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8 GARY AND JULIE ABATE  
9 DINO AND NICOLE DEL CARLO  
GEORGE AND PAM VIERRA  
10 MARCHINI LAND CO. PTP  
RENZO AND EVELYN MENCONI  
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12  
13 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

14  
15 IN THE MATTER OF THE PETITIONS  
FOR RECONSIDERATION OF ORDER  
16 WR 2011-0005

**LANDOWNERS' PETITION FOR  
RECONSIDERATION OF OCTOBER 15,  
2014 RULING OF STATE WATER  
RESOURCES CONTROL BOARD**

**Water Code, § 1122  
Code of Regulations, Title 23, §§ 768, 769**

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26 R.D.C. Farms, Inc., Ronald & Janet Del Caro, Eddie Vierra Farms, LLC, Dianne E.  
27 Young, and Schmidt Highway 4 Ranch, LLC, Gary and Julie Abate, Dino and Nicole del Carlo,  
28 George and Pam Vierra, Marchini Land Co., PTP, and Renzo and Evelyn Menconi (collectively,

1 “Landowners”) petition the State Water Resources Control Board (“Board”) to reconsider the  
2 Board’s October 15, 2014 ruling, and pray for the relief described below. This Request for  
3 Reconsideration is based on this request, the accompanying Memorandum of Points and  
4 Authorities, the documents in the agency’s files and other such evidence to be presented at the  
5 hearing on this request should the Board allow a hearing.

6 The purpose of this petition is to prevent a procedural train-wreck in the rehearing  
7 proceeding. If we are going to do this, we need to do it right.

8 *Petitioners respectfully request a hearing to resolve this due process issue as soon as*  
9 *possible to allow the parties to prepare properly and to avoid the need for court intervention.*

10 **1. Name and address of Petitioners**

11 Petitioners are R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC,  
12 Dianne E. Young, and Schmidt Highway 4 Ranch, LLC, Gary and Julie Abate, Dino and Nicole  
13 del Carlo, George and Pam Vierra, Marchini Land Co., PTP, and Renzo and Evelyn Menconi.  
14 All Petitioners are landowners who own land within the boundaries of Woods Irrigation Company  
15 (“Woods”). Petitioners may be contacted through their counsel.

16 **2. The specific Board action to be reconsidered**

17 Landowners request reconsideration of the Board’s Ruling on Comments Regarding  
18 Advance Courtesy Notice of Tentative Dates for Supplemental Hearing and Pre-Hearing  
19 Conference Related to Order WR 2012-0012 (Order Granting Reconsideration)—In the Matter of  
20 the Petitions for Reconsideration of Order WR 2011-0005.

21 **3. The date on which the order or decision was made by the Board**

22 The Board adopted this ruling on October 15, 2014.

23 **4. The reason the action was inappropriate or improper**

24 The Board’s action continues to deprive the Landowners of due process in two ways.

25 First, by limiting the rehearing to allow the Landowners to present supplemental evidence  
26 to try to convince the Board to modify the existing Order WR 2011-0005, as opposed to starting  
27 the hearing process anew, the Board is continuing to deprive the Landowners of due process.  
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1 Landowners must be allowed to participate in the proceeding from the beginning to have a  
2 meaningful opportunity to be heard. At a minimum, the Board must start the hearing anew and  
3 attribute zero precedential value to Order WR 2011-0005.

4 Second, asking the Landowners to participate in a Cease and Desist Order (CDO) Hearing  
5 process that may affect their water rights *as a first step*, without having conducted a water rights  
6 investigation or issuing a draft CDO to the Landowners, is improper and confusing for all  
7 involved. The original draft CDO issued to Woods in 2009 did not implicate the Landowners'  
8 water rights. The Board's enforcement staff has never conducted an investigation of the  
9 Landowners' water rights, or asked the Landowners' to provide information to justify their  
10 claimed rights and diversions. And, most importantly, the Board never issued a draft CDO to the  
11 Landowners to explain what the Board intends to Order so that the Landowners could prepare to  
12 address those issues in the hearing. In short, *it is entirely unclear what is going to be at issue in*  
13 *the hearing for the Landowners*. It is not even clear which landowners should be involved in the  
14 hearing, as the Board has been sending its notices to landowners who do not even receive  
15 irrigation water through the Woods facilities and landowners who own properties the Board has  
16 previously determined were riparian.

