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BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of ORDER WR 2011 - XXXX Against Woods Irrigation Company	**COMMENTS ON DRAFT CEASE AND DESIST ORDER**

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I. Introduction

The Draft Cease and Desist Order against Woods Irrigation Company (Draft CDO) includes cursory and often contradictory analyses of evidence and avoids making important factual findings. The Draft CDO does not properly define the water rights of Woods Irrigation Company (WIC) or identify any other water right pursuant to which WIC appropriates water. The Draft CDO explains that in an enforcement proceeding, "it may not be necessary to define all of the parameters of a right." (Draft CDO, at 15.) That approach runs counter to State Water Resources Control Board (State Board) policy and long-standing principles of California water law.

The State Board initiated the action against WIC, along with actions against other Delta diverters, as part of its investigation into water use in the Delta and resolve existing uncertainties in the water rights asserted by in Delta water users. (Strategic Workplan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Strategic Workplan), at 80-83.) The State Board recognized identifying and vigorously prosecuting illegal Delta diversions was a matter of statewide concern. (*Id*; December 28, 2009 Draft CDO, at. 2.) In this matter, the State Board and its staff dedicated substantial amounts of time and effort to this end. It is unfortunate the Draft CDO does little to address the State Board's concern.

The Draft CDO concludes water rights are "likely" held or exist within WIC. However, those conclusions are made without regard for the law. As an example, the Draft CDO concludes that it is "likely" a pre-1914 water right of up to 77.7 cubic feet per second (cfs) exists within WIC.[1] The Draft CDO renders that conclusion without any evidence water was put to beneficial use prior to 1914 or that such use was diligently pursued. In fact, the Draft CDO cites no evidence to support sub-conclusions including the quantity of water diligently applied, or the season when water was

[1] In this Draft CDO, the State Board has simply concluded that because WIC was diverting water for a long period of time through some sort of diversion works, it must mean WIC has a water right. The State Board has incorrectly construed the intent to use water and the actual use of water as sufficient evidence to establish both a riparian right and a pre-1914 appropriative right. A riparian diverter, however, is only entitled to divert from the natural flow. (*Lux v. Haggin* (1886) 69 Cal. 255, 391("*Haggin*").) In contrast, a pre-1914 appropriator is only entitled to take water for non-riparian lands after riparian needs have been met. (*Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 252 ("*Rindge*").) In the San Joaquin River Basin, the type of water right determines whether the right holder is subject to limitations on when and how much water may be diverted. The limitations for riparian right holders are very different from those for pre-1914 appropriative right holders. Without determining what rights WIC and the landowners may have, the State Board cannot determine whether WIC or its landowners are subject to any limitations. Thus, the State Board has no way of knowing whether WIC or its landowners are violating any of those limitations and making unauthorized diversions.

applied. The Draft CDO concedes those deficiencies exist, and posits that direct evidence is not needed; "inferences" are acceptable. Given that approach departs from well-established principles of water law – which require water rights determinations to be supported by fact, not interference – it is of no surprise the Draft CDO cites nothing for support. The Draft CDO simply explains evidence is not needed because of "the difficulty in obtaining evidence from more than 100 years ago." (Draft CDO, at 32.)

If the failure to define WIC water rights was not enough, the Draft CDO's ordering paragraphs inexplicably delegates to the Deputy Director decision that should have been made in the Draft CDO. The Draft CDO tasks the Deputy Director with making final water rights determinations. This delegation oversteps the State Board's authority. Nothing in the State Board resolution delegating authority to the Deputy Director authorizes her to decide water rights. It also places with the Deputy Director a decision that should only be made after providing WIC, the landowner or water user at issue, and interested parties a fair hearing. Because the delegation lacks any required adjudicatory formalities, the delegation will likely lead to violations of due process.

For all of these reasons and others presented below, the State Board should not adopt the Draft CDO. The State Board should direct staff to re-examine the evidence and prepare for the State Board's consideration a draft order that includes a complete analysis of what water rights, if any, are held by WIC and identification of water rights, if any, of landowner and water users with WIC pursuant to which WIC appropriates water.

II. Legal Standard

The findings in the Draft CDO are not supported by sufficient analyses or conclusions. The findings of an administrative agency must include sufficient information to "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) This requirement "serves to conduce the administrative body to draw legally relevant sub-conclusions supportive or its ultimate decision" and prevent the agency from "randomly leap[ing] from evidence to conclusions." (*Id.*, at 516.) Not only do these requirements ensure findings are supported, but they "enable the reviewing court to trace and examine the agency's mode of analysis." (*Id.*) As explained below, the

Draft CDO does not provide this required analysis. Instead, the Draft CDO's evaluation of evidence is based on unlawful deference, inferences that evidence that is not in the record exists, and unexplained ignorance of other existing evidence.

III. The State Board Has The Authority To Define, And The Draft CDO Should Have Defined, WIC's Water Rights

The Draft CDO dedicates nine pages to the defense of the State Board's authority to determine whether diversions are made pursuant to valid pre-1914 appropriative and riparian rights. Not surprisingly, the Draft CDO concludes the State Board has the statutory authority to evaluate claims of pre-1914 and riparian rights to determine if water diverted pursuant to those rights amounts to actual or threatened unauthorized diversion or use of water. (Draft CDO, at 10-11.) Despite the Draft CDO's strong statement of authority, the Draft CDO does not act on its authority, failing to define the water rights held by WIC, or water rights held by water users or landowners with the WIC service area. (Draft CDO, at 30, fn. 11.) This failure results in the Draft CDO that falls short of satisfying the mandated requirement of the Strategic Workplan to identify and vigorously enforce water rights in the Delta, and that renders conclusions that are incomplete and legally deficient.

