very least, the Board should recognize a minimum pre-1914 diversion rate for WIC of 81.78, not 77.7.

SECTIONS 4.4.6 AND 4.4.7 DO NOT ACCURATELY REVIEW THE EVIDENCE REGARDING THE PRESERVATION OF RIPARIAN WATER RIGHTS.

The draft Order interprets every single piece of evidence regarding sloughs and other interior island channels in a manner such that it concludes there were no channels/bodies of water at all, in any location, and thus no riparian rights could have existed. An interpretation of the evidence which results in just one channel or slough, or body of water existed and conferred riparian status on some land would lead the SWRCB to find WIC has been diverting at a rate covered by riparian and pre-1914 rights. Just one channel. This is because the measured rate by the SWRCB staff of 90 cfs is only 12.5 more than the 77.7 cfs "right." 12.3 cfs would supply approximately 1200 acres at a rate of 1 cfs per 100 acres. Hence if the Board can identify 1200 acres of lands riparian which are even arguably riparian, there is no basis for a CDO. The evidence provided by WIC shows much more than this.

First, the testimony was clear that even if the various sloughs and channels were not directly connected to the main channels via surface flow, they were of sufficient depth to collect water naturally, and thus be source of water which confer riparian status to lands abutting them (See for example RT 1173:10-23; RT 1202:5-8; 1204:14-1205:6). WIC 8, pages 3-7

Many examples of these other sloughs and channels are contained in the record and were cited in WIC's closing brief. (See for example WIC 6P page 6; WIC 6O, page 9; WIC 6K; MSS R-14A WIC Exhibit 2; WIC 3P). The MSS parties also provided evidence of these sloughs.

MSS R-14A exhibit 9A-F is a map which according to the MSS witness, shows Duck Slough extending from Burns Cutoff about two miles inland. This slough, in varying shapes and configurations is confirmed by exhibits 17, 18, 19 which show it branching off in a southerly direction into the middle of the WIC service area on Roberts Island. Exhibits 43, and 44 show Duck Slough traveling in a more southwesterly direction along the borders of the WIC service area . Exhibit 45, is a 1911 USGS Quadrangle map for the subject area which shows water in at least some of the portions of Duck Slough identified in the previous MSS exhibits. At this point then, the evidence shows that at least the remnants of Duck Slough existed well into the early 1900's, and water was in the feature. MSS's parties expert testifies that the connection of Duck Slough to Burns Cutoff had been severed and a flood gate installed only for the purposes of allowing drainage in the old slough to drain into Burns Cutoff. (RT 968:20-969:14). Although the MSS' parties witness testified that the old slough must have been filled in by 1913, that conclusion is not based on any documentary evidence produced (Wee testified a "portion" had been filled), and is contradicted by the fact that the flood gates were installed; that is to say, if the channel of Duck Slough had been filled in, the flood gates would not be draining anything. Even MSS Parties evidence noted that the old sloughs on Roberts Island would be used to drain the interior. (See Exhibit MSS-R-14A-21.)

The WIC witness testified that such flood gates could and were operated to both drain and to irrigate, by using the tidal actions in the Delta channels to control when water flowed into the old slough. (WIC 8 & 4). Other evidence indicated that since the lands in this area are already below sea level, the slough channel then must be below the level (again, see RT 1173:16-22) of the land (in order to be used as drainage). Such low features naturally collect water from the surrounding land (which will inundate due to them being below sea level. (See for example RT Vol 1, page 42-50).

Hence, even ignoring the remainder of the WIC evidence, one can only conclude that as of at least 1911 (the date of the USGS Quadrangle Map), portions of Duck Slough at the very least remained a long channel or channels which naturally filled with water due to their relationship to the surrounding lands which are below sea level, and which were drained out to

Burns Cutoff via flood gates (RT 1196:7-11). A channel which naturally fills with water confers a riparian right to the lands surrounding it. (RT 1202::5-8; RT 1204:14-1205:6; MSS R-14A exhibit 7A shows a parcel containing 2,461.14 acres (identified therein as A 75:484) which abutted at least a portion of this Duck Slough feature which extends in the southwesterly direction. If this channel naturally filled with water (it was being used to drain the land) it would confer riparian status on this substantial acreage. This clearly was the case at least up through the time of the 1911 USGS map; which is the time WIC came into being, and the time when the Woods lands were benefitted by the agreements to furnish water. It should be noted that even Mr. Wee had to admit that at least two miles of Duck Slough had been dredged before the installation of any flood gate at it junction with Burns Cutoff (RT 1186:4-20)

It is important to remember again the SWRCB policy set forth in Cal-Am of interpreting evidence. The above analysis actually requires no preferential interpretation; the evidence suggests at least the remnants of Duck Slough existed as of 1911; the remnant would naturally collect water due to its elevation in relation to sea level and the surrounding land; and riparian rights attach to lands abutting such a feature/condition. When this evidence is viewed in a manner most favorable to WIC, there can be only one conclusion. That conclusion is that a significant portion of the Woods lands maintained riparian status sufficient to account for diversions in excess of 77.7 cfs, and at least up to 90 cfs.

The above analysis relates only to those portions of Duck Slough which wind their way in a southwesterly direction, or what has been generally identified as the main portion of Duck Slough. However, MSS R-14A exhibits 17, 18 and 19 identify other portions of Duck Slough that wind their way in a more southerly, or even southeasterly direction. As set forth in WIC's closing brief, the WIC evidence equates these channel to those eventually used by WIC as supply or drainage channels thus confirming that regardless of their surface connection to the main channels of the area, these features remained in existence until (and well past the time) the WIC system began operation (see for example WIC 6J). If these additional channels too collected water naturally (as they must due to elevation) then they too conferred riparian status to additional lands as of the 1911 agreements. Per MSS R-14A exhibit 7A (when compared with

exhibits 17, 18 and 19) those lands would be A 68:280 of 600 acres; A 72:64 of 240 acres; A 78:131 of 520 acres; and A 77-63 of 794.10 acres. This is sufficient acreage to cover the alleged unauthorized diversion of 12.3 cfs.

Similarly, WIC put on extensive evidence regarding the existence of numerous interior island sloughs or channels which originally connected to Middle River, as opposed (or in additional to) connecting to the San Joaquin River or Burns Cutoff. This evidence is located in WIC exhibits 2, 4, 6, 8. These pieces of evidence, like those above indicate that at the very least, the remnants of old sloughs continued to remain as features of the land, below the surface of the surrounding lands, and in fact coincided with the MSS parties identification of the sloughs branching off the southerly portion of Duck Slough. As such, at any point where the old slough bottom was below the surface of the and the ground water was at or above the bottom of the slough bed, then these old sloughs would also collect water naturally and confer riparian status on lands surrounding them, as set forth above. MSS R-14-A-5A and 46A is shows the elevations of the land in relation to sea level as of 1911 (See also RT 1173:10-23).

Hence, one can easily identify many areas where the old slough beds were below sea level, and thus where water collected naturally. Comparing these exhibits to that of MSS R-14A 7A again shows that the evidence now clearly suggests that virtually all (if in fact not all) of the WIC lands abutted old sloughs which naturally filled with water and thus those lands were riparian. Recall, although there was speculation by the MSS parties that those old sloughs were filled in, then later excavated out for use as irrigation ditches. No evidence presented by any party suggested this was the case. To the contrary, the only evidence on the subject was that these sloughs were used for drainage from the very beginning; eventually be converted to the "improved" ditches of today.

As before, we must again reference the SWRCB policy in the Cal-Am Order. If the evidence is interpreted in a light most favorable to WIC, then one would have to conclude that at least some of the WIC lands (which in 1911 were at or below sea level) were transected by old slough channels which naturally collected with water and which conferred riparian status on those lands. Even a small amount of acreage so benefitted by such old sloughs would negated

the draft CDO's limitations on diversions. This of course is the reason why the draft CDO attempts to draw a distinction between the channels and the local ground water, why it tries to ignore and argue away the interconnectedness of the local waters and why it disputes the Delta Pool concept.

In fact, the evidence even without an interpretation favorable to WIC shows that all the WIC lands had access to water at the time the 1911 Agreements to Furnish Water were executed. Those agreements merely confirmed the method of getting water to lands; the lands already had access to water by various means. It is important to note that the reasonable conclusion regarding the actions of WIC in and around 1911 is that they considered all the lands benefitted by riparian rights.[4]

The WIC closing brief examined in detail the support for the conclusion that these interior island sloughs were always and originally equipped with flood or sluice gates to control both drainage and provide irrigation. We will only briefly reference that evidence again here. As provided in Mr. Nomellini's testimony and evidenced in his exhibit (WIC 8D), the Settlement Geography of the Delta noted that when sloughs traversed the levees, or lands which were being build up as levees, they were dammed off and the dams "were always furnished with sluiceways and gates ... the facilities also served as controls of irrigation water." The MSS parties' expert disputed this, but only by stating he had no knowledge of what was done on any such old slough unless it was specified in the documents he had examined. After stating unequivocally that the flood gates on Duck Slough were only for drainage and not for irrigation (RT 1196:7-10, 1196:22-1197:3) Mr. Wee had to admit that those gates could have been used for irrigation and he did not know if they had or had not. (RT 1197:-12-22). Mr. Wee also had to admit that he was not actually aware when the slough which became the main WIC diversion point was dammed, or if such damming included a flood gate (RT 1171:2-1173:4).

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[4] This is because we see no separate record of their counsel attempting to comply with any the requirements of water rights (as interpreted by case law) at that time. Instead of trying to create new water rights, it appears they were simply trying to finalize the method by which all the lands would receive water before those lands were broken up and sold to other parties; exactly what a lawyer would do with riparian lands prior to "separating" those lands from a channel.

This leaves the Board with evidence wherein authoritative sources state these flood gates were always installed and used for drainage and irrigation and confirmation of this by WIC's experts Nomellini and Neudeck. The only "contrary" evidence is by Mr. Wee who does not actually know if the Duck Slough flood gate was operated for irrigation, but admits that it could have been, and does not know if the slough at the main diversion point for WIC had a flood gate. Interpreting this evidence in a light most favorable to WIC results in the conclusion that Duck Slough, as well as the other old sloughs did indeed have sluice gates or flood gates installed at the time the levees were made, and these were used for both irrigation and drainage.

In support of this, WIC requests the Board take judicial notice of a San Joaquin County Superior Court case it recently found, a copy of which is attached hereto. That case is Meyer et. al. v. Gaul et. al., San Joaquin County Case No. 11,140, judgment entered September 12, 1914. Meyer et. al. were the trustees of RD 544 which encompasses upper Roberts Island, and Gaul et. al. are land owners on the southern end of that district whose lands abutted Old River. The case involved the ability of a land owner to rebuild a flood gate structure through the levee which had been blocked during flood control activities. The case confirms that just as testified by Mr. Nomellini, old sloughs were dammed and used to irrigate the lands on Roberts Island (see for example Statement of Facts, page 3). It also confirms that even after levees were constructed, periodic high flows reconnected the old sloughs with the surface water notwithstanding the flood gates. When viewed with the other WIC evidence by Mr. Nomellini regarding the old flood gate at the current WIC diversion point, it confirms the validity of the WIC assertions.