17 As we explain in the attached memorandum, the current proposed rehearing process turns  
18 the proper burden of proof for a Board CDO proceeding on its head and will create a procedural  
19 mess.

20 **5. The specific action which petitioner requests**

21 Landowners request that the Board revise its October 15, 2014 ruling beginning at the  
22 bottom of page 2 as follows:

23 **Additional Objections**

24 Both Woods and Landowners request a new hearing stating that a supplemental hearing  
25 will not provide due process for Landowners. The commenters assert that supplementing  
26 the hearing rather than starting from scratch will place a burden on "Landowners" to  
27 overcome the Stale Water Board's previous adverse decision.

1 To avoid the due process issue, the State Water Board will rescind its order granting  
2 reconsideration (Order WR 2012-0012) of its original order against Woods (Order WR  
3 2011-0005). The State Water Board will investigate Landowners' water rights and  
4 diversions and the relationship of these rights and diversions to the rights and diversions  
5 of Woods. After this investigation, if the Board enforcement team believes that the  
6 diversions of Woods and its Landowners are unlawful, the Board will prepare a new  
7 notice and draft Cease and Desist Order to be mailed to the parties whose claimed rights  
8 and diversions would be affected by the proposed order. Diverters receiving the proposed  
9 order could request a hearing.

10 ~~Despite the commenters' assertions, Landowners' burden of proof has not shifted. The~~  
11 ~~State Water Board has already stated that a hearing shall be scheduled to allow Woods'~~  
12 ~~customers to participate as parties, call witnesses, and cross-examine witnesses that have~~  
13 ~~already testified on behalf of other parties in order to supplement the evidentiary record~~  
14 ~~with evidence of water rights held by the Woods' customers. (Order WR 2012-0012~~  
15 ~~[granting reconsideration].) The information presented by Woods' customers will be~~  
16 ~~balanced with the original evidence in determining whether to change or re-adopt the~~  
17 ~~original terms of Order WR 2011-0005. The State Water Board has not placed a burden~~  
18 ~~on Landowners to disprove the original findings.~~

19 ~~Thus, no additional burden is imposed on Woods' customers by supplementing the exiting~~  
20 ~~hearing record rather than starting a new hearing, and the request to undertake an entirely~~  
21 ~~new hearing is denied.~~

22 ~~Ms. Spaletta requests, in the alternative, that extensive communication occur prior to the~~  
23 ~~hearing regarding the scope and issues for the hearing. We agree that such~~  
24 ~~communication will be welcome in the context of the Pre-Hearing Conference.~~

25 **6. A statement that copies of the petition and any accompanying materials have been**  
26 **sent to all interested parties**

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Copies of this Petition for Reconsideration and the accompanying Memorandum of Points and Authorities in Support of the Petition for Reconsideration are being sent by electronic mail to the interested parties contained on the attached list.

Respectfully submitted,

Dated: November 14, 2014

SPALETTA LAW PC



By: \_\_\_\_\_  
JENNIFER L. SPALETTA  
Attorney for R.D.C. Farms, Inc., et al.