A. The Draft CDO Does Not Vigorously Defend Water Rights

State Board Resolution No. 2008-0056 approved the goals and objectives set forth in the Strategic Workplan and bound the State Board to undertake specific actions to meet these goals. The Strategic Workplan identified illegal water diversions and uncertain water supply as a major issue affecting the Delta:

> The number and magnitude of illegal diversions in the Bay-Delta watershed is unknown. However, it could be quite significant. In the past certain water diversions to Delta island properties had been characterized as taking place under riparian rights. Recently, however, the State Water Board found in Order WR 2004-0004, that some of these property owners lack a riparian right for their water diversions because their properties were not adjacent to Delta waterways. The San Joaquin County Assessor's records reveal that many parcels within Delta islands are not contiguous to Delta waterways, yet aerial photographs show the parcels are being cultivated and therefore are likely supplied with water diverted from Delta channels. While many of these diversions may posses valid pre-1914 appropriative water rights, the bases of

right must be investigated to make that determination.

(Strategic Workplan, at 82.) In order to create water reliability through certainty of supply and reduce illegal diversions, the Strategic Workplan requires the State Board to:

> [V]igorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits or licenses, and violations of the prohibition against the waste or unreasonable use of water in the Delta.

(Strategic Workplan, at 81.) This mandate is the apparent instigation of this proceeding. The original Draft CDO, issued December 28, 2009, stated the purpose for initiating the CDO was to "vigorously enforce water rights by preventing unauthorized diversion of water." (Original Draft CDO, at 2.)

The Draft CDO does not satisfy this mandate. The findings included in the Draft CDO do little to reduce the uncertainty of water rights in the Delta. If the State Board were to adopt the Draft CDO, left unanswered is the basic question presented by the CDO: what rights support WIC's diversions? The fact that this question remains unanswered underscores the Draft CDO's failure to provide certainty and take vigorous enforcement.

B. Without Defining WIC Water Rights, The Draft CDO Cannot Determine Which Diversions Are Unauthorized

Without first defining the water rights relied upon by WIC, the ability to determine whether WIC diversions are authorized is inherently compromised. As the State Board itself recognizes, defining water rights is a prerequisite to the determination of whether diversions are validly made or unauthorized and subject to enforcement:

> In cases where a diversion is not authorized by a water right permit or license, but the diverter claims to hold a riparian or pre-1914 appropriative right, ascertaining whether the water diverted has been appropriated in accordance with State law, as expressly authorized by Water Code section 1051, necessarily will entail evaluating and deciding whether the riparian or pre-1914 appropriative claim of right is valid. Similarly, taking enforcement action as authorized by Water Code section 1052 or 1831 necessarily will entail evaluating any riparian or pre-1914 appropriative claims of right advanced by a diverter. Otherwise, the mere assertion of a riparian or pre-1914 appropriative claim of right, without providing information to support such an assertion, would effectively thwart the Board's ability to exercise its

> enforcement authority, and to fulfill its statutory mandate to prevent illegal diversions.

(Draft CDO, at 10-11 [*citing* Water Code, § 1825].)

The Draft CDO does not define allegedly held by WIC, or even identify the water rights relied upon by WIC to supports its diversions. As the Draft CDO recognizes, without this step, the analysis and conclusions needed in the Draft CDO are "thwarted."

IV. The Draft CDO Concludes Water Rights Are "Likely" Without Conducting Legally Required Analyses

As noted above, the Draft CDO does not identify the water rights relied upon by WIC to support its diversions. The Draft CDO discloses that the standard to determine whether to take an enforcement action is "more limited" and "may not be based on the same amount or quality of evidence that would be required to substantiate a right." (Draft CDO, at 15.) Indeed, the State Board concedes it has not performed the necessary analyses to define WIC's water rights. (Id., at 4, 15, 21.) Despite this clear annunciation of limited purpose and asserted different standards, the Draft CDO finds that riparian and pre-1914 rights "likely" exist. (*Id.*, at 21-22.) This finding is unlawful. Although the Draft CDO should have performed a full water rights analysis, it did not. This limited analysis prohibits the Draft CDO from determining rights are "likely."

A. The Draft CDO's Determination Of "Likely" Pre-1914 Rights Based Upon Incomplete Analysis And Thus Is Unlawful

The Draft CDO does not adequately support its finding that pre-1914 water rights are "likely." First, the Draft CDO applies an incorrect burden of proof. It unlawfully assumes WIC has rights up to 77.7 cfs. Second, its evaluation of evidence is arbitrary and capricious. The Draft CDO (1) assumes facts that are not part of the evidentiary record, (2) applies evidence inconsistently, and (3) ignores evidence that does not support its analysis.

(1) The Draft CDO Improperly Applies The Burden Of Proof When Analyzing If WIC Appropriates Pursuant To Pre-1914 Water Rights

The Draft CDO improperly apply the burden of proof to WIC's claim of pre-1914 water rights. The Draft CDO correctly annunciates the burden of proof in its riparian rights analysis.

Specifically, it states that upon a showing by an entity supporting enforcement that insufficient evidence exists to support a water right, the burden of proving the right shifts to the party who claims a right. (Draft CDO, at 20, 25.) This is the correct standard and one that the Draft CDO should apply in its analysis of pre-1914 water rights. It does not.

Instead, the Draft CDO presumes WIC diversions up to 77.7 cfs are valid, requiring the MSS Parties to prove a negative. The MSS Parties combed extensive historic records and found no evidence to support intent to establish a pre-1914 water right or evidence demonstrating the diligent pursuit to put water to beneficial use. Notwithstanding, the Draft CDO assumes a pre-1914 water right was established. (Draft CDO, at 28 ["the burden does not rest on Woods to demonstrate it has a right to divert up to 77.7 cfs"].) That assumption is not consistent with the law. In the absence of evidence, an enforcement action is proper unless the landowner or water user can provide information to support the asserted right.