SECTION 4.2.3.2 WHEN STEWART ET AL. SEPARATED THEIR LANDS FROM THE BANKS OF VARIOUS WATERWAYS THEY RETAINED RIPARIAN RIGHTS TO THOSE WATERWAYS.

When a Grantor Separates itself from the Banks of a Waterway the Grantor Does Not Lose Riparian Rights to that Waterway Unless the Conveyance Contains An Expression to the Contrary.

In *Murphy Slough* Assn. v. Avila (1 972) 27 Cal.App.3d 649, the court discussed the situation where the grantor loses its surface connection to the banks of a waterway as a result of

a

deed of conveyance and held as follows:

> Even if the trial court had concluded that the deed conveyed a fee interest to the grantee, it seems clear to us such a conveyance would have no effect on the riparian rights of the grantors' remaining lands not included in the conveyance, absent some expression to the contrary. [Citations.]

(Id., p. 658, emphasis added.) As support for this determination, *Murphy Slough*, at page 656, relied on "[t]he rationale for the holding in [*Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327] [as] explained in *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 538-539, as follows:

> "'In a grant, the grantor has title to the land subject to the grant. The proposed grantee has nothing, and therefore . . . secures only such title as is granted. When the grant is silent as to riparian rights obviously such rights have not been conveyed *and remain with the grantor for the benefit of his retained lands* and for the benefit of other riparians. If the grant deed conveys the riparian rights to the noncontiguous parcel, that parcel retains its riparian status." (Emphasis added [by *Murphy Slough*])

Thus, pursuant to *Murphy Slough* and *Rancho Santa Margarita* (and, hence, *Anaheim*), there is a fundamental difference when a grantor separates itself from the banks of a watercourse versus when a grantor conveys a parcel to the grantee that is separated from the banks of a watercourse. In the former situation the party trying to demonstrate that the grantor intended to forever eliminate its riparian rights to that watercourse must point to "some expression" of such an intention in the conveyance to so eliminate such rights, or else there is no such elimination. As *Murphy Slough* further explains:

> Absent some expression of intent to convey or sever rights in lands not included in the conveyance, the grant must be deemed inapposite to a consideration of the riparian status of the excluded land.

(*Murphy Slough*, at p. 657.) In other words, absent such an expression, the "grant" simply does not affect the riparian status of the grantor's separated lands. It is important to note that *Murphy Slough* does not state that the "deed language" is "inapposite to a consideration of the riparian status of the excluded land." Quite to the contrary, the "deed language" is very much apposite or relevant to such a consideration. When that language lacks the requisite expression to convey or sever rights in the grantor's retained lands, *then* the "grant" becomes inapposite or irrelevant and

the grant, as a result, cannot be used as a basis to contend that the grantor gave up all of its riparian rights to its retained land.

Despite these clear expressions of the law, the Draft CDO contends that *Murphy Slough's* discussion of this matter is *dicta* and that, because *Rancho Santa Margarita's* analysis of the fundamental principles regarding severance of water rights via a conveyance was in the context of discussing the differences between conveyances and partitions, that such principles can somehow be ignored in the instant proceedings. The Draft CDO errs on both counts.

With respect to *Rancho Santa Margarita*, suffice it to say that the case is a California Supreme Court case which speaks directly to the topic of severance of water rights via a deed and the SWRCB, as an inferior tribunal, is entirely bound by its determinations in that regard. Moreover, there is nothing remotely ambiguous about the above-quoted portion of *Rancho Santa Margarita*, i.e., "When the grant is silent as to riparian rights obviously such rights have not been conveyed and remain with the grantor for the benefit of his retained lands and for the benefit of other riparians." (*Rancho Santa Margarita, supra*, 11 Cal.2d 501, at pp. 538-539.)

The Statements in *Murphy Slough* That are Applicable Herein are Not Dicta.

With regard to *Murphy Slough*, the Draft CDO contends that the court's above-quoted statements and principles can be ignored because they are dicta, yet the Draft CDO fails to cite any authority to support that contention. The Draft CDO is mistaken.

As the court explains in *Childers v. Childers* (1946) 74 Cal.App.2d 56, at pages 61-62, "Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum. [Citation.]" The above-quoted statements from *Murphy Slough* were very much necessary to its determination. The principle contention that *Murphy Slough* was addressing was the following:

> Appellant contends that the deed is clear and unambiguous on its face and conveyed a fee title, with the result that respondents' [i.e.,. the grantor's] land south of the levee, no longer abutting Murphy Slough, lost its riparian status.

(*Murphy Slough*, supra, 27 Cal.App.3d 649, 653.) In connection with the court's resolution of that issue the court addressed the various above-quoted principles regarding interpretation of deeds and severance of riparian rights. Those principles are squarely relevant and necessary to

the court's determination of the principle contention. The court needed to discuss those principles, including the California Supreme Court's prior establishment of those principles, in order to meaningfully resolve that contention.

The Draft CDO preparers may have overlooked the fact that *Murphy Slough* ultimately provided two independent grounds to support its resolution of the principle contention. As the court explains, "As shown above, the extrinsic evidence *and* the deed itself support the judgment of the trial court." (*Murphy Slough*, p. 658, emphasis added.) The Draft CDO seemingly contends that because the court ruled that the extrinsic evidence shows that the grantor did not intend to eliminate its riparian rights, then the court's ruling that the lack of any expression of such intent in deed itself was also independently dispositive of the issue was not necessary and, hence, was dictum. The Draft CDO is mistaken.

As the Court explains in *Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, at page 431, footnote 3:

> "[I]t is well settled that where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and is of equal validity. [Citations.]" [Citations.]

In *Murphy Slough* the court did indeed provide two independent reasons for its decision. The first was that the extrinsic evidence supported the trial court's determination that the grantor merely conveyed a right of way and, as a result, such a conveyance could not convey riparian rights to the grantee nor eliminate riparian rights of the grantor. (*Murphy Slough*, p. 658.) The second reason was the following:

> Even if the trial court had concluded that the deed conveyed a fee interest to the grantee, it seems clear to us such a conveyance would have no effect on the riparian rights of the grantors' remaining lands not included in the conveyance, absent some expression to the contrary. [Citations.]

(*Murphy Slough, supra*, 27 Cal.App.3d 649, 658, emphasis added.) The court's concluding sentence confirms that there were indeed two independent basis for the court's decision: "As shown above, extrinsic evidence *and* the deed itself support the judgment of the trial court." (*Ibid.*, emphasis added.) Accordingly, "neither [basis] is to be considered mere dictum . . . ."

(*Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council*, *supra*, 4 Cal.4th 422, 431, fn. 3.)

Because the SWRCB is bound by the above-quoted determinations in *Murphy Slough*, *Rancho Santa Margarita*, and *Anaheim*, and because none of Stewart et al.'s deeds for Parcels 3 through 10 depicted on the map at MSS-R-14, Exhibit 7A, contained any expression whatsoever that Stewart et al. intended to eliminate any of the riparian rights of its retained lands to Middle River and/or Burns Cutoff, those "conveyance[s] would have no effect on the riparian rights of [Stewart et al.'s] remaining lands not included in the conveyance . . . ." (*Murphy Slough*, *supra*, 27 Cal.App.3d 649, 658; see also WIC's Closing Brief, pp. 61-72.)[5]

The CDO's Reliance on *Pleasant Valley* to Support its Contention that *Murphy Slough* is Dicta is Misplaced.

The Draft CDO contends that the fact that the Fifth District Court of Appeal in *Pleasant Valley Canal Company v. Borror* (1998) 61 Cal.App.4th 742 (i.e., the same district as *Murphy Slough*), disposed of a case on the sole grounds that the intent of the parties supported a finding that all that was transferred was a right of way which could not sever the grantor's riparian rights means that *Murphy Slough's* second, independent basis to conclude the grantor in *Murphy Slough* did not sever its riparian rights somehow disappears. And along with it, *Murphy Slough's* analysis and quotes from *Rancho Santa Margarita* and *Anaheim* likewise somehow disappear. That is entirely unfair and unreasonable. In *Pleasant Valley* it could easily be establish that all that was granted was a mere right of way and, as the court explains, "Pleasant Valley makes no real argument to the contrary." (*Id.* p. 781.) There was simply no reason for the Fifth District to go any further and address alternative bases to conclude the grantor did not

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[5] It should be noted that *Murphy Slough* also makes it clear that the grantor's mere transfer of "all . . . tenements, hereditaments and appurtenances," which the deed in that case transferred (see p. 652), does not constitute an expression that the grantor intended to sever the riparian rights of its retained lands. To constitute such an expression, the grantor cannot merely transfer property previously belonging to the conveyed property to the grantee of that property. Rather, the grantor must express an intention to go well beyond that and actually eliminate the riparian rights of its retained lands. Something the grantor in *Murphy Slough* and the instant grantors, Stewart et al., clearly did not do.

sever its riparian rights since it was easy to dispose of the issue on the right of way grounds.

In the instant case, there is no contention that Stewart et al. transferred mere right of ways like there was in both *Murphy Slough* and *Pleasant Valley*. Accordingly, this is a case where the alternative basis in *Murphy Slough* is essential and cannot be ignored.

The Draft CDO's Purported Unwillingness to "Extend" *Murphy Slough* Is Misplaced; No Such Extension is Required.

As discussed above, the above-quoted principles set forth in *Murphy Slough*, *Rancho Santa Margarita*, and *Anaheim* require an inquiry into whether Stewart et al.'s conveyances express an intent that Stewart et al. intended to sever the riparian rights of their retained lands. As also discussed above, the Draft CDO mistakenly contends that the SWRCB can simply ignore all of those principles on grounds that they are either dicta or otherwise not relevant.

The Draft CDO states that "the State Water Board declines to extend the dicta in *Murphy Slough* to create a presumption that a grantor retains a riparian right when the grantor divides a riparian property, and keeps only the land that is not contiguous to a waterbody." (Draft CDO, p. 25.) The so-called dicta in *Murphy Slough* does not create any such presumption. Instead, *Murphy Slough* provides that there is no severance of a grantor's riparian rights if the conveyance does not contain some expression that such a severance was intended, period. It is not a mere presumption. While in some cases there could be a good faith dispute over whether there is such an expression in the conveyance, if the result of that dispute is that there is *not* such an expression, then the matter is over, and there is no severance of riparian rights.

Accordingly, the Draft CDO misses the mark when it talks about "extend[ing]" the holding in *Murphy Slough*. Creating a presumption would be detracting from that holding and something the SWRCB as an inferior tribunal simply cannot lawfully do.

If the SWRCB or any other party desires to make a good faith argument that the language in Stewart et al.'s deeds indicates an expression that Stewart et al. intended to sever their riparian rights, then that would be appropriate. Barring that, pursuant to *Murphy Slough*, as well as *Rancho Santa Margarita* and *Anaheim*, a mere argument or showing that the extrinsic evidence evidences the grantor's intent to sever its riparian rights without a showing that the deed

language is reasonably susceptible to that interpretation is inadequate as a matter of law to effectuate such a severance.