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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF THE PETITIONS  
FOR RECONSIDERATION OF ORDER  
WR 2011-0005

**MEMORANDUM OF POINT AND  
AUTHORITIES IN SUPPORT OF  
PETITION FOR RECONSIDERATION OF  
OCTOBER 15, 2014 RULING**

**Water Code, § 1122  
Code of Regulations, Title 23, §§ 768, 769**

1 **I. INTRODUCTION**

2 R.D.C. Farms, Inc., Ronald & Janet Del Caro, Eddie Vierra Farms, LLC, Dianne E.  
3 Young, and Schmidt Highway 4 Ranch, LLC, Gary and Julie Abate, Dino and Nicole del Carlo,  
4 George and Pam Vierra, Marchini Land Co., PTP, and Renzo and Evelyn Menconi (collectively,  
5 “Landowners” or “Petitioners”) submit this Memorandum of Points and Authorities in support of  
6 their Petition for Reconsideration of the October 15, 2014 Ruling of the State Water Resources  
7 Control Board (“Board”).

8 The Board’s October 15, 2014 ruling relates to the reconsideration of Order 2011-0005.  
9 In Order 2011-0005, the Board prohibited Woods Irrigation District (“Woods”) from diverting  
10 water in excess of 77.7 cfs. In reaching this figure, the Board determined not only the rights of  
11 Woods, but also the water rights of Landowners who were excluded from the proceedings. A  
12 court held that the Board violated Landowners’ due process rights and that the order was void.

13 The Board now proposes to reopen the cease-and-desist-order (“CDO”) proceedings  
14 against Woods to allow Landowners to “supplement” the record and potentially change the  
15 Board’s previous conclusions. The Board rejected Landowners’ contentions that a supplemental  
16 hearing would not resolve the due process violations. Landowners petition for reconsideration  
17 because:

18 (1) The Board never provided Landowners their due process right to be notified of the case  
19 against them. Under the Water Code and due process clause, the Board has a legal obligation  
20 to provide individuals with notice and opportunity for a hearing before requiring them to  
21 cease and desist their diversions. The Board has always complied with this requirement by  
22 conducting an investigation, issuing a draft CDO, and giving a party the opportunity to justify  
23 their diversions—all before proceeding to the CDO hearing phase. None of that has occurred  
24 here for these Landowners. Rather, they are being asked to jump into an already completed  
25 hearing as a first and only means of notice and participation.

26 (2) The proposed proceedings will deprive Landowners of their due process rights to be heard at a  
27 meaningful time and in a meaningful manner. The Board has made clear that it is operating  
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1 on the presumption that Landowners lack the water rights they allege—if Landowners do not  
2 provide additional evidence to support their claimed rights, the Board will readopt Order  
3 2011-0005 and limit the diversions of both Woods and the Landowners who divert through  
4 the Woods system. Thus, although by law the Board carries the burden of proof to show that  
5 Landowners lack the water rights they allege in the first instance, here the Board flips this  
6 standard and requires Landowners to prove that they possess their claimed rights before the  
7 Board prosecution team has to put forth any evidence regarding the Landowners’ rights.

8 **II. STATEMENT OF FACTS**

9 **A. Landowners and Board Order 2011-0005**

10 Woods is an irrigation company that diverts water from Middle River, and conveys that  
11 water to customers on Roberts Island. Landowners are Woods customers that own and farm  
12 property within the Woods service area, and use Woods’s facilities to exercise their riparian and  
13 pre-1914 appropriative water rights.

14 On December 29, 2009, the Board issued a notice of proposed CDO to Woods which  
15 *ordered Woods to:*

- 16 1. “cease and desist from diverting water in excess of 77.7 cfs at any time,”
- 17 2. “file a Statement of Diversion and Use for each of its points of diversion,”
- 18 3. “submit a list of all properties and owners receiving water delivered by Woods’  
19 diversion system, and the basis of right for any properties receiving water either  
20 outside Woods’ service area, or in excess of Woods’ claimed pre-1914 right,” and  
21 4. “provide a monitoring plan.”

22 (2009 Draft CDO at p. 3.)