(2) The Evaluation Of Evidence To Determine Pre-1914 Water Rights Is Arbitrary And Capricious

(a) The Law Does Not Support The Draft CDO Approach To Assumes Facts Not In The Evidentiary Record And Contradicted By Record Evidence

The Draft CDO states that evidence of pre-1914 water rights must be evaluated in the light most favorable to the party asserting the right due to the difficulty in providing historical evidence.[2] (Draft CDO, at 29-30.) The Draft CDO goes beyond deference and assumes facts not part of the evidentiary record. The Draft CDO cites Order WR 95-10 to support the assumption of fact approach. However, the approach in Order 95-10 is readily distinguished from the approach taken in the Draft CDO.

In Order 95-10, California American Water Company (Cal-Am) presented: (1) evidence of an intent to establish a pre-1914 water right, including deeds, notices of appropriation, (2) direct

[2] The legal basis to provide deference is not well established, as the Draft CDO only cites one case in support of this principle. In addition, even if such a principle exists, it should not be provided liberally. This type of deference has not historically been a consideration in the evaluation of pre-1914 water rights and if applied as broadly as suggested by the Draft CDO, it would fundamentally change the evaluation of pre-1914 water rights, since the proof of any pre-1914 water right at this date would require century-old historical evidence.

evidence of actual water usage prior to 1913, (3) evidence demonstrating the existence of a physical water plant from 1880, and dollar volumes of water sales prior to 1914. Even after considering this evidence in the light most favorable to Cal-Am, the State Board determined this evidence was insufficient to establish a pre-1914 right because it did not specify the specific amount of water that was beneficially and continuously used and contrary evidence indicated the claimed amount of water could not have been diverted. (Order 95-10, at 20.)

In the present matter, WIC produced significantly less evidence than that provided by Cal-Am in 1995. WIC did not produce any direct evidence of appropriation of water prior to 1914, or evidence of a water system used for irrigation purposes. In fact, contrary evidence was entered that indicated the WIC system was a drainage system used to reclaim land. In order to conclude pre-1914 water rights were "likely", the Draft CDO went beyond considering all evidence in the light most favorable to WIC – instead, it assumed evidence not in the record and ignored evidence that suggested WIC was not delivering water prior to 1914.

(b) The Draft CDO's Evaluation Of Pre-1914 Water Right Requirements Improperly Assumes Facts Not In Evidence And Ignores Evidence In The Record Without Explanation

The Draft CDO recognizes that establishment of a pre-1914 water right requires proof of three elements: (1) intent to appropriate water prior to 1914; (2) actual diversion of water for beneficial use; and (3) diligence in putting water to beneficial use. (Draft CDO, at 27.) The Draft CDO concludes WIC or landowners have satisfied each element and pre-1914 water rights up to 77.7 cfs "likely" exist within WIC. This conclusion is not supportable. As explained in more detail in Section IV, the State Board has not performed adequate analysis to determine if a pre-1914 water right exists. In addition, the analysis it did perform was arbitrary and capricious – it assumes evidence not in the record, ignores evidence in the record without explanation and does not provide sufficient explanation connecting the evidence to its conclusions.

(i) There Is No Evidence Of Actual Appropriation Of Water Prior To 1914

In the present matter, the Draft CDO concedes there is no direct evidence that WIC actually diverted water before 1914, and therefore a pre-1914 water right cannot be established based upon

pre-1914 water use. (Draft CDO, at 32.) The Draft CDO discusses two articles from the late 1800s referencing plans to build an irrigation system and assumes this system was constructed. (*Id.*, at 31.) The Draft CDO also evaluates maps and agreements that reference a water control system around 1910 and assumes this system was delivering appropriated water. This assumption is not supported by evidence and is particularly egregious because the Draft CDO fails to consider information in the record that indicates the system was a gravity system in place to provide drainage from a high water table and tidal influences and was incapable of providing irrigation to much of the WIC service area. (Exhibit MSS R-14, exs. 5, 6; WIC 6O, at 3; WIC 4E; WIC 4G; Reporters Transcript 991:4-13.) In the end, the State Board concludes there is no direct evidence of diversion prior to 1914, but that it is reasonable to "infer" WIC delivered water prior to 1914. (*Id.* ["it is reasonable to infer that irrigating a large part of the intended service area required a large part of 77.7 cfs."].) This kind of inference is not supported by evidence in the record, is arbitrary and capricious, and cannot be the basis upon which the State Board determines a pre-1914 water right is "likely."

(ii) The Evidence Does Not Support A Finding That WIC Intended To Appropriate Water Prior To 1914

The Draft CDO concludes that WIC intended to appropriate water prior to 1914 based on the 1911 Agreements and the 1909 Articles of Incorporation. None of these documents is evidence of such intent. The Draft CDO describes the 1911 Agreements as:

> [E]vidence of a plan to divert up to a combined 77.7 cfs of irrigation water on the original Woods service area's lands, even after its subdivision into smaller tracts, as they anticipate that the agreements will run with the land.

(Draft CDO, at 31.) As described by the Draft CDO, this evidence does not indicate WIC intended to appropriate water. Evidence of intent to divert water tied to the land cannot be evidence of intent to divert water pursuant to an appropriative right.[3]

The Draft CDO also points to the 1909 Articles of Incorporation as evidence that WIC intended to appropriate water. However, the Draft CDO concedes this intent is limited by rights

[3] As noted in detail below, pp. 11-12, the 1911 Agreements cannot simultaneously stand for intent to preserve a riparian right and establish a pre-1914 right.

held by WIC landowners in 1909. (Draft CDO, at 31.) Therefore, if all landowners and/or water users were diverting pursuant to their own rights in 1909, the Articles would not evidence any intent on the part of WIC. Further, the language cited by the Draft CDO indicates the 1909 Articles intended to acquire water and water rights only for the purpose of supplying water to stockholders. The Draft CDO does not provide an explanation of how this evidence supports the conclusion that WIC intended to establish a pre-1914 right of its own.