The Draft CDO Not Only Ignores Controlling Precedent But Also Ignores the Deed Language Itself.

According to the Draft CDO, the SWRCB's solution to the situation where a conveyance eliminates a grantor's surface connection to a watercourse is to give zero weight to the fact that the deed says nothing about the grantor wanting to sever its riparian rights. While ignoring the deed language is squarely contrary to controlling precedent in *Murphy Slough*, *Rancho Santa Margarita* and *Anaheim*, it is also squarely contrary to common sense and fundamental fairness. Regardless of *Murphy Slough*, *Rancho Santa Margarita* and *Anaheim*, why would anyone, much less the SWRCB, give zero weight to the fact that the grantor and grantee executed a deed that says absolutely nothing about the grantor wanting to give the grantee all of the grantor's riparian rights associated with the grantor's *retained lands*? Why would anyone, much less the SWRCB, not conclude that having said nothing about such giving of the grantor's rights at least weighs in favor of a finding that the parties did not intend that the grantor give those rights to the grantee?

Even if the SWRCB could somehow ignore the controlling precedent set forth in *Murphy Slough*, *Rancho Santa Margarita* and *Anaheim*, one would not expect the SWRCB to go so far as to ignore the actual language, or lack thereof, in any particular deed.

Regardless of the Deed Language, or Lack Thereof, Extrinsic Evidence Confirms that Stewart et al. Did not Intend to Sever Their Riparian Rights.

Assuming *arguendo* that controlling precedent is ignored and that the language in the deed, or lack thereof, is also entirely ignored, then we are left, according to the Draft CDO, with an examination of extrinsic evidence of the grantor and grantee's intent.

As noted elsewhere in these comments, the Draft CDO acknowledges that a lower showing of evidence to establish a riparian or other water right may be allowable in the context of the instant, discretionary CDO enforcement proceedings:

> In addition, the State Water Board's determination in an enforcement proceeding that a claim of right is valid may not be based on the same amount or quality of evidence that would be required to substantiate the right in a statutory stream

> adjudication or court reference. The Board's decision whether to take enforcement action is discretionary, and the Board may elect not to take enforcement action against a diverter, even if the evidence substantiating the diverter's claim of right is deficient in certain respects. [Citations.]

(Draft CDO, pp. 15-16.) Thus, the question becomes what type of showing must be made to demonstrate that Stewart et al. did indeed intend to retain their riparian rights to their retained parcels? If the standard in a statutory stream adjudication or court reference is that it is "more likely than not" that they so intended to retain such rights, then what is the allowable standard in the instant proceedings?

The Draft CDO states:

> Generally, in an enforcement action, the prosecution bears the burden of establishing a prima facie case of a violation or a threatened violation. [Citations.] At that point, the burden shifts to the alleged wrongdoer to answer such evidence, including establishing affirmative defenses. [Citations.]

WIC submits that the prosecution has failed to meet that burden in terms of their attempt to demonstrate that Stewart et al. intended to sever their riparian rights to their retained lands. Because, according to the SWRCB, the deed language is to be entirely ignored, i.e., it is given zero weight one way or the other, WIC will address the evidence set forth in the Draft CDO on this matter which presumably may have come from the prosecution, though it appears the SWRCB may have simply come up with the evidence itself, which would seemingly be inappropriate.

The Draft CDO states: "Riparian properties therefore presumably benefit from limiting the acreage and number of landowners that maintain a riparian right, when there is scarcity." (Draft CDO, p. 26).

Such a statement is incorrect, at least in the Delta. In the Delta, it is undisputed that there is no such scarcity of water in the main watercourses at issue herein. There is an essentially unlimited supply of water on account of the tidal influence on those watercourses (that presumably increases every year, and has increased every year since the instant conveyances, due to sea level rise). Moreover, it is well-established that at the time of the instant conveyances, the paramount concern was having too much water and the effort and focus was how to keep water off the lands to allow productive use of such lands. The undisputed

reclamation history of the Delta islands, including Roberts Island, is a testament to that concern, effort and focus.

With regard to water quality, it is also not true that riparians in the Delta are better off from limiting the acreage and number of landowners that maintain a riparian right. WIC submitted into evidence a report from DWR that concludes farming in the Delta actually improves the water quality in the channels during the agricultural season. (See WIC Exhibit 8H, "Report 4. Quantity and Quality of Water Applied to and Drained From the Delta Lowlands.")[6]

Accordingly, since water quantity is unlimited and more farming improves water quality in the Delta, it would be in Stewart et al.'s and the grantees' interest that both of them retain riparian rights to their respective lands after a conveyance and have access to all of the water they reasonably need. Thus, to the extent the prosecution team is relying on the instant proffered evidence to make its prima facie case, such effort must fail since this evidence weighs in favor of Stewart et al. wanting to retain riparian rights to their retained lands.

The Draft CDO states: "The State Water Board sees no reason to presume that silence means the grantor chose to retain the right on the non-contiguous land, as opposed to having bargained a higher price for the sale of the contiguous parcel of land." (Draft CDO, p. 26).

All of Stewart et al.'s deeds had identical language, i.e., they transferred "all . . . tenements, hereditaments and appurtenances" associated with the conveyed parcel to the grantees and said absolutely nothing about transferring the tenements, hereditaments and appurtenances associated with the non-conveyed parcels to the grantees. (See MSS-R-14, Exhibits 7C -7M.) In light of that consistent language, an examination of the prices Stewart et al. obtained reveals that the prices are all over the place without any discernable correlations

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[6] Said report makes the following conclusion at page 30: "The Delta Lowlands [of which WIC is a part; see "plate 1"] act as a salt reservoir, storing salts obtained largely from the channels during the summer, when water quality in such channels is most critical and returning such accumulated salts to the channels during the winter when water quality there is least important. Therefore agriculture practices in that area enhanced rather than degraded the good quality Sacramento River water en route to the Tracy Pumping Plant."

pertaining to water rights or otherwise. To the extent the prosecution team is relying on such a correlation to make its prima facie case, such effort must fail since there are no such correlations.

Below is a tabulation of the bargained for prices of Stewart et al.'s lands:

Parcel 1: (Deed: Book A 68/280) 600 acres, Total sale price: $5.00
Price/Acre ~$.0083
(MSS-R-14-7C)

Parcel 2: (Deed: Book A 74/289) 710.85 acres, Total sale price: $10.00
Price/Acre ~$.014
(MSS-R-14-7D)

Parcel 3 A&B: (Deed: Book A 72/63) 160 acres, Total sale price: $5.00
Price/Acre ~$.03125
(MSS-R-14-7E)

Parcel 4: (Deed: Book A 72/64) 240 acres, Total sale price: $10.00
Price/Acre ~$.04167
(MSS-R-14-7F)

Parcel 5: (Deed: Book A 72/65) 480 acres, Total sale price: $10.00
Price/Acre ~$.021
(MSS-R-14-7G)

Parcel 6: (Deed: Book A 77/61) 1130.71 acres, Total sale price: $10.00
Price/Acre ~$.008844
(MSS-R-14-7I)

Parcel 7: (Deed: Book A 77/63) 794.1 acres, Total sale price: $10.00
Price/Acre ~$.0126
(MSS-R-14-7J)

Parcel 8 A&B: (Deed: Book A 74/484) 2416.14 acres, Total sale price: $10.00
Price/Acre ~$.00414
(MSS-R-14-7K)

Parcel 9: (Deed: Book A 78/130) 149.5 acres, Total Sale price: $10.00
Price/Acre ~$.067
(MSS-R-14-7L)

Parcel 10: (Deed: Book A 78/131) 520acres, Total Sale price: $10.00
Price/Acre ~$.0192
(MSS-R-14-7M)

Four Parcels from "WIC's Request for Official Notice," dated August 18, 2010, which abut Middle River near WIC's southwestern boundary:

Parcel A: Stewart. Bunten & King> Fraser (9/2/1890)
70.84 acres, Total sale price: $5.00
Price/acre: ~$.0706

Parcel B: Stewart, Bunten & King> Muller&Engle (6/9/1891)
41.24 acres, Total sale price: $10.00
Price/acre: ~$.2425

Parcel C: Stewart, Bunten &King > Keenan (6/9/1891)
54.34 acres, Total sale price: $10.00
Price/acre: ~$.184

Parcel D: Stewart, Bunten King > Bruse (6/9/1891)
38.97acres, Total sale price: $10.00
Price/acre: ~$.256

The Draft CDO states: "Such a presumption would be particularly inappropriate in a case such as this one, where the retained lands maintained a riparian connection to other natural waterbodies." (Draft CDO, p. 26).

Presumably, the Draft CDO is contending that the fact that Stewart et al. remained contiguous to other natural watercourses weighs in favor of a finding that they intended to sever their riparian rights to the particular watercourse at issue in the instant conveyance. The exact opposite is the case.

There are obvious and significant differences between the right to divert water directly from the banks of a particular waterway versus the right to divert water from the banks of another waterway. One such difference is the potential discrepancy in water quality. In the Delta, where water quality is substantially influenced by matters such as the tides and river flow, it is common knowledge that water quality can and does vary significantly among watercourses throughout the Delta, including Middle River, Burns Cutoff and Duck Slough, to name a few of the natural watercourses abutting Stewart et al.'s lands at the time of the instant conveyances.

Another equally obvious and significant difference is the quantity of flow between various branches of waterways. Having the ability to divert directly from a large waterway such as Middle River or Burns Cutoff offers significant advantages in terms of the potential quantity of diversions versus considerably smaller and/or shallower sloughs such as Trapper Slough, Black Slough, Duck Slough, etc.

Accordingly, it would in the interest of a prudent grantor to retain riparian rights to as many natural watercourses as possible to ensure that it could obtain and utilize water from any of those watercourses whenever it became necessary to do so. Thus, to the extent the prosecution

team is relying on the instant proffered evidence to make its prima facie case, such effort must also fail since this evidence once again weighs in favor of Stewart et al. wanting to retain riparian rights to their retained lands.

The Draft CDO states: "Unlike in *Murphy Slough*, there is no indication in evidence here that Stewart et al. intended to maintain a right to Middle River on their remaining properties. There is no evidence of an irrigation system to those lands, or that Stewart et al. were engaged in any farming, much less farming that would have required irrigation." (Draft CDO, pp. 26-27).

These statements are particularly unfair since none of the landowners currently owning Stewart et al.'s lands were invited to participate in the instant proceedings. But in any event, as just discussed, there is indeed ample evidence supporting Stewart et al.'s intent to maintain riparian rights to Middle River, Burns Cutoff or Duck Slough, as the case may be, on their retained lands. In addition to the forgoing, it is undisputed that Middle River, Burns Cutoff and Duck Slough, for example, were hydraulically connected to each other at the time of Stewart et al.'s conveyances. The area in question, being located within the tidal zone of the Delta, constitutes a unique situation in that such waterways, which literally surround the lands in question, are hydraulically connected to each other. The Delta is essentially one very large, hydraulically connected tidal pool with the water in any particular waterway reversing its direction throughout the day as a result of the tides and commingling with the water in the numerous hydraulically connected waterways.