23 The Draft CDO *contained no provisions related to the individual Landowners’ rights and*  
24 *was not served on the Landowners.*

25 The Board scheduled a hearing on the CDO for June 7, 2010, without notice to the  
26 Landowners. By letters dated May 12, 2010, Landowners requested to intervene in the  
27 proceedings, expressed concern that their water rights would be affected by any order, and  
28



1 advised the Board of potential due process violations. The Hearing Officer declined intervention  
2 reasoning that the “Woods CDO hearing will not bind non-parties to the hearing.”

3 The Board issued Order WR 2011-0005 (“2011 Order”) on February 1, 2011. The Board  
4 *prohibited Woods from diverting more than 77.7 cfs unless and until Woods or landowners in its*  
5 *area* provided additional information to a Board staff person, and the staff person agreed that this  
6 information proved the right to divert additional water. (Order WR 2011-0005, at pp. 61-62.) If  
7 the staff person disagreed with the claimed right, the remedy was to appeal the decision to the full  
8 Board. The Order also imposed monitoring and reporting requirements on Woods’s exercise of  
9 the 77.7 cfs pre-1914 rights, and required Woods to provide the Board with the names of all  
10 property owners receiving water from its system. (Order WR 2011-0005, at pp. 61-62.)

11 Although limiting Woods’s diversions to 77.7 cfs, the Board never clearly identified  
12 whose water rights it was determining. Instead, it vaguely concluded “that Woods or landowners  
13 within the Woods original service area had the intention before 1914 to divert up to 77.7 cfs of  
14 water for irrigation within its original service area,” and “that the water rights associated with the  
15 77.7 cfs Woods diversion passed with the land.” (Order WR 2011-0005 at p. 4.)

#### 16 **B. Trial court decision on Order 2011-0005**

17 On March 2, 2011, Landowners filed a petition for writ of mandate and/or prohibition  
18 challenging the Order.<sup>1</sup> Landowners alleged, among other things, that the Board deprived them  
19 of their due process rights by impairing their water rights without affording notice and an  
20 opportunity for a fair hearing. The trial court agreed to set the CDO aside. Although the Board  
21 requested the court to keep at least portions of the 2011 Order in place, the court found the entire  
22 2011 Order must be voided to address the due process violation. (*Young v. State Water*  
23 *Resources Control Bd.* (2011) Case No. 39-2011-00259191 at pp. 6-7, revd. on other grounds in  
24 *Young v. State Water Resources Control Bd.* (2013) 219 Cal. App. 4th 501.) The Board never  
25 challenged the trial court’s holding that the Order violated Landowners’ due process rights,  
26 though it appealed on other grounds.<sup>2</sup>

27 <sup>1</sup> Woods and Landowners also filed petitions for reconsideration of the 2011 Order on March 3, 2011.

28 <sup>2</sup> The Board, in Order WR 2012-0012, wrongly states that the Board has challenged the court’s due process ruling.  
(Order WR 2012-0012 at 6.) “The Water Board did not, however, challenge the trial court’s finding that the

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**C. The Board’s order to reconsider Order 2011-0005**

Over a year after the trial court’s decision, the Board issued draft Order WR 2012-0012 (“Reconsideration Order”) that set aside only three pages of its sixty-three-page 2011 Order and stated that Landowners could participate in a future proceeding. The Board then went on to affirm in the very same Reconsideration Order several of its key findings from the 2011 Order that are adverse to Landowners. (See, e.g., Reconsideration Order at p. 8 [finding that Duck Slough, a key water feature reviewed in the proceedings, “does not provide riparian rights to water from Middle River to property owners on Roberts Island.”].) The Board further made clear that the 2011 Order would be affirmed entirely unless Landowners presented evidence that the Board found warranted revision. (See Reconsideration Order at p. 13 [“The findings and conclusions of law in this order and Order WR 2011-0005 . . . are subject to reevaluation and revision based on additional evidence and argument that may be presented at the hearing.”].)