(iii) There Is No Evidence In The Record That Supports The Conclusion That WIC Was Diligent In Putting Water To Beneficial Use

Even if one were to conclude an intent to appropriate water existed prior to 1914, there must also be evidence that WIC was diligent in putting water to beneficial use. (*Inyo Consolidated Water Co. v. Jess* (1912) 161 Cal. 516, 520.) The Draft CDO's conclusion that WIC was diligent in putting 77.7 cfs of water to beneficial use is not supported. In this regard, the Draft CDO considers only one piece of circumstantial evidence – the complaint in the 1957 action to quiet title. In this complaint, WIC stated it had been delivering water as envisioned by the 1911 Agreements since the Agreements became effective. (Draft CDO, at 32.) Reliance on the 1957 complaint is not appropriate for a number of reasons. First, the complaint includes inconsistent accounts of WIC water deliveries; it states that WIC had been delivering water since 1911 as envisioned by the 1911 Agreements, yet concedes certain lands within WIC, which were identified in the 1911 Agreements, were not capable of being irrigated. (Draft CDO, at 32.) The State Board does not explain why it dismisses the statements limiting WIC diversions and relies only upon those contending deliveries were made as set forth in the Agreements. Second, the statements were made to further the interests of WIC, were not subject to cross examination, and not made under penalty of perjury. Finally, the statements were general and not supported by any corroborating facts or evidence.

Further, in relying exclusively on the 1957 complaint, the Draft CDO ignores other evidence in the record without explanation. The Draft CDO does not address the fact that a year after the quiet title action a WIC representative stated WIC did not have pre-1914 water rights. (*Woods Irrigation Company v. Department of Employment* (1958) 50 Cal.2d 174.) This statement was subject to cross examination, made under oath, and against the interest of the declarant and

therefore should have been given more weight – not less – than the statements made in the 1957 quiet title complaint.

In addition, the Draft CDO did not consider the testimony of Mr. Stretars, the prosecution team witness, who stated that the first year in which there was evidence that WIC diverted 77.7 cfs was in 1964. (Reporters Transcript, at 123:11-19.)

In the end, the Draft CDO acknowledges that that the record contains no direct evidence that WIC was diligent in putting water to beneficial use – stating the 1957 complaint does not "demonstrate an exact timeframe for development of irrigation within the Woods service area" – but does not explain how it overcomes this lack of evidence to conclude that irrigation was expanded as envisioned by the 1911 Agreements. For all of these reasons, the Draft CDO lacks a legally defendable conclusion that WIC diversions up to 77.7 are supported, even in part, by a pre-1914 water right.

B. The Draft CDO's Determination Of "Likely" Riparian Rights Is Unlawful

The Draft CDO properly sets forth the rules which must be satisfied in order to preserve a riparian right in a severance. (Draft CDO, at 22-27.) When land is severed from contiguity with a water course, the non-contiguous parcel loses its riparian right, absent affirmative proof of intent to the contrary. (*Id.*, at p. 23.) In section 4.2.3.1, the Draft CDO finds that "Parcel 2" appears to have maintained riparian rights because "the irrigation contracts were in place, and the contracts were intended as a lien upon all the lands after subdivision[.]" (Draft CDO at 22.) In support of this conclusion, the State Board does not cite any case law, but only cites its own previous decision in Order WR 2004-0004 (*Phelps*). (Draft CDO, at 19, 20.) The *Phelps* decision does not, in fact, support the proposition that a contract to maintain irrigation service is evidence of intent to preserve a riparian right and such a proposition is not otherwise supported.

(1) A Contract to Furnish Water is Not Sufficient to Demonstrate an Intent to Maintain Riparian Rights

The water right, whether it be riparian or appropriative or held by the landowner or the party furnishing the water, is in no way evidenced by the act of creating a contractual right to receive

water, nor by making the contractual right appurtenant to the land. (*See Stanislaus Water Co. v. Bachman* (1908) 152 Cal. 716, 723 ("*Stanislaus*"); *In re Thomas' Estate* (1905) 147 Cal. 236.) Both riparian and appropriative rights result from contracts to furnish water and may be appurtenant to the lands upon which the water is used. (*See Title Insurance & Trust Co. v. Miller & Lux* (1920) 183 Cal. 71.)

Contracts to furnish water are merely agreements to sell and deliver water. (*Stanislaus*, p. 722-723.) "Such an agreement confers a right to receive water upon the terms agreed on, and this is no doubt a right in real property . . . but it does not necessarily follow that the instrument by which it is conferred constitutes a present grant or transfer." (*Id.*, at 723.) Additionally, the terms of the contract determine whether a contract to furnish water becomes appurtenant to the land on which the water is to be used. (*Copeland v. Fairview Land & Water Co.* (1913) 165 Cal. 148.) When an agreement to furnish water includes a provision that the water will only be used on the lands of the parties to the agreement, then the right to receive water pursuant to the contract becomes a covenant running with the land. (*Fresno Canal & Irrigation Co. v. Dunbar* (1889) 80 Cal. 530.)

Accordingly, the 1911 Agreements are contracts that run with the land within WIC's service area and, to the extent a water right(s) exists, they create a real property right to receive water on those lands. (*See Stanislaus*, pp. 722-723.) The mere existence of such contractors before subdivision of the lands and their appurtenance to the lands after subdivision is not, per se, evidence of intent to preserve a riparian right.

(2) The 1911 Agreements Do Not Manifest An Intent To Preserve Riparian Rights For The Severed Parcels

(a) The 1911 Agreements Cannot Be Evidence Of Intent To Maintain Riparian Rights And Intent To Create Pre-1914 Appropriative Rights

The Draft CDO finds the 1911 Agreements demonstrate an intent to preserve the riparian rights of the landowners. (Draft CDO, at 22.) The Draft CDO also finds the 1911 Agreements are sufficient to demonstrate WIC's intent to create a pre-1914 appropriative right. (Draft CDO, at 31.) The intent to preserve a riparian right upon severance and the intent to create and develop a pre-1914 appropriative right, however, are two completely separate and distinct, mutually exclusive

concepts, which entail much more than the intent to use water and the actual use of water. The 1911 Agreements cannot be evidence of both of the above mentioned intents.