Accordingly, Stewart et al. continually maintained a physical connection to those watercourses even after they lost surface connection to the banks of any one of them. The situation is analogous to a ditch that connected Stewart et al.'s land to those watercourses, although the ditch is a very large natural watercourse. The maintenance of such a continuous physical connection to a watercourse is generally deemed sufficient evidence of an "intention that it should continue to have the riparian right, notwithstanding its want of access to the stream . . . ." (*Hudson v. Dailey* (1909) 156 Cal. 617, 624 -625.)

Accordingly, the Draft CDO is once again incorrect. There is indeed ample evidence that

Stewart et al.'s intended to maintain riparian rights to Middle River, Burns Cutoff or Duck Slough, as the case may be, on their retained lands.

The Prosecution Team Has Failed to Make a Prima Facie Case that Stewart et al. Intended to Sever Their Riparian Rights to their Retained Lands.

As the foregoing analysis illustrates, the Draft CDO is incorrect when it states, "Here, there is no evidence that the parties intended that the remaining Stewart et al. properties maintain riparian rights to Middle River [or other natural watercourses as the case may be]." (Draft CDO, p. 27.) There is ample evidence of such intent as just discussed. What is clearly missing, however, is evidence supporting the prosecution team's prima facie case that Stewart et al. did *not* intend to retain such rights. If the foregoing recitals in the Draft CDO constitute that prima facie case, then WIC has very easily rebutted it.

For the foregoing reasons, even if the SWRCB can ignore controlling precedent from the Appellate and California Supreme Courts, and even if the SWRCB can ignore and give no weight to deed language or the lack thereof, and even if the SWRCB finds that the foregoing recitals in the Draft CDO constitute an adequate prima facie by the prosecution team against the establishment of riparian rights, it is respectfully requested that the SWRCB find that, for purposes of the instant, discretionary CDO enforcement proceedings, WIC has more than sufficiently overcome that prima facie case and has established that, at a minimum, Stewart et al. successfully preserved riparian rights to Middle River and/or Bums Cut-Off for all of its lands within WIC depicted on MSS-R-14, Exhibit 7A (with the exception of Parcel No. 1) at the times when those lands were initially separated from the banks of those watercourses.

SECTION 4.3.3.1 RELATIONSHIP BETWEEN RIPARIAN AND APPROPIATIVE RIGHTS IN WOODS SERVICE AREA

The Draft CDO, in section 4.3.3.1 makes many incorrect and misleading statements, and should be revised accordingly. For example, the Draft CDO states: "To the extent lands within the Woods service area have maintained a riparian right to divert from Middle River, these lands did not additionally develop a pre-1914 water right." (Draft CDO, p. 34.) That is incorrect and it appears the SWRCB would agree. A riparian can unquestionably also possess an

appropriative right. (See e.g., WIC's Closing Brief, p. 25.)

In the foregoing and other statements in the Draft CDO, the Draft CDO is apparently assuming that the riparian right has been adjudicated or otherwise definitively established. It appears few if any of the riparian rights within WIC have been so adjudicated or established. According, this statement in the Draft CDO is also false: "While it is true that it is possible to develop an appropriative right on riparian lands in certain circumstances, this development only occurs when the appropriative use of water is one that the riparian right could not provide." Someone who thinks it is a riparian, for example, may turn out not to have riparian rights in a formal adjudication of those rights. Thus, prior to that adjudication the appropriative right can indeed be developed to provide water that a riparian right could also provide.

In a similar vein the following statements are incorrect and misleading (and there may be more along these lines):

> "The only water available for appropriation is water not needed for use on riparian lands: . . . ." (Draft CDO, p. 35.)
>
> "Thus, a riparian right holder cannot develop an appropriative right to what would be needed for riparian use." (*Ibid.*)

Moreover, the Draft CDO does not make any distinction between the situation where WIC is the entity establishing an appropriative right versus a particular potential riparian landowner establishing such a right. While following the adjudication and confirmation of the riparian owner's riparian right, that riparian may not be able to so-called "double dip" with its own appropriative right that it has developed, it is not at all clear that following that adjudication and confirmation, WIC would not thereafter be able to change the place of use of its appropriate water rights and redivert water that it previously delivered to that riparian to other water users.

The Draft CDO also fails to note that riparians may establish riparian rights to watercourses other than Middle River. Accordingly, to the extent such riparians formally establish such riparian rights, WIC should be entitled to deliver its Middle River appropriate rights that it would have otherwise delivered to that riparian, to any other water users with WIC (or outside of WIC if it gains permission to change its place of use) and that riparian could

thereafter rely on its riparian rights to that other watercourse.

All in all, this section of the Draft CDO needs to be revised to be more specific in what it is and is not saying. As it stands it is in many respects misleading and inaccurate.

SECTION 4.4.1 DELTA POOL THE DRAFT CDO OVERLOOKS THE EVIDENCE IN THE RECORD AND REFLECTS A MISUNDERSTANDING OF THE PHYSICAL CHARACTERISTICS FO THE SACRAMENTO-SAN JOAQUIN DELTA AS SHOWN BY THE EVIDENCE.

This may be due in part to some documentary evidence when submitted was difficult to read and upon reproduction in the record became even more difficult to read.

The subject lands served by Woods Irrigation Co. are located in the Delta Lowlands and were categorized by the United States and State of California as Swamp and Overflowed lands. (See WIC Exhibit 8, pages 1 and 2 and MSS-R-14A-19A). Delta Lowlands are defined by DWR and USBR to be those lands below five (5) feet above mean sea level. (See WIC Exhibit 8, page 7 and WIC Exhibit 8H, page 4 and Plate 1). It is not simply that Delta waters are subject to tidal influence but rather that the subject lands without the levee systems would abut and/or be regularly inundated by a single body of water.

Mean seal level generally reflects that one-half the time the elevation of the Delta Pool is above zero and the other one-half of the time it is below zero. MSS R-14A-45A which is the 1911/1913 Holt 7.5 Minute USGS Quadrangle Map and MSS R-14A-46A which is the 1911/1913 Stockton 7.5 Minute USGS Quadrangle Map both show the mean sea level lines and provide that the Datum is "Mean Sea Level Datum".

The 1911/1913 Quadrangle Maps show that the bulk of the land within the area served by Woods Irrigation Company was at below mean sea level. Also see WIC Exhibit 8L which is the Atwater 1982 Map For The Holt Quadrangle which the Draft CDO erroneously concludes is not part of the record. Inclusion of the evidence from the Mussi, Pak, Young and Dunkel matters would greatly assist the SWRCB in correctly understanding the evidence in this matter. There are areas on the Stockton Quadrangle to the south of the Woods easterly distribution slough/canal shown to have a 5 foot elevation. These areas would appear to abut Middle River

and/or the Delta Pool and the internal sloughs. Defining the Delta Pool by reference to the regular tides does not account for the rise in elevation of the Delta Pool by reason of the regular reoccurring winter and spring flows. Lands bordering the Delta Pool or remaining connected thereto by ditches, canals, flumes, sloughs, or borrow pits whether artificially made or not would enjoy riparian status.

See Nomellini testimony in response to cross-examination by O'Laughlin at RT 418 through 420. The Delta Pool is the waterbody that would exist absent the construction of levees as part of the reclamation of the Swamp and Overflowed lands in the Delta Lowlands area.

The Woods portion of Middle Roberts Island and Honker Lake is clearly within the Delta Lowlands and area of the Delta Pool. The Delta Lowlands boundary does not encompass the entire Delta as defined in Water Code section 12220.

As relevant herein, the evidence is clear that without levees, the Woods area would be regularly inundated by a single body of water encompassing the portions of Middle River along Middle Roberts Island, the San Joaquin River, Burns Cutoff, Black Slough, Whiskey Slough, Trapper Slough and all the unnamed sloughs within Middle Roberts, Honker Lake, the Pocket, Drexler Tract and areas downstream.

Relevant herein and under 4.4.2 of the draft CDO the draft CDO states that "land does not become riparian by virtue of its having been flooded or swamp land, as riparian rights do not attach to land that is under water." This statement is an incorrect simplification of the law and facts that is not supported by the by the citations provided therein.

The California Supreme Court has expressly recognized riparian rights to lands in Delta regions similar to the Sacramento-San Joaquin Delta in which water spreads out from main channel.

Prior to reclamation, the Middle Roberts Island area, including the Woods area, included more water than it does today as a result of the fact that the rivers that flowed into and through the delta in this region were not naturally confined to the definite channels in which they flow today. Rather, as the term "Delta" explains, these rivers, upon reaching this portion of the valley floor, often spread out, flowing through "fingers" of sloughs and swamp-like swath areas,

making their way out to the Pacific Ocean, and influenced by the tide. Obviously, the extent of this natural disbursement of water, and the length of the various sloughs and swaths it generated, were not static. Rather, they would change from year to year and even from season to season within a year based on the conditions at the time.

This "delta" concept is not the same thing as "flood" waters or "diffused surface waters" as page 40 of the draft decision implies, and the law has historically treated these different types of waters differently.

"Diffused surface waters" consist of drainage falling upon and naturally flowing from and over land before such waters have found their way into a natural watercourse. Hutchins at 27, 372. "Flood waters" are waters that were once part of a watercourse, but have broken away from the watercourse. Flood waters include the element of abnormality. Hutchins at 27, 372.

Neither of these types of waters describes the type of water that regularly traversed Roberts Island, and the rest of the Sacramento-San Joaquin Delta, prior to completion of reclamation efforts. Rather, the water that ran over and through Roberts Island prior to reclamation is best described as "overflows not separated from the stream." *See* Hutchins at 26:

> It is well determined by the authorities that waters flowing under circumstances such as these, notwithstanding that they may consist of a large expanse of water on either side of the main channel, constitute but a single watercourse **and that riparian rights pertain to the whole of it**.

Hutchins at 26, citing *Miller & Lux v. Madera Canal & Irr. Co.*, 155 Cal. 59, 77 (1907, 1909). A review of the actual factual discussion in this case is helpful to illustrate the similarities between way in which the Fresno River made its way to the San Joaquin River and the way in which the water in the various delta channels made their way to the Pacific Ocean:

> The matter was practically heard upon affidavits, a large number of which were filed on either side, and those upon the part of plaintiff, made by persons who had observed conditions on said Fresno River for twenty and thirty years, show that practically in every year during the winter and early spring months, on account of rainfall and the melting of the snows in the watershed of the stream, the Fresno River carries a large volume of water; that this entire volume of water, if not interfered with, is carried in the channel of the river past the point where the water is diverted from the river into the reservoirs of appellant complained of, and for some distance west of the town of Madera, **when the river divides into two or more channels which diverge and flow in the same general direction as the main channel of the river and further on unite with it; that when the volume**

> **of water flowing in the river reaches the higher stages a portion of the water flows into these branch channels; that at the highest stages of the flow the water overflows the main and branch channels of the river at various points and spreads over the low-lying lands adjacent thereto; that the main and branch channels of the *76 river and the lands subject to overflow lie in a trough or basin running parallel with the river for a distance of about eighteen miles; that all of the water which so overflows flows on with the water confined in the lower banks of the main and branch channels of the river in a westerly direction and in a continuous body down to Lone Willow slough and finally into the main channel of the San Joaquin River; that none of the water which overflows is vagrant or becomes lost or wasted, but flows in a continuous body, as above stated, within a clearly defined channel, and so continues until the volume of water coming down the stream commences to lower, when the overflow waters recede back into the main channel of the river and flow on with the rest of the water; that this overflow is practically of annual occurrence,** and may be and is anticipated in every season of ordinary rainfall within the watershed of the Fresno River and fails to occur only in seasons of drought or exceptionally light rainfall.

Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur; they are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno River has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary-when a season of drought prevails.

As to such waters, it is said in Gould on Waters, section 211, "Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence floods and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that 'freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years though at no regular intervals.' " (*Heilbron v. Fowler Switch Canal Co.,* 75 Cal. 426, [7 Am. St. Rep. 183, 17 Pac. 535]; *77 *Cairo Railway Co. v. Brevoort,* 62 Fed. 129; *California T. & A. Co. v. Enterprise C. & L. Co.,* 127 Fed. 741.)

And when such usually recurring floods or freshets are accustomed to swell the banks of

a river beyond the low-water mark of dry seasons and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well-defined boundaries, they constitute a single natural watercourse. It is immaterial that the boundaries of such stream vary with the seasons or that they do not consist of visible banks. It is only necessary that there be natural and accustomed limits to the channel. If within these limits or boundaries **nature has devised an accustomed channel for the limited flow of the waters therein during the dry season, and an accustomed but extended channel for their flow when the volume is increased by annual flood waters, and all flow in one continuous stream between these boundaries and are naturally confined thereto, and when the waters lower the overflow recedes into the main channel, this constitutes one natural watercourse for all such waters and the rights of a riparian owner thereto cannot be invaded or interfered with to his injury.** This is the character of the waters of the Fresno River, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted; they flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin River, and while they spread over the bottom lands, or low places bordering on the main channel of the Fresno River as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases.

It is well determined by the authorities that waters flowing under circumstances such as these, notwithstanding they may consist of a large expanse of water on either side of the main channel, constitute but a single watercourse and that riparian rights pertain to the whole of it. As is said in *Lux v. Haggin,* 69 Cal. 418, [10 Pac. 674], "it is not essential to a watercourse that the banks shall be unchangeable or that there shall be *78 everywhere a visible change in the angle of ascent marking the line between bed and banks. ... We can conceive that in the course of a stream there may be shallow places where the water spreads and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very

gradually for an indefinite distance on either side. In such case if water flowed periodically at the portion of the depression it flowed in a channel ..." In *Crawford v. Rambo,* 44 Ohio St. 279, 282, [7 N. E. 429, 431], the court says:

> It is difficult to see upon what principle the flood waters of a river can be likened to surface waters. When it is said that a river is out of its banks no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel; so that when, swollen by rains and melting snows it extends and flows over the bottom in its course, that is its flood channel, and when by droughts it is reduced to its minimum, that is its low water channel.

So in *O'Connell v. East Tennessee Ry Co.,* 87 Ga., 246, [27 Am. St. Rep. 246, 13 S. E. 489, 491],

> If the flood water forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi,* as by the recession of the waters, it is to be regarded as still a part of the river ... The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds without well-defined banks or channels so long as they form with it one body of water eventually to be discharged through the proper channel.

To the same effect are *Chicago etc. Ry. Co. v. Emmert,* 53 Neb. 237, [68 Am. St. Rep. 602, 73 N. W. 540]; *Fordham v. Northern Pacific Ry. Co.,* 30 Mont. 421, [104 Am. St. Rep. 729, 76 Pac. 1040]; *Jones v. Seaboard etc. Ry. Co.,* 67 S. C. 181, [45 S. E. 188]; *New York etc. Ry. Co. v. Hamlet Hay Co.,* 149 Ind. 344, [47 N. E. 1060, 49 N. E. 269]; *Cairo etc. Ry. Co. v. Brevoort,* 62 Fed. 129.

And where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks does not affect its character as a watercourse. (*Macomber v. Godfrey,* 108 Mass. 219, [11 Am. Rep. 340]; *West v. Taylor,* 16 Or. 165, [13 Pac. 665].)

Miller & Lux v. Madera Canal & Irrigation Co. 155 Cal. 59, 75 -78 (Cal. 1909).

Similarly, the lands in the Middle Roberts and Honker Lake area of Roberts Island including the Woods area experienced regular seasonal inundation and/or surrounding by intermittent sloughs and swaths prior to the completion of reclamation efforts that served to keep these waters confined to the main channels. Clearly, the efforts of the landowners to control these waters,

and meter their use, does not evidence an intent to forego riparian rights which they clearly had prior to reclamation. Rather, it is more logical, and consistent with public policy, to view these efforts as efforts to comply with the constitutional amendment of 1928 which limited all water use in the state to that which is both reasonable and beneficial. This amendment was specifically triggered by court decisions, such as the *Miller* decision noted above, which upheld a riparian's right to utilize the entire overflow of a stream without regard for the rights of appropriators who desired to dam and control the regular seasonal overflow so as to maximize use of the water.

The California Supreme Court had occasion to address the rights of riparian right holders on delta lands in the nearby Suisun Bay in 1934, a few years after the constitutional amendment. *See Peabody v. City of Vallejo,* 2 Cal.2d 351, 369, 40 P.2d 486, 492 (CA.1935). In *Peabody*, the high court did not question the riparian rights of the delta landowner, but rather, clarified that the constitutional amendment limited the riparian right such that the owner no longer had the right to use the full flow of the stream over his lands in the same manner as had been previously upheld in the Miller decision.

While this is a lengthy explanation, it is necessary to correct the over-simplification of the law set forth on page 40 of the draft decision. These properties are not claiming riparian rights based on abnormal flood events or diffused surface water flow that has yet to reach a watercourse. Rather, their riparian rights derive from the very "delta" nature of the properties and the watercourses, which naturally fanned out over the properties in numerous smaller channels and swaths as they made their way to the ocean. The California Supreme Court, since at least 1909, has specifically held that such land is riparian.

SECTION 4.4.2 Swamp and Overflowed Lands may lose riparian rights.

The Draft CDO incorrectly states the contention of Woods, et. al.

The contention is "The severance of riparian water rights from Swamp and Overflowed Lands of the Delta is both contrary to law and physically impossible.

It should be self-evident that successful reclamation of Delta lands required expensive construction and maintenance of levees, drains, floodgates, drainage pumping plants and irrigation facilities. The testimony of Dante John Nomellini, Sr. provides that "Critical to the

economic viability of the subject parcels and economic support of the levees and drainage necessary to reclaim and sustain the reclamation is the ability to cultivate various crops including the timely application and utilization of water for surface and sub-irrigation." See WIC Exhibit 8, page 2. There is no evidence in the record to support a contrary view.

Once the land was drained, it is obvious that successful crop production required management of water for surface and sub-irrigation. See WIC Exhibit 8D The Settlement Geography of the Delta, pages 310 and 311, and WIC Exhibit 8C History of San Joaquin County, California, Thompson & West (1879), page 43, first column.

The Draft CDO states that no argument was presented as to why a riparian right would be necessary for irrigation? The issue addressed by Woods, et. al. is why a Grantor in the Delta (particularly the Delta Lowlands) would intend to deprive land of the appurtenant riparian right and why the State having the obligation to reclaim the lands into a productive state would want such to occur. The riparian right enjoys a priority over upstream appropriations. It is appurtenant to the land and already in place. Unlike an appropriative right, it cannot be transferred.

The Draft CDO suggests that Woods, et. al. contends that all irrigation features were intended to substitute for natural watercourses. Such is not the case. The reclamation of the Swamp and Overflowed Lands of the Delta required the construction of levees which necessitated the construction of dams or control structures across natural watercourses.

Once the lands were drained so that cultivation could take place, water was reintroduced into the watercourses for irrigation. Many of the natural watercourses crossed by levees continue to be used for both irrigation and drainage. See WIC Exhibit 8. The character of a watercourse crossed by a levee for riparian right purposes is not changed. See particularly *Lindblom v. Round Val. Water Co.* (1918) 178 Cal. 450.

The Draft CDO at 4.4.7 which is also relevant herein contends that the construction of levees to reclaim Swamp and Overflowed Lands in the Delta at the urging of the United States and State of California is akin to a permanent natural avulsive change in course or a geologic change in the formation of the earth. As relevant herein, the major levees were constructed in

about 1875. Numerous natural sloughs/watercourses were crossed. It is not clear in every case whether a control structure was constructed at the time of initial levee construction or installed later. The time interval certainly did not span a geologic age. In any event, the reclamation of the subject lands at the urging of the State was not equivalent to a natural avulsive change nor to a geologic change in a different geologic age.

The Draft CDO misconstrues the authorities cited at page 50. The loss of character of a natural watercourse is a different issue than the creation of an artificial watercourse to which riparian rights may attach. Not every irrigation canal, drainage ditch or levee results in an artificial watercourse to which riparian rights attach. Some of course simply retain the connection of the parcel to the waterbody confirming the intent to preserve the riparian contention.

The applicable law is set forth in the Woods et. al. Joint Closing Brief at pages 45 and 46. *Smith v. City of Los Angeles* (1944) 66 Cal.App.2d 562, page 579:

> " 'A watercourse does not lose its character as such by reason of the fact that it is improved by deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. *Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period.*-although such diversion may deprive lower riparians of their rights,-nor by reason of the fact that the water has all been dammed at a place far up the stream. ...' " (Italics added.)

> "upon the other hand, however, the authorities hold that a watercourse, although constructed artificially, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to be deemed by prescription natural watercourses. Such is the case where the whole stream is diverted into the new channel, and thereby the artificial channel is substituted for the natural. Where this is done under such circumstances as to indicate that it is to be permanent, riparian rights may attach to the artificial channel. And it is further held that where the artificial watercourse was not created by joint action of the owners, it may become such a one to which riparian right may attach, if the various owners along its course have always treated it as such." See *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal.1, page 18.

It is important to note that the levees did not perform as a geologic feature and water was periodically restored to the interior island portions of the Delta Pool including the internal watercourses. Although not complete, the record includes a number of references to the re-

flooding of the Woods area. The levees broke on March 22, 1893, and the Woods brothers got no crops in 1893 nor 1894. See History of San Joaquin by George H. Tinkham WIC Exhibit 8J at pages 348 and 349.

The Central Valley Project Delta Lowlands Service Area Investigations, Report Area DL-9 (January 1964) reports that the Middle Division was also flooded in 1886. See WIC Exhibit 8B, page 6.