Landowners objected to the Reconsideration Order and moved in the trial court to enforce the amended writ and judgment. Landowners also filed a separate petition for writ of mandate to set aside the Reconsideration Order. However, because a portion of the trial court’s judgment was being appealed at this time, the parties stipulated to stay the writ proceedings challenging the Reconsideration Order pending the resolution of the appeal. The trial court entered an order staying the proceedings on November 30, 2012.

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**D. The Board’s October 15, 2014 ruling**

On September 4, 2014, the Board provided advance notice of tentative dates for the supplemental hearing related to the reopening of the CDO proceedings.

Landowners commented on the notice in a September 14, 2014 letter. Landowners alleged that reopening proceedings would not remedy due process violations. They explained that the Board’s proposed procedure would wrongly burden Landowners by requiring them to affirmatively show that their water diversions are lawful. Landowners further explained that the due process clause would be satisfied only if the Board began the CDO proceedings anew.

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Customers had been denied due process in the administrative proceedings.” (*Young v. State Water Resources Control Bd.* (2013) 219 Cal. App. 4th 501.).

1 On October 15, 2014, the Board hearing officers rejected Landowners contentions, and  
2 scheduled a supplemental hearing for June 2015. The Board noted that Landowners could present  
3 additional evidence to counteract evidence already accepted, and that they would not need to  
4 prove that the Board's original findings were incorrect. (2014 Ruling at p. 2) Thus, they found,  
5 "no additional burden is imposed on Woods' customers by supplementing the existing hearing  
6 record rather than starting a new hearing." (2014 Ruling at p. 3.)

7 On November 10, 2014, the Board issued notice of the supplemental hearing and pre-  
8 hearing conference. The Board explained there that the supplemental hearing would address two  
9 issues:

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

### 15 **III. STANDARD OF REVIEW**

16 An interested party may petition the Board for reconsideration of a decision or order based  
17 on the following grounds:

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

24 (23 C.C.R. § 768.)

25 This petition is based on the Board's error in law and perpetual irregularity in proceedings  
26 with will prevent the Landowners from having a fair hearing.  
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1 **IV. ARGUMENT**

2 **A. The Board has deprived Landowners of their due process right to be notified of**  
3 **the case against them.**

4 The due process clauses of the state and federal constitutions impose constraints on  
5 governmental decisions that deprive individuals of life, liberty, or property. (U.S. Const.,  
6 Amends. V, XIV; Cal. Const., art. I, § 7.) The fundamental requirement of these clauses is that  
7 the government must provide individuals with the opportunity to be heard “at a meaningful time  
8 and in a meaningful manner” before taking their property. (See, e.g., *Mathews v. Eldridge* (1976)  
9 424 U.S. 319, 333; *id.* at pp. 348-48 [the due process clause requires “that ‘a person in jeopardy  
10 of serious loss [be given] notice of the case against him . . . .’ ”].)

11 The Legislature was cognizant of due process requirements when it enacted legislation  
12 allowing the Board to issue CDOs. Section 1831 of the Water Code authorizes the Board to issue  
13 CDOs against a party only after the Board has given that party notice and opportunity for a  
14 hearing. The Board has always complied with this requirement by the following process:

- 15 1. The Board first conducts an investigation to determine whether an unlawful diversion  
16 has occurred. The investigator asks the diverter to justify the right for the diversion.
- 17 2. If, after the investigation and receipt of information from the diverter, the Board  
18 believes a party is unlawfully diverting water, it issues a draft CDO.
- 19 3. In response to the draft CDO, the party can request a hearing.
- 20 4. At the hearing, the Board’s prosecution team bears the initial burden of proving the  
21 diversion is unlawful. The party can then rebut the presented evidence.

22 This process *was not used here for the Landowners*. The Board never investigated  
23 Landowners’ water rights and diversions, and it never initiated CDO proceedings against  
24 Landowners. Instead, the Board’s initial draft CDO was directed only at Woods, even though the  
25 Board attempted to determine the rights of both Woods and landowners in its service area in the  
26 final CDO.