In Order WR 99-001, the State Board asserted that intent to preserve riparian rights is manifested when "evidence indicates that the parties to the conveyance intended to retain the riparian rights attached to the severed parcel." (Order WR 99-001, at 4.) To make that showing, one must identify that the right to be retained is a riparian right. In contrast, the intent necessary for creating a pre-1914 appropriative right is the intent to apply water to beneficial use on lands that are not riparian. (*Simons v. Inyo Cerro Gordo Mining & Power Co.* (1920) 48 Cal.App. 524, 536-537.) Thus, the 1911 Agreements cannot serve as the intent to both maintain riparian rights and establish pre-1914 appropriative rights.

Additionally, in WIC's case, the same water cannot be used as evidence of exercising both a riparian and a pre-1914 appropriative right. (Cal. Water Code § 1201, 1202.) A riparian diverter is only entitled to divert from the natural flow. (*Haggin*, at 391.) In contrast, a pre-1914 appropriator is only entitled to take water for non-riparian lands after riparian needs have been met. (*Rindge*, at 252.) Thus, for example, if WIC diverts 77.7 cfs to lands which are riparian, the water diverted to those riparian lands cannot be calculated into the amount appropriated to support the establishment of WIC's pre-1914 right. So, any pre-1914 appropriative right WIC could claim would be less than 77.7 cfs because some of that 77.7 cfs diverted is riparian water.

The Draft CDO properly analyzes the circumstances under which a landowner may possess both a riparian right and a pre-1914 appropriative right to use water on the same land (Draft CDO, at 34-37.) However the Draft CDO fails to apply this analysis properly The circumstances under which both riparian and pre-1914 rights attach to lands are rare and do not apply here, per evidence presented by WIC. (Id.; *see Rindge v. Crags Land Co.* (1922) 56 Cal. App. 247.) First, WIC did not acquire an appropriative right on the lands within in its service area while those lands were part of the public domain and before riparian rights attached. (*See Rindge*, at 252; *Borror*, at 774.) Second, WIC did not acquire a pre-1914 appropriative right to provide water in a manner that a riparian right could not provide. (*See Rindge*, at 253.)

If the 1911 Agreements demonstrate intent to preserve the riparian rights of the landowners

within WIC's service area, then WIC must demonstrate intent to develop a pre-1914 appropriative right **to provide water that the preserved riparian rights within its service area could not otherwise provide**. (*Id.*) WIC, however, provided no evidence that it built storage, imported foreign water, or delivered appropriated water. Absent such evidence, WIC has not shown how the 1911 Agreements reflect an intent to preserve riparian rights.

(b) The 1911 Agreements Cannot Be Read To Manifest An Intent To Preserve The Riparian Rights Of The Parcel 2 Because The Terms, Provisions, Conditions, Factors And Language Contained In The 1911 Agreements Are Contrary To, Incompatible With, And Not Synonymous With An Intent To Preserve The Riparian Rights.

None of the documents submitted into evidence support an express intent to preserve a riparian right. None of the deeds that resulted in either the severance of Parcel 2, or the 1911 Agreements make any reference to a reservation of a riparian right. In fact, the word "riparian" does not appear in the 1911 deed, (*see* Exhibits Dunkel-3F and Dunkel-3G), the 1911 Agreements, (Exhibits WIC-6O and WIC-6), the 1909 Articles of Incorporation, (WIC Exhibit PT-5, at 28-37), the 1910 Bylaws of WIC, (Exhibit WIC-11A), 1957 Complaint to Quiet Title to Corporate Stock and for Declaratory Relief, (Exhibit WIC-4G), nor in any of the other documents submitted into evidence to support the intent. Instead, the 1911 Agreements specifically refer to the landowners as "consumers," which is legally defined as those who buy goods or services. (Exhibits WIC-6O and WIC-6P); Black's Law Dictionary (8th ed. 2004).)

Most landowners at that time knew the hazards of dividing and subdividing property and the possibility that such divisions could result in the severance of riparian rights. (Exhibit Mussi-3J, at 319.) The fact that the parties here made absolutely no reference to riparian rights at all in any of the relevant documents, but instead established a contractual scheme, is in no way synonymous with an understanding of, or an intention to preserve, riparian rights.

(i) <u>The Water Rate Is Quantified And Limited To 77.7 cfs</u>

The 1911 Agreements limit the amount of water to be delivered to all of the subject lands to 77.7 cfs. (Exhibits WIC-6O and WIC-6.) Such express quantification does not support an intent to maintain riparian rights, because riparian rights are not expressed as mathematical certainties nor

are they defined in fixed quantities. (*Prather v. Hoberg* (1944) 24 Cal.2d 549, 560 ("*Prather*"), citing *Pabst v. Finmand* (1922) 190 Cal. 124, 129 ("*Pabst*").)

In *Phelps*, the State Board attempted to avoid the plain application of the law by concluding that in limiting the water in the Wilhoit Douglass Tract to 77.7 cfs, the 1911 Agreements did not reduce the landowners' water right to a mathematical certainty, but instead the 77.7 cfs was an expression of the physical capacity of WIC's canal. (Order WR 2004-0004, at 28.) But, even WIC disagrees with that statement. Mr. Christopher Neudeck testified that the 77.7 cfs was not a limit to the size of WIC's facilities, but rather it was a specifically calculated number equal to one (1) cfs per 100 acres, a standard practice during that time for irrigation. (WIC RT, at 520, 525; Exhibit WIC-4, at 4.) By quantifying the amount of water, the landowners agreed to limit their water to one (1) cfs per 100 acres, regardless of the amount of water the property needs or the size of any aspect of the diversion and conveyance facilities.