The area was flooded in January 1875 and remained flooded at the time that Charles Drayton Gibbes visited the area. He reported that at the confluence of Willow Slough with Middle River the slough was 80 links wide (53 ft.) and 8 feet deep. It had been dammed twice but not in substantial enough manner to withstand freshets. The breaking of the dam in the recent freshet (in January 1875) was principally responsible for the interior of the island then being covered with flood waters. The current of the slough was running as strong as in the river. See MSS-R-14, pages 6 and 7.

The acquisition by the State of the subject Swamp and Overflowed lands was pursuant to an Act of Congress commonly known as the Arkansas Act. This Act created specific duties on the part of the State. See Woods et. al. Joint Closing Brief, pages 46-50.

In *Kings County v. Tulare County* (1898) 119 Cal. 509, at page 511, the California Supreme Court observed that "The purpose of the grant [pursuant to the Arkansas Act] was to enable the State to reclaim the lands by means of levees and drains."

For the State to now assert that the patented lands should lose their riparian rights because the reclamation has proceeded by means of levees and drains as intended is a breach of the obligation to carry out in good faith the reclamation of said lands. See *Kimball v. Reclamation Fund Commissioners* (1873), 45 Cal. 344, 360.

Whether other Congressional Acts impose a similar duty and obligation on the State is not the issue. The State herein through the SWRCB is seeking to use its cease and desist order authority to advocate new interpretations of water law to disparage the water rights of those who in good faith have invested resources at the urging of the State to reclaim said Swamp and Overflowed Lands in fulfillment of the duties of the State to the United States. All this coming

after 100 years of reaping the benefits of such reclamation.

As to the Draft CDO erroneous contention at page 40 that "land does not become riparian by virtue of its having been flooded or swamp land, as riparian rights do not attach to land that is under water" the comments to 4.4.1 herein and the argument in Woods et. al. Joint Closing Brief at pages 43 and 44 are incorporated.

The SWRCB should not use its extraordinary authority to impose a cease and desist order where there is reasonable uncertainty as to the water right status of the respondent. The uncertainty should first be resolved in a court of law. The Draft CDO conclusion at page 41 that a new rule would be necessary to require a clear expression to sever riparian rights to lands that become non-contiguous to a waterway, if adopted, would be tantamount to an unlawful adjudication of the riparian rights of landowners in the Delta.

SECTION 4.4.3. THE HYDROLOGIC CONNECTION BETWEEN THE SHALLOW GROUNDWATER AND THE SURFACE STREAMS AFFORDS LANDOWNERS WITHIN WIC RIPARIAN AND/OR OVERLYING RIGHTS TO DIVERT DIRECTLY FROM THOSE STREAMS.

The Shallow Groundwater is in "Immediate Connection" with the Surface Streams and, Hence, the Landowners Overlying That Groundwater are Riparian to those Streams.

In *Hudson v. Dailey* (1909) 156 Cal. 617 (*Hudson*), the Court held:

> If the water in the underground strata is in such *immediate connection* with the surface stream as to make it a part of the stream, as the plaintiff seems to contend, *then the defendants' lands overlying such water must be considered as also riparian to the stream*, and, under the law of riparian rights, they have a common right with the plaintiff to the use of the water.

(*Id.*, pp. 626-627, emphasis added.)

In their Closing Brief, WIC cited to the considerable evidence in the record attesting to the well-recognized immediacy of the connection between the shallow groundwater underlying the lands within WIC (and within the entire Delta for that matter) and the surface streams. (See e.g., WIC's Closing Brief, pp. 53-54.) Nowhere does the Draft CDO purport to deny the

immediacy of that connection. Instead, the Draft CDO contends, without citation to authority, that *Hudson* "does not establish a new test for classifying groundwater," but, instead, merely continues the longstanding common law distinction between percolating groundwater and groundwater flowing through known and definite channels." (Draft CDO, p. 43.) Despite that so-called long standing distinction, apparently there are even more distinctions, e.g., groundwater can presumably also be classified as "underflow." (See e.g., CDO, p. 42 & 44.)

If *Hudson* does not establish a new test for classifying groundwater, then out of all of the classifications of groundwater existing at the time of *Hudson*, which classification would be given to underground water that "is in such immediate connection with the surface stream as to make it a part of the stream, [such that lands overlying that groundwater] must be considered as also riparian to the stream . . . ?" (*Hudson, supra*, 156 Cal. 617, 626-627.) The Draft CDO seemingly fails to answer that critical question.

Being "considered as also riparian to the stream" is immensely significant since it would put an immediate end to the instant proceedings, and avoid literally millions of SWRCB and landowner dollars and countless hours incurred in future water right investigations throughout the Delta which the SWRCB's Strategic Plan is poised to vigorously carry out. Contrary to the Draft CDO's footnote 12 at page 44, being "considered as also riparian to the stream" would indeed give the landowner "the right to divert from the surface stream." Such a right is precisely what being considered a riparian to such a stream affords. While it is true that the landowner would have to obtain permission to physically access the stream banks from any intervening landowners, it is also true that every landowner within WIC who desires such access already has such permission.

WIC respectfully submits that all of the landowners within WIC meet the "immediate connection" test in *Hudson* and, accordingly, all of them should be deemed to be riparian to all of the natural watercourse surrounding their lands. If the SWRCB disagrees, then it would behoove everyone, including the SWRCB, for the SWRCB to better articulate what additional evidence, if any, must be developed for the SWRCB to determine that the landowners within WIC do indeed meet that "immediate connection" test so that such evidence could be

meaningfully developed which would then potentially put an end to this burdensome assault on Delta water rights.

In a Common Underground/Surface Supply Situation it Should be Deemed to be Within the Scope of a Landowner's Coequal and Correlative Rights to that Common Supply to Divert from the Surface Component of that Supply in the Absence of Injury to Others With Rights to that Supply.

It is important to note that the Court in *Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, could have very easily said that such an overlying user could *never* take its fair share directly from the surface stream. For example, it could have declared that it is entirely repugnant to the doctrines of riparian and overlying rights to allow an overlying user, who is not also a riparian, to take any amount of water whatsoever from the banks of a surface stream. The Court, however, clearly made no such declarations. Instead, the Court merely stated that such an overlying user could not do so *if* it resulted in "injury [to the] lands which abut upon the proper banks of the surface stream . . . ." (*Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, 323.) The Court specifically left the issue open for further development by the courts or even the SWRCB:

> It is not necessary here to [definitively] decide what rights to the use of the underground flow [or percolations] of a stream may, by virtue of its position, attach to land which abuts upon, or extends into or over such waters, but does not extend to the surface stream.

(*Ibid.*)

WIC explained at length why the SWRCB should further develop that issue to the extent *Hudson* or other courts have not already so developed it, and make a determination that it is indeed within the scope of an overlying user's "overlying rights" to take its fair share of the common underground/surface supply directly from the surface stream so long as it can do so without causing injury to any other overlying or riparian water right holder with coequal and correlative relative rights to that common supply. Such a determination would be fully consistent with, and in furtherance of, *Anaheim*, *Hudson*, *Turner* and the well-established "no-injury rules" set forth in case law and statutory law with regard to changing points of

diversion from a common supply.

Sadly, instead of meaningfully considering WIC's contentions and failing to even mention the so-called "no-injury rules," the Draft CDO, in essence, simply argues that:

> No case that the parties presented and no other authority that the State Water Board has been able to find has held that landowners whose lands include groundwater may divert from interconnected surface waters on the basis of the connection to groundwater. The State Water Board has held to the contrary. (Phelps, supra, p. 12.)

(Draft CDO, pp. 46-47.) This is the second time (the Phelps case being the first) where the SWRCB has utterly failed to provide any explanation whatsoever why the SWRCB should not make the requested determination. Such a determination would instantly put an end the current expensive, time consuming and misdirected assault on Delta water rights and enable the SWRCB to focus its investigations of alleged unauthorized water diversions and its scarce resources on areas where there is not such a common underground/surface supply and, hence, where the distinction between overlying and riparian water rights holders is truly significant and where such water right holders are not obligated to share any such common supply. Accordingly, WIC once again respectfully requests that the SWRCB make such a determination in the instant proceedings.

4.4.4 The State Board Is Not Estopped From Contesting the Water Rights of Owners of Swamp and Overflowed Lands.

In adopting the Draft CDO, the SWRCB would not be simply enforcing the water right laws of the State but rather would be adjudicating a disqualification of the water rights exercised for 100 years based on the landowners reclaiming the Swamp and Overflowed Lands by means of construction of levees and drains as required and intended by the State in furtherance of its duties incurred pursuant to acceptance of the Grant from the United States pursuant to the Arkansas Act.

The Draft CDO seeks to impose its own rewrite of the water law of California and goes far beyond simple enforcement in conformance with a court adjudication of the scope of a water right. Woods et. al. incorporates its previous comments in 4.4.2 and its argument in its Joint Closing Brief at pages 50 through 52.

4.4.5. THE LANGUAGE IN THE RELEVANT DEEDS PRESERVED A RIPARIAN RIGHT THUS PROVIDING ADDITIONAL JUSTIFICATION FOR WIC'S DIVERSIONS.

In *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, at page 331, the California Supreme Court stated:

> If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, *unless the conveyance declares the contrary.*

(Emphasis added.) Nowhere in *Anaheim*, nor in any other case that WIC is aware of, do the courts state that the such a declaration in the conveyance must use the words "water" or "riparian rights." Nor does the Draft CDO provide any such authority.

WIC contends that the conveyances at issue herein *do* indeed "declare[] the contrary," and declare that very clearly. While said conveyances do not contain the words "water" or "riparian rights," they are not required to. Said conveyances unambiguously convey ***all*** property rights associated with the conveyed parcels including, but not limited to, riparian and other water rights. Under case law and under common sense and fundamental fairness, and, especially in the context of the instant, discretionary CDO enforcement proceedings, such a declaration is more than sufficient to preserve riparian rights in the grantee's non-contiguous property.

All of the deeds alleged by MSS to sever the riparian water rights to the parcels within WIC between the years of 1989 and 1892 contain the following language:

> Together with ***all*** and singular the *tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining* and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.
>
> To have and to hold, ***all*** and singular the said premises, *together with the appurtenances*, unto the said party of the second part, and to his heirs and assigns *forever*.

(See MSS-R-14, Exhibits 7C -7M, emphasis added.) Those deeds refer to parcels 1 through 10 depicted on the map at MSS-R-14, Exhibit 7A. It is seemingly undisputed that immediately prior to the conveyance of parcels 1, 2, 3A, 3B, 4, 5, 6, 7 and 8A on that map, such parcels had riparian rights to one or more natural watercourses on account of their surface contiguousness to

those watercourses. For example, prior to said conveyances, at a minimum parcels 1 and 2 were contiguous to Middle River, Duck Slough and Burns Cutoff; and parcels 3A, 3B, 4, 5, 6, 7 and 8A were contiguous to Duck Slough and Burns Cutoff. (Parcels 8B, 9 and 10 seemingly involve disputed contiguousness and/or riparian rights to natural watercourses prior to their conveyances; WIC contends these parcels were also so contiguous and possessed riparian rights before and after said conveyances.)