27 The Board’s prior proceedings deprived Landowners of their due process right to be  
28 notified of the case against them, leading to the voiding of Order 2011. (*Young v. State Water*

1 *Resources Control Bd.* (2011) Case No. 39-2011-00259191 at p. 6 [“The notice and opportunity  
2 to Woods Irrigation District was not sufficient to satisfy Landowners’ due process rights”], revd.  
3 on other grounds in *Young v. State Water Resources Control Bd.* (2013) 219 Cal. App. 4th 501.)

4 The Board will repeat this failure to provide notice if it readopts the 2011 Order or issues  
5 any other order that effectively directs Landowners to curtail their diversions. Although the  
6 Board has not initiated CDO proceedings against Landowners, it has indicated that they must  
7 prove up their water rights in a CDO hearing, and that their failure to do so will result in an order  
8 issued against them. This is completely backward.

9 Unless the Board properly conducts an investigation of Landowners rights and diversions,  
10 issues a draft CDO against Landowners, and then provides Landowners with the opportunity for a  
11 hearing to respond to the draft CDO, the Board cannot lawfully adopt any order that requires  
12 Landowners to curtail their diversions.

13 Further, common sense and practicality dictate that the Board conduct an investigation  
14 and issue a draft CDO against Landowners so that all parties to the hearing understand what is at  
15 issue. As things currently stand, the list of potential landowners includes landowners whose  
16 properties the Board has already determined are riparian and landowners who do not even receive  
17 irrigation water through the Woods diversions. There is a tremendous need for the Board  
18 prosecution staff to be allowed to take a step back and re-group so that this process is meaningful.

19 **B. The proposed reopening of the CDO proceedings deprives Landowners of the**  
20 **opportunity to be heard at a meaningful time and in a meaningful manner**

21 **1. The Board unlawfully requires Landowners to affirmatively show that**  
22 **they possess their claimed water rights before the Board meets its burden**  
23 **of showing that the Landowners’ diversions are unlawful**

24 In its 2011 Order against Woods, the Board determined the extent of the water rights of  
25 Woods and all landowners in Woods’s service area. The Board, however, only allowed Woods to  
26 participate in the proceedings leading up to the order. (See May 24, 2010 Hearing Officer Letter.)  
27 Although excluding Petitioners and other landowners, the Board nonetheless believed it did not  
28 wrong the landowners, because the landowners could attempt to convince a Board staff person to  
allow additional water deliveries than allowed under the 2011 Order. In other words, the Board

1 would assume Landowners lacked their claimed rights and prohibit diversions, but would allow  
2 Landowners to present evidence later to support a different conclusion.

3 The San Joaquin County Superior Court found these procedures violated Landowners’ due  
4 process rights. The court explained that the Board could not “simply assume” that Landowners  
5 lacked their claimed water rights; instead, it “must give notice and a fair opportunity to  
6 Landowners to demonstrate the legitimacy of their claims.” (*Young v. State Water Resources*  
7 *Control Bd.* (2011) Case No. 39-2011-00259191 at p. 5.)

8 Now nearly four years later, the Board is reopening the proceedings on the CDO to give  
9 Landowners the opportunity to supplement the record and potentially change the Board’s  
10 previous conclusions. But this proposed reopening only slightly modifies the defective process in  
11 the 2011 Order. Under the 2011 Order, Landowners could attempt to convince a Board staff  
12 person that increased water deliveries were permitted; under the proposed reopened proceedings,  
13 Landowners can attempt to convince Board hearing officers that increased deliveries are  
14 permitted. The process is a little more formal here but the result is the same: Landowners carry  
15 the burden of proof to convince the Board that they possess their alleged water rights. And in  
16 either case, if Landowners do nothing, the Board will “simply assume” Landowners lack their  
17 claimed rights—precisely what the trial court already ruled the Board could not do. (See *Young*  
18 *v. State Water Resources Control Bd.* (2011) Case No. 39-2011-00259191 at p. 5.)