Further, in *Phelps*, the State Board stated that with the exception of the physical capacity limits, there was nothing further in the Agreements that would otherwise limit the riparian rights. The State Board's analysis in *Phelps* was improper and must be distinguished here due to new information in the record. Thus, the 1911 Agreements are contrary to the spirit and definition of riparian rights and it would be unreasonable to conclude the Agreements were used as a vehicle for express intent to maintain riparian rights.

(ii) The Landowners Have No Rights In The Water

The 1911 Agreements state the landowners have no rights in the water, which is incompatible with the notion that WIC is delivering water pursuant to riparian rights held by landowners. The language on page two of the 1911 Agreement to Furnish Water from WIC to Jessie Lee Wilhoit and Mary L. Douglass and on page three of the 1911 Contract to Furnish Water from WIC to E.W.S. Woods is contrary to preserving a riparian right because the holder of the water right and the water right being protected in the Agreements is that allegedly held by WIC, not that of the landowners' riparian rights. These paragraphs specifically states:

> It is understood and agreed between the parties hereto that this contract is not intended to and does not create or convey any lien, estate, easement, or

> servitude, legal or equitable, in any manner upon or in the canal or ditch of [Woods Irrigation Company], or in or to the water flowing therein or which may hereafter flow therein, nor does this contract create any equitable covenant encumbering the said canals, and disposition thereof by [Woods Irrigation Company].

(Exhibits WIC-6O and WIC-6P.)

By signing these Agreements, the landowners acknowledged they obtain no lien, estate, easement, or servitude in or to the water flowing in WIC's canal. According to Black's Law Dictionary, lien, easement, and servitude are all different forms of a legal right or interest that one party has in real property owned by another party. (Black's Law Dictionary (8th ed. 2004).) As the 1911 Agreements do not create or convey any lien, estate, easement, and servitude, the 1911 Agreements do not create or convey to one party a legal right or interest in the real property claimed by the other party.

This restrictive language is contradictory to the substance and objective of riparian rights such that no riparian proprietor would have allowed his right to be described in this fashion nor would he have employed it as the vehicle for expressing his intention to maintain their riparian rights. If WIC was delivering riparian water to the landowners, there would be no need for this type of language between the landowners and WIC.

Although in *Phelps* the State Board felt this language did not preclude the preservation of a riparian right, and that it was silent as to the basis or ownership of any water right to the water, the new evidence entered by WIC contradicts the State Board's prior determination. WIC has specifically alleged that it owns the canals, ditches and water therein. (Exhibits WIC-6O, at 3 and WIC-6P, at 2.) WIC further alleged the language in the 1911 Agreements is not silent as to the basis of ownership, but rather, the 1911 Agreements clearly provide that WIC owns the canals and ditches, and the landowners do not and will not obtain a legal right or interest in the canals and ditches, nor in the water therein or the water which may flow therein.

(iii) The Expiration Of The 1911 Agreements And WIC After 50 Years Is Evidence That Contradicts The Claim That WIC Or Its Landowners Intended To Preserve Riparian Rights

Riparian rights are part and parcel with the land, not subject to prescription or abandonment and, so long as the parcel remains contiguous to a watercourse, is the smallest tract held under one chain of title, and is located within the watershed of the watercourse to which it is contiguous, (*Rancho Santa Margarita*, at 529), the riparian right is perpetual. (*Haggin*, at 391; *Rancho Santa Margarita*, at 529; *Fresno Canal & Irrigation Co. v. People's Ditch* (1917) 174 Cal. 441, 450; *Mt. Shasta Power Corpn. v. McArthur* (1930) 109 Cal. App. 171, 192 ("*Mt. Shasta Power*").) The 1911 Agreements, however, are not perpetual, nor is WIC. They end. They each expire on December 14, 1959, 50 years after the incorporation of WIC. (Exhibits WIC-6O, at 3; WIC-6P, at 2; PT-5, at 29.) These facts further demonstrate the 1911 Agreements cannot reflect an intent to preserve riparian rights.

At the time the parties entered into the 1911 Agreements, they knew the corporation was temporary and would cease to exist after 50 years because in 1909, two years before the 1911 Agreements were signed, they signed the Articles of Incorporation for WIC, which certified: "the term for which said Corporation is to exist is fifty years from and after the date of its incorporation." (Exhibit PT-5, at 29.) Additionally, the 1911 Agreements expressly state that "[t]he said water shall be so furnished by the first party to the second party from the 29th day of September, 1911, until the 14th day of December, 1959, and thereafter in perpetuity." (Exhibits WIC-6O, at 3; WIC-6P, at 2.) While the last clause states "thereafter in perpetuity," this promise is illusory and is so insubstantial as to impose no obligation because, pursuant to WIC's terms, WIC expires exactly 50 years after its incorporation. (Exhibit PT-5, at 29.) In fact, discretionary, intervening action was required to extend the existence of the corporation. (Exhibit PT-5 at 34-37.)

Furthermore, the 1911 Agreements contain no reservation of rights by the landowners for legal access to Middle River to exercise individual riparian rights in the event that WIC expired as contemplated. Neither the 1911 Agreements nor WIC were expected to furnish water after December 14, 1959 – absent some intervening discretionary action in which the existence of the

corporation was extended. It is unreasonable to think that a party intending to maintain its riparian rights would have used an agreement that expired as the vehicle for expressing its intention. The very idea of expiration is so contrary to the value, meaning and purpose of riparian rights that no reasonable person would have permitted the possibility of expiration to be a part of any effort to maintain riparian rights at the time of severance. The fact that WIC and the parties to the 1911 Agreements expressly contemplated their expiration in the absence of discretionary, future action demonstrates that the parties did not intend the 1911 Agreements to be a vehicle for expressing the intention to maintain the riparian rights of the landowners.