Accordingly, if the foregoing deed language is sufficient to "declare[] to the contrary," i.e., to evidence the parties' intent to preserve those parcels' riparian rights to those watercourses after the conveyance, then those parcels could never lose those rights through future subdivisions because those lands could never be further separated from the banks of those watercourses–such separation is a one time event. (See e.g., *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 539; *Murphy Slough Assn. v. Avila, supra*, 27 Cal.App.3d 649, 655-656; and Strong v. Baldwin (1 908) 154 Cal. 150, 157; see also, e.g., WIC's Closing Brief, pp. 41-42 & 62, for a discussion of those cited authorities.) And if the SWRCB determines that such language is indeed sufficient, it would put an end to what has been, and will continue to be, an extremely burdensome and costly process for all parties, including the SWRCB.

The Declaration in the Deeds Could Not Be Clearer that the Non-Contiguous Parcels Were to Retain *All* of the Property Rights They Possessed Prior to the Conveyances, Including Riparian Rights.

The transfer of *all* "hereditaments," as well as *all* "tenements" and *all* "appurtenances" evidences a clear intent that the grantees retain *all* property rights that existed prior to the conveyances, including, but not limited to, riparian rights.

The Transfer of *All* "Hereditaments" Evidences an Intent to Transfer Riparian Rights.

It is undisputed that at the time of said deeds, as well as the present time, riparian rights constitute "hereditaments." The key word in the above-referenced deed language is the word "all." Those deeds did not state that all hereditaments *other than* riparian rights were included in the transfers. Instead, the deeds unambiguously and expressly state that "all" hereditaments

belonging to the property, regardless of their shape, form or nature, were transferred to the grantees. Since at the time of said deeds (and continuing to the present time), it was and is well recognized that riparian rights are hereditaments there was no reason whatsoever for the parties to those deeds to single out riparian rights (or water rights in general for that matter) from among all other hereditaments associated with the parcels. Instead, the intent was crystal clear that "all" hereditaments were intended to be transferred, including, but not limited to, riparian water rights.

The Transfer of *All* "Appurtenances" Evidences an Intent to Transfer Riparian Rights.

While the reference in the deeds to "all . . . hereditaments" should be dispositive of this issue, as far as "appurtenances" are concerned, as the court explains in *State v. Superior Court of Riverside County* (2000) 78 Cal.App.4th 1019, at page 1025, riparian rights at the time of the instant conveyances, as well as the present time, are "sometimes described as a right 'appurtenant to' . . . an interest in real property":

> [T]he current state of the law is that a riparian (or overlying) owner, or an established appropriator, has the right to take and use water from, e.g., a flowing stream, but the flowing water is not owned. On the other hand, a water right itself has been considered an interest in real property. [Citation.] It is also sometimes described as a right "appurtenant to" or "part and parcel of" an interest in real property. (See, e.g., *Lux v. Haggin*, [1886] 69 Cal. at pp. 390, 391-392.)

(See also, *Hudson v. West* (1957) 47 Cal.2d 823, 829 ["a riparian water right has also been described as 'appurtenant' in recent cases"]; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1240, with emphasis added ["An overlying right, '*analogous to that of the riparian owner* in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and *is appurtenant thereto*"]; *Ivanhoe Irr. Dist. v. All Parties and Persons* (1957) 47 Cal.2d 597, 621, reversed on other grounds in *Ivanhoe Irr. Dist. v. McCracken* 357 U.S. 275, with emphasis added [The riparian "right was declared by this court in *Lux v. Haggin* . . . to be a right *appurtenant to the land*, in fact a part and parcel of the land itself]; *Lux v. Haggin* (1886) 69 Cal. 255, 300, with emphasis added [The riparian right "is designated "property,". . . an incorporeal hereditament *appertaining to the land*"].)

While legal scholars may squabble over whether riparian rights are more appropriately deemed "part and parcel to" the land, rather than merely "appurtenant to it," what is at issue is not a determination of the most hyper-technically or philosophically correct manner to characterize riparian rights. The issue is what was the intent of the grantors and the grantees, i.e., normal people, in the above-referenced deeds.

Here, the intent to transfer *all* property rights associated with that parcel, including riparian rights, could not be more clearly set forth in the deeds. As with hereditaments, the intent was not to transfer merely some appurtenances and exclude others. Rather, the intent was to transfer every single one of them, i.e., "all" of them, whatever they may be. And to rivet the all-inclusiveness of the grant even further, the deeds include the words "in anywise appertaining" thereby evidencing the parties' intent to avoid any hyper-technical or philosophical disputes regarding the degree or nature of the particular transferred right's connection to the property.

The Transfer of All "Tenements" Evidences an Intent to Transfer Riparian Rights.

While there appears to be less case law discussing the definition of "tenements" in the water right context or otherwise, according to Black's Law Dictionary (4th ed. 1951):

> This term . . . in its original, proper and legal sense . . . signifies *everything that may be holden, provided it be of a permanent nature*, whether it be of a substantial and sensible, or of an unsubstantial, ideal, kind.

(Id., p. 1637, italics in original.) Ballentine's Law Dictionary (3rd ed. 1969) further defines "tenements" as follows:

> *Real Property; inclusive of any incorporeal hereditament which issues out of corporeal property or which is annexed thereto.* [Citation.] [¶] In its most extensive signification, the word comprehends *everything which may be holden, provided it be of a permanent nature.*

(Id., p. 1265, emphasis added.)

It is well-established that riparian rights are "real property." (See e.g., *Scott-Free River Expeditions, Inc. v. County of El Dorado* (1988) 203 Cal.App.3d 896, 904 ["Water is unquestionably a species of real property and the right to use such water, whether that right be riparian, appropriative, or any other such right, is a valuable property right"]; see also, *Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598 ["Although there is no

private property right in the corpus of the water while flowing in the stream, the right to its use is classified as real property"].)

Moreover, riparian rights are undoubtedly "of a permanent nature." Indeed, they are often said to be "part and parcel" of the land, "inseparably annexed to the soil." (See e.g., *Lux v. Haggin* (1886) 69 Cal. 255, 300 & 390.)

Accordingly, the transfer of "all" tenements is also sufficient in and of itself to indicate an intent to transfer "all" real property interests "of a permanent nature" including, but not limited to, riparian rights.

Conclusion.

In the end, Blacks Law Dictionary's discussion of "hereditaments" aptly describes the obvious intent behind the all-encompassing "together with all the tenements, hereditaments and appurtenances" language utilized in the instant deeds:

> The term [hereditaments] includes a few rights unconnected with land, but *it is generally used as the widest expression for real property of all kinds*, and is therefore employed in conveyances after the words "lands" and "tenements," to *include everything of the nature of realty which they do not cover*.

(Black's Law Dict. (4th ed. 1951) p. 859, emphasis added.) Indeed, it is difficult to imagine how parties to a conveyance could more expressly declare their intent to transfer "*everything* of the nature of realty," including but not limited to riparian or other water rights, than by the language used in the instant deeds.

While WIC believes it would be extremely unreasonable and unfair for anyone to infer an intent on the part of either the grantor or the grantee to any deeds within the Delta to forever eliminate a parcel's ability to utilize water from any of the numerous waterways that literally surround it, especially at this early stage of the reclamation of this swamp and overflowed land where the entire purpose of such reclamation was to facilitate the cultivation of such lands and the concern on everyone's mind was the overabundance of water on their lands, not any semblance of a shortage thereof, in the instant case the parties to the above-referenced deeds could not have made it any clearer in their deed language that they intended that the separated parcel forever retain any and all property rights, including riparian rights, which it possessed

prior to the conveyance.

There is no authority that grantors and grantees must use the word "water" or the words "riparian rights" to sufficiently "declare[] to the contrary" and preserve riparian rights within the meaning of *Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, 331. Not all deeds in the Delta or elsewhere contain the "all tenements, hereditaments and appurtenances" language. Fortunately, the instant deeds do, and for the SWRCB or anyone else to assert that the parties did not really mean "all," but, instead, meant "all tenements, hereditaments and appurtenances" *except* riparian rights, is just plain unfair and unreasonable and reads into *Anaheim* a requirement that the deeds mention the word "water rights" or "riparian rights," which is a requirement that simply does not exist in *Anaheim* or elsewhere.

The Draft CDO's citation to *Murphy Slough*, *supra*, is misplaced for many reasons including the fact that the case was addressing the opposite situation, i.e., the situation where the grantor loses its surface connection to the banks of a waterway as a result of a conveyance. Here, it is the grant*ee* that is losing its surface connection to the banks of a particular waterway as a result of the conveyance. In any event, even if *Murphy Slough* stated that the "all tenements, hereditaments and appurtenances" deed language was not specific enough to meet the "declar[ation to] the contrary" requirement in *Anaheim* in the instant situation (which it did not, and which it would have been *dicta* if it did), it is a *1972* case which the parties to the late 1800 transfers at issue herein obviously could not be fairly required to be mindful of.

It is important to note that not only was *Murphy Slough* decided approximately eighty (80) or more years *after* the instant conveyances, but even seminal cases like *Anaheim* (1907) and *Hudson* (1909) were not decided until approximately twenty (20) or more years after said conveyances. As *Murphy Slough* explains, "[T]he meaning of a writing '. . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." (*Murphy Slough*, *supra*, 27 Cal.App.3d 649, 654.) Not having constructive notice or otherwise of those seminal cases at the time of drafting said conveyances, yet knowing, at a minimum, that riparian rights were recognized as hereditaments and appurtenances, a reasonable and prudent individual or attorney would have reasonably believed that the use of the

all-encompassing "together with all the tenements, hereditaments and appurtenances" would be more than adequate to ensure that the grantee retained riparian, and all other property rights, after such conveyance.

Making it crystal clear that the grantee is to retain *each and every*, i.e., *"all,"* "tenements, hereditaments and appurtenances" is as specific as one can reasonably and fairly be required to get, especially in the late 1800's, and easily constitutes a "declar[ation to] the contrary" within the meaning of *Anaheim* that the SWRCB should recognize in (as well as outside of) the instant proceedings. Such a recognition would be entirely reasonable and fair and would put an immediate end to the instant and intensely expensive and time-consuming proceedings, which are only the tip of the iceberg of what will surely follow if they are not so terminated.

Even if the Deed Language is Not Dispositive, Such Language Is Strong Evidence of the Parties' Intent that the Grantee Retain *All* of the Property Rights its Parcel Possessed Prior to the Conveyance, Including Riparian Rights.

Assuming *arguendo* that the forgoing deed language is not a sufficient "declar[ation to] the contrary" within the meaning of *Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, 331, and, hence, it is also necessary to consider any other extrinsic evidence of the parties' intent regarding riparian rights, the grantor's conveyance of *each and every* hereditament, *each and every* appurtenance and *each and every* tenement should weigh very heavily in any evaluation of the intent of the parties. The Draft CDO apparently gives zero weight to that declaration of intent. To overcome that intent, one would have to demonstrate that it is more likely than not that the parties did not really mean what they said, i.e., that the parties did not really mean to say "all," rather, they really meant to say each and every hereditament, appurtenance and tenement *except* riparian rights.