(iv) The Fact That WIC's Shareholders Must Pay For Water Further Demonstrates The 1911 Agreements Were Not Intended To Preserve Riparian Rights

WIC's shareholders are required to pay for the water received from WIC, which is contrary to the exercise of riparian rights. Riparian rights, which are part and parcel of the soil itself, are "are separate and distinct from . . . contractual rights to water." (*Mt. Shasta Power*, at 191, [citing *San Bernardino v. Riverside* (1921) 186 Cal. 7, 13].) The 1911 Agreements, however, clearly state water must be paid for:

> For the water herein agreed to be furnished, the consumer in consideration of the promises, hereby promised, promises and covenants to pay in gold coin of the United States to the Company or its agents as may hereafter be provided at its or their office as follows[.]

(Exhibits WIC-6O, at 3; WIC-6P, at 2.)

In addition to being required to pay for water, the parties to the 1911 Agreements are subject to cessations in delivery in the event that they fail to pay for water. (Exhibit MSS-5, at 2.) If the shareholders truly possessed riparian rights and intended to pursue those rights by executing the 1911 Agreements, paying for water would be unnecessary, and they never would have agreed to have deliveries cease upon failure to pay the water bill. (*Mt. Shasta Power*, at 191.)

This payment of gold coin for water furnished pursuant to the 1911 Agreements is in addition to, and separate from, the total costs for maintenance and replacement of the canal and structures, the delivery of water, to remove seepage waters, of the operation of the WIC's affairs, of litigation, and of all other expenses incidental to the operation of the canal system. (Exhibits WIC-

6O, at 3; WIC-6P, at 3.) While it is reasonable to expect riparian landowners to pay for the costs associated with the existence, operation, and maintenance of the delivery system, it is not reasonable to expect them to pay for the water itself, as that water is theirs by nature of the riparian characteristic of their property.

The provisions of the 1911 Agreements requiring landowners to pay for water are contrary to the essence of a riparian right. No landowner intending to create a document memorializing his intention to retain riparian rights would have chosen to include a restriction to pay for water which he already owns.

(v) Shareholder Restrictions On Purpose Of Use, Time Of Use, Method Of Use And Restrictions To An Amount Of Water Run Counter To An Intent To Preserve Riparian Rights

The 1911 Agreements cannot be construed as manifesting an intent to preserve the landowners' riparian rights at the time of severance because the purpose of use, time of use (seasonal), method of use and quantity of water used are not only limited, but are also controlled by WIC, and no landowner that intended to preserve his riparian rights at the time of severance would have willingly consented to such excessive restrictions. Riparian rights are only limited to reasonable beneficial use, and the amount of water available. (*Pabst*, at 129.) So long as water is available and being put to a reasonable beneficial use, riparian proprietors may divert water without being restricted by the purpose of use, time of use (seasonal), method of use or quantity of water used. (*Haggin*, at 390-391; *People v. Shirokow* (1980) 26 Cal.3d 301, 307 ("*Shirokow*").)

First, riparian owners are not limited by purpose of use so long as it is beneficial. (*Pabst*, at 129.) Riparian proprietors are only limited to reasonable beneficial uses and may apply water for any of the following: domestic use, irrigation, municipal use, industrial use, preservation and enhancement of fish and wildlife, recreational use, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan. (Cal. Water Code, § 1257.) The 1911 Agreements, however, specifically limit the shareholders' beneficial use of the water to irrigation only. The shareholders do not have the option of exercising a right to apply water pursuant to any other beneficial use.

Next, riparian owners' use is not limited by the season or time of year. Riparian proprietors may use riparian water year round, so long as water is flowing past their lands. (*See Enterprise Canal*, at 441.) According to the WIC's rules and regulations, however, Rule 11 limits the shareholders seasonal deliveries of "four irrigations per season." (Exhibit MSS-5, at 3-4.)

Additionally, riparian proprietors are not limited by any particular method or means of use. Riparian owners may take their share of the waters of the stream by any means available, so long as they do not injure other riparian users. (*Haggin*, at 391.) The 1911 Agreements, however, do not permit the shareholders to take water by any means available, but in fact restrict them to receiving water in rotation if WIC so elects. (Exhibits WIC-6O, at 6; WIC-6P, at 4.) Additionally, WIC has the right to determine whether the use of water is neglectful and if it finds a shareholder's use to be so, WIC can direct that shareholder's method of irrigation. Such determination of whether a riparian proprietor's use of water is reasonable is a question for the trier of facts in the courts of law. (*Prather*, at 560.)

Finally, riparian proprietors are not limited to a specific quantity of water. (*Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California* (1930) 209 Cal. 206, 220.) Riparian owners are not limited to specific quantities of water, but instead have a "common ownership with other riparians on the stream [to] a correlative share of the natural flow," (*Rancho Santa Margarita*, at 560-562; see also *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743; *Pabst*, at 129), fixing a riparian proprietor's share is contrary to the nature of a riparian right. The 1911 Agreements, however, give WIC the power to fix the amount of water shareholders receive if WIC feels water use is neglectful. (Exhibits WIC-6O, at 5; WIC-6P, at 4.) Thus, none of the restrictions above are consistent with the nature and practice of riparian rights. Riparian rights may be exercised as needed so long as put to a reasonable and beneficial use. (*Pabst*, at 129; *Haggin*, at 390-391; *Shirokow*, at 307.) Riparian rights are not restricted by the purpose of use, method of use, method of delivery, amount of water, nor by the cost of water. Including such limitations in the 1911 Agreements is contrary to any intent to preserve the riparian rights of the landowners.

(vi) The Landowners' Agreement To Prorate Water In The Event Of Shortage Is Not Evidence Of Intent To Preserve Riparian Rights

According to the 1911 Agreements, in the event of a shortage, water will be prorated among the landowners in WIC's service area on a per acre basis. (Exhibits WIC-6O, at 6; WIC-6P, at 5.) This provision is incompatible with riparian rights because in times of shortage, riparian water is adjusted according to the landowners' needs based upon their reasonable beneficial use of the water, (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 695; *Pabst*, at 129), and not divided equally based upon acreage. Again, no landowner intending to create a document to preserve his riparian right at the time of severance would permit the document to include a provision dividing the riparian rights upon acreage, and not upon reasonable and beneficial use.