The Draft CDO acknowledges that a lower showing of evidence to establish a riparian or other water right may be allowable in the context of the instant, discretionary CDO enforcement proceedings:

> In addition, the State Water Board's determination in an enforcement proceeding that a claim of right is valid may not be based on the same amount or quality of evidence that would be required to substantiate the right in a statutory stream

> adjudication or court reference. The Board's decision whether to take enforcement action is discretionary, and the Board may elect not to take enforcement action against a diverter, even if the evidence substantiating the diverter's claim of right is deficient in certain respects. [Citations.]

(Draft CDO, pp. 15-16.)

While the express language in the deeds at issue herein transferring *all*, i.e., each and every, hereditament, appurtenance and tenement, should be more than sufficient to evidence an intent that the grantee retain riparian rights to its non-contiguous parcel in a statutory stream adjudication or court reference, there should be no question that it is sufficient in the instant discretionary enforcement proceedings. What evidence has the prosecution team or any other person submitted to demonstrate, convincingly or otherwise, that the parties did not really mean to say "all," instead, that they really meant to say "everything but riparian rights"? WIC submits there is none and, accordingly, the SWRCB should find for purposes of the instant proceedings that sufficient evidence has indeed been presented to demonstrate the preservation of riparian rights for *all* of the parcels depicted on the map at MSS-R-14, Exhibit 7A. To find otherwise, and to require diverters to cease diverting because the SWRCB believes their predecessors did not really mean to say "all," would be manifestly unreasonable and extremely unfair.

4.5 **Issuance of a CDO is Appropriate Even If It Might Result in No Decrease or a Slight Increase in Water Use on the Island.**

The present CDO proceeding is not simply an effort to prevent unlawful diversion of water. It is rather an effort to render unlawful the diversions that have been ongoing for 100 years by rewriting the water law in a manner preferred by the Draft CDO. Such is tantamount to an unlawful adjudication of the pre-1914 and riparian rights of those in the Delta.

The Cease and Desist authority of the SWRCB is an extraordinary authority similar to the court authority to issue an injunction and should only be exercised to avoid substantial injury where the lack of a pre-1914 or riparian right is clear.

The Draft CDO misstates the testimony of Mr. Nomellini at RT 379:5-9 to the effect that each acre of agriculture saves approximately 2 acre feet per annum of water. The actual testimony at RD 379:5-13 is as follows:

> "The rule of thumb that I'm aware of over the years is that agriculture in the Delta saves about 2 acre feet per acre on average for the Delta as a whole. That's because the various crops involve cultivation of land where many times for many days it's dry.
>
> It doesn't have any vegetation on it, it's in a cultivated condition, and therefore it doesn't suffer from the evapotranspiration that you would have from a water body or a vegetated area."

As per the tables prepared by DWR and the USBR, the reversion of land to tule and swamp or riparian vegetation would use far greater amounts of water than even alfalfa which is only part of a diversified mix of crops growing in the Delta. See RT 378 and 379.

Discontinuation of drainage due too inability to farm would result in the reversion to tule and swamp, riparian vegetation or water surface. See RT 380.

The Draft CDO inappropriately speculates that all lands served by Woods can continue to be adequately served with the 77.7 cfs diversion. The record does not contain evidence to support such assertion.

4.7.1.2 **THE SWRCB'S GRANT OF THE MOTION TO STRIKE PORTIONS OF CHRISTOPHER NEUDECK'S TESTIMONY IS INCORRECT.**

The Draft CDO rejects WIC's objections to the hearing officer's ruling on portions of Mr. Neudeck's testimony in WIC's closing brief because some of those objections were allegedly not raised either "at the hearing [nor] before the ruling issued." (Draft CDO, p. 59.) In particular, those objections contended that Mr. Neudeck's testimony was relevant to numerous issues in addition to WIC's "common underground/surface supply theory." While WIC believe the closing brief was the first and appropriate opportunity to raise *any* objections to the hearing officer's ruling, in their closing brief WIC also reiterated their previous objections which include the objection that Mr. Neudeck's testimony is indeed very relevant to WIC's "common underground/surface supply theory."

The hearing officer rejected said portions of Mr. Neudeck's testimony because:

> "[that] theory was rejected in State Water Board's *Phelps* Order [WRO 2004-004], which was upheld on judicial review. [Citations.] Because a riparian water right cannot attach through groundwater, this evidence is not relevant to the proceeding, and the motion to strike is granted on that ground."

(See "Woods Irrigation Company Hearing Motions and Evidentiary Objections," dated July 19, 2010, p. 3.)

The Draft CDO spends no less than six (6) pages on the merits of that theory, thereby confirming WIC's contentions that the theory is very much alive and well and, accordingly, because said portions of Mr. Neudeck's testimony are undisputedly relevant to that theory, said portions should not be stricken from the record.

SECTION 4.7.1 OF THE DRAFT ORDER INCORRECTLY CONCLUDES THAT CERTAIN EVIDENCE PRESENTED BY WIC SHOULD NOT BE INCLUDED IN THE RECORD.

The draft CDO denies the request by WIC to incorporate the record in the concurrent proceedings against Mussi et. al. Pak and Young, and Dunkel, citing a number of reasons, including: WIC had the ability to submit the evidence in this hearing; it was made clear only the WIC record would be considered at an early stage of the proceeding; and that a proposed stipulation regarding such incorporation was never presented.

With regard to having time to present the various evidence, WIC submits that various factors relate to the ability to submit evidence. First and foremost is the availability of witnesses.[7] Second, the development of evidence was and continues to be an ongoing activity, and evidence such as the maps of Duck Slough presented in the Mussi et al., proceeding were not located until well into the process (CITE). Third, and by way of explanation only and not excuse, after Mr. O'Laughlin offered to make a first cut of a stipulation regarding the incorporation of evidence and testimony, he failed to follow through and did not ever contact counsel for WIC at any time.

Notwithstanding these issues, the SWRCB's assumed goal is to make a decision based on all relevant facts and testimony. As stated before herein, the draft CDO contemplates WIC and or its constituent landowners will return to the Board with additional evidence to support

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[7] Counsel for WIC represents that the witness Ken Lajoie decided after the other CDO hearings had begun that due to time constraints, he would not appear or testify in the Woods IC matter.

diversions in excess of 77.7 cfs. If we are already aware of such evidence and testimony in the other concurrent proceedings, there is no reason to not consider it at this time. The draft CDO characterizes that other evidence and testimony as being different in that the parties are not the same. However, that description is misleading. Both the WIC and Mussi et al. proceeding had all the exact same counsel involved, most of the exact same witnesses, and dealt with the exact same issues regarding Duck Slough and other interior island sloughs within the WIC service area.

Hence there would appear to be no reason why evidence or testimony or responses to cross examination in one should not be used in another. It would be a waste of SWRCB and party time and expense to have to later resubmit this very same evidence in another proceeding which seeks to justify additional diversions by WIC.

What makes this approach even more reasonable is that one of the hearing officers in the WIC case is no longer on the SWRCB Board, while the two hearing officers for Mussi et al. will be participating in making the decision in WIC. Those two hearing officers have heard all the Mussi et al. evidence and testimony, but for some reason the others are not supposed to use the same information. Regardless, the Board can and should take judicial notice of official, public materials within its control. Therefore, WIC requests the Board take judicial notice of LAJOIE, TWO NEW MAPS???

The draft CDO mischaracterizes the discussion in the record regarding WIC'c counsel arguments in opposition to the motion to strike portions of Mr. Neudeck's testimony. First, the draft Order (on page 59) appears to conclude that the WIC opposition to the evidentiary ruling regarding the Neudeck testimony was somehow untimely or improper. To the contrary, the hearing officers received argument from both sides after the last hearing date, and made their ruling via correspondence. There is nothing improper for WIC to object to this ruling in its closing brief, as that was the first opportunity to dispute the ruling after it was made, and was before the final ruling in this matter.

Second, although the hearing officers did indeed ask all parties to be prepared to discuss the evidentiary motions on July 2, 2010, those discussions did not occur, except for the one set of

questions by Board counsel to WIC counsel. The draft Order characterizes WIC counsel as being unable to articulate any other reason for opposing the motions to strike. To the contrary, the record shows that WIC counsel stated the Neudeck testimony was pertinent for the issue of the ground water/surface water connection, but did not limit its relevancy to only the legal argument regarding riparian status of lands. (RT 1268:19-1269:4). As is seen herein, the Neudeck testimony is not only relevant to the determination of riparian status due to the connection between ground water and surface water, but it is also very relevant to whether the old sloughs naturally filled with water given their location in relation to the surrounding surface streams.

OTHER CORRECTIONS TO DRAFT ORDER.

The draft Order on page 20 incorrectly states that Woods has admitted that it owns no property on which it itself is using water, and thus has no riparian rights itself. More correctly, Woods does not irrigate any of its own lands, but does own land at the point of diversion which appears to be riparian land.

The draft Order incorrectly concludes on page 49 that there is no evidence that Stewart et al's lands received water from Middle River. This is incorrect, as the WIC and MSS evidence clearly showed that the original slough at the location of the current WIC diversion point was not dammed at the time that the Gibbs survey was made in preparation for completing the levees around Middle Roberts Island. Thus if such slough (and others existed) there was certainly water being provided to the Stewart et al lands via the tides and high flows moving through the slough(s).

The draft Order incorrectly states on page 51, Footnote 16 that the Atwater Map was not submitted into evidence. As referenced hereinbefore, that is not correct. The Atwater Map is attached to Mr. Nomellini's testimony and is identified as WIC 8L. A full size version of the map which is more easily read was submitted in the Mussi et al proceedings.

The draft Order states on page 54 that Mr. Wee concluded Duck Slough had been filled in by 1913. More correctly, the cited statements were that a portion of Duck Slough at its intersection of Burns Cutoff had been filled in by that date; not the entire slough itself (RT

968:20-969:14).

Request for Judicial Notice.

Per the above references and arguments, WIC requests the Board take judicial notice of Mussi Exhibit No. 1 (Testimony of Kenneth R. Lajoie), Mussi Exhibit Nos. 30 and 40, and the Reporter's Transcripts dealing with testimony and cross-examination regarding these exhibits.

CONCLUSION

Pursuant to the above legal arguments, the Board has no authority and should not issue a cease and desist order against WIC. Pursuant to the factual presentations and discussions above, the vast quantity of evidence in support of WIC's asserted water rights and authority to divert other's waters rights precludes the issuance of any CDO and argues that any questions regarding such rights should be deferred until such time as WIC, SWRCB staff, and other interested parties have an opportunity to develop and review other information.

Dated: January 11, 2011

JOHN HERRICK, Attorney at Law

CONCLUSION

Pursuant to the above legal arguments, the Board has no authority and should not issue a cease and desist order against WIC. Pursuant to the factual presentations and discussions above, the vast quantity of evidence in support of WIC's asserted water rights and authority to divert other's waters rights precludes the issuance of any CDO and argues that any questions regarding such rights should be deferred until such time as WIC, SWRCB staff, and other interested parties have an opportunity to develop and review other information.

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