(vii) The 1911 Agreements' Restrictions On Conveyance Of Water Rights Are Inconsistent With The Intent To Preserve Riparian Rights

Riparian rights may be severed by grant, condemnation or prescription from the land to which they are part and parcel. (*Gould v. Stafford* (1891) 91 Cal. 146, 155; *Haggin*, at 392; *Forest Lakes Mut. Water Co. v. Santa Cruz Land Title Co.* (1929) 98 Cal.App. 489, 495.) The 1911 Agreements, however directly contradict this riparian attribute because they state that "[t]he Consumer shall not sell or dispose of any of the water, furnished under this contract, to any other land or person or allow the water to flow off his land upon the land of others." (Exhibit WIC-6O, at 6; WIC-6P, at 4-5.) No landowner intending to create a document to preserve his riparian right would permit the document to include a provision that discusses conveyance – a concept not applicable and foreign to his riparian right, yet this is what WIC is asking the State Board to conclude.

V. The Delegation Of Authority To Deputy Director Is Unlawful And Unclear

A. The Draft CDO Delegates Too Much To The Deputy Director

The Draft CDO should have evaluated, determined, and defined the water rights of WIC. To the extent WIC is appropriating water pursuant to rights held by landowners or water users within the WIC service area, the Draft CDO should have identified those rights. However, the Draft CDO failed to take these actions. Instead, the State Board has directed the Deputy Director to receive

information from WIC and its landowners/water users and make water rights determinations. This delegation oversteps the State Board's delegation authority and will likely violate the due process rights of landowner/water user and other stakeholders, including the MSS parties.

(1) The Draft CDO Goes Beyond The State Board Delegation Authority

The Draft CDO delegates the authority to make water rights decisions to the Deputy Director. (Draft CDO, at 60-61.) Specifically, the ordering paragraphs require the Deputy Director to receive information from WIC, its landowners, and its water users, evaluate the information, and determine if this information is sufficient to support WIC's appropriations. (*Id.*) This delegation goes beyond the State Board's authority. Resolution No. 2007-0057 does not provide the State Board with the authority to delegate the power to determine the existence and scope of water rights to the Deputy Director. It allows the State Board to delegate its authority to record water rights determination made by the State Board and make decisions regarding temporary water rights, but does not provide the Deputy Director with the authority to make binding determinations defining water rights. (Resolution No. 2007-0057.)

(2) The Unlawful Delegation Will Likely Violate Due Process Rights

The ordering paragraphs allow the Deputy Director to make water rights determinations without requiring any specific process. (Draft CDO, at 60-61.) Such determinations, if made without affording the landowners, water users, and/or stakeholders a fair hearing would contravene due process protections.

B. <u>Delegation To The Deputy Director Is Unclear</u>

The Draft CDO's first ordering paragraph provides the Deputy Director with the following mandate:

> <u>For rights not recognized in this Order</u>, the basis of right must be substantiated by different information than was provided during this hearing . . . If the information provided does not establish a basis of right acceptable to the Deputy Director for Water Rights, Woods shall not deliver water to that property.

(Draft CDO, at 60-61 [emphasis added].)

This mandate is unclear because it assumes the Draft CDO "recognizes" water rights, which

is inconsistent with the State Board's position elsewhere in the Draft CDO. (Draft CDO, at 21.) This lack of clarity may result in this provision being read two different ways. First, if this provision intends to reference rights that are "likely", the Deputy Director must receive acceptable information only for diversions over 77.7 cfs or outside the WIC service area. Aternatively, if the State Board is taken at its word, the Draft CDO does not recognize any rights and before any diversions are made the Deputy Director must receive acceptable information to substantiate the right to divert water. The State Board should clarify this provision and the resulting duties of the Deputy Director.

VI. Conclusion

The Draft CDO cannot be adopted as it is currently drafted. The Draft CDO includes unsupported analyses and unlawful determinations, centered on the Draft CDO's failure to answer the single question at issue in this enforcement action: what rights support WIC's appropriation of water? The MSS Parties request the State Board direct staff to re-examine the evidence and prepare for the State Board's consideration a revised draft order that includes a complete analysis of what water rights, if any, are held by WIC. If the State Board determines WIC holds no water rights of its own, the revised order should limit WIC to delivery of water based on water rights identified and allegedly held by landowners or water users within the WIC serviced area.

Dated: January 11, 2011

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PROOF OF SERVICE

I, Jolanthe V. Onishi, declare as follows:

I am over 18 years of age and not a party to the within action; my business address is 400 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

On January 11, 2011, I served a copy of the foregoing document entitled: **COMMENTS ON DRAFT CEASE AND DESIST ORDER** on the following interested parties in the above-referenced case number to the following:

See attached Service List

[X] **BY MAIL**
By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited for first class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business as indicated above.

[X] **ELECTRONIC MAIL**
I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Diepenbrock Harrison, originating from the undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail address(es) indicated above."

[ ] **BY FACSIMILE** at _____a.m./p.m. to the fax number(s) listed above.
The facsimile machine I used complied with California Rules of Court, rule 2003 and no error was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.
[ ] A true and correct copy was also forwarded by regular U.S. Mail by following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited for first-class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business.

[ ] **BY OVERNIGHT DELIVERY**
[ ] Federal Express [ ] Golden State Overnight
Depositing copies of the above documents in a box or other facility regularly maintained by Federal Express, or Golden State Overnight, in an envelope or package designated by Federal Express or Golden State Overnight with delivery fees paid or provided for.

[ ] **PERSONAL SERVICE**
[ ] via process server [ ] via hand by:

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 11, 2011at Sacramento, California.

Jolanthe V. Onishi

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