19 The Board states the burden has not shifted, because Landowners do not have the burden  
20 of disproving the original findings in the 2011 Order. (2014 Ruling at pp. 2-3.) This is flat  
21 wrong—that is exactly what the Board is requiring of Landowners. If Landowners do not provide  
22 additional evidence, the original findings will stand. (See Reconsideration Order at p. 13 [“The  
23 findings and conclusions of law in this order and Order WR 2011-0005 . . . are subject to  
24 reevaluation and revision based on additional evidence and argument that may be presented at the  
25 hearing.”]; November 10, 2014 Notice of Supplemental Hearing [the Board will consider whether  
26 “the original terms of Order WR 2011-0005 [should] be modified or re-adopted based on  
27 supplemental evidence, cross examination, or arguments that arise as a result of the supplemental  
28 hearing”].) To make matters worse, the Board emphasized in its Reconsideration Order that

1 Landowners' task is great. For example, a key issue in considered in the 2011 Order was whether  
2 riparian rights in Duck Slough could have supported riparian rights to Middle River. The Board  
3 concluded in the 2011 Order that it could not. It then reaffirmed this conclusion in the  
4 Reconsideration Order, stating, "Duck Slough, even if it did exist at one time, does not provide  
5 riparian rights to water from Middle River to property owners on Roberts Island."  
6 (Reconsideration Order at p. 8.)

7 The Board thus wrongly places on Landowners the initial burden of affirmatively showing  
8 that they have the water rights they claim, in clear violation of due process requirements. The  
9 Board must carry the initial burden of proof to show that Landowners' diversions are unlawful.  
10 The United States Supreme Court's decision in *Armstrong v. Manzo* (1965) 380 U.S. 545 is  
11 particularly useful in demonstrating this requirement given the close parallels in the facts of the  
12 case.

13 In *Armstrong*, the Supreme Court considered whether a juvenile court's adoption decree  
14 violated the due process clause. The juvenile court initially granted an individual legal-father  
15 status over a child, even though the natural father was never given notice of the proceeding.  
16 (*Armstrong, supra*, 380 U.S. at p. 548.) On learning of the adoption decree, the natural father  
17 brought a motion to have the decree set aside and a new trial granted. (*Ibid.*) The juvenile court  
18 allowed the natural father to present additional evidence to show the decree should not have been  
19 granted, but declined to allow a new trial. (*Id.* at 549.) After hearing the natural father's  
20 evidence, the juvenile court reaffirmed the adoption decree. (*Ibid.*)

21 Considering these facts, the Supreme Court found it "clear that failure to give the  
22 petitioner notice of the pending adoption proceedings violated the most rudimentary demands of  
23 due process of law." (*Armstrong, supra*, 380 U.S. at 550.) The Court firmly rejected the  
24 argument that the failure to give the petitioner notice had been cured by the hearing subsequently  
25 afforded him upon his motion to set aside the decree. (*Ibid.*) Because of the close parallels here,  
26 it is useful to quote the opinion at length:

27 Had the petitioner been given the timely notice which the Constitution requires, the  
28 Manzos, as the moving parties, would have had the burden of proving their case as against  
whatever defenses the petitioner might have interposed. . . . Had neither side offered any

1 evidence, those who initiated the adoption proceedings could not have prevailed. [¶]  
2 Instead, the petitioner was faced on his first appearance in the courtroom with the task of  
3 overcoming an adverse decree entered by one judge, based upon a finding of nonsupport  
4 made by another judge. . . . The burdens thus placed upon the petitioner were real, not  
5 purely theoretical. For ‘it is plain that where the burden of proof lies may be decisive of  
6 the outcome.’ . . . Yet these burdens would not have been imposed upon him had he been  
7 given timely notice in accord with the Constitution.

8 *Id.* at 551.

9 Thus, the Court concluded, the juvenile court could have satisfied due process  
10 requirements only by granting the motion to set aside the decree and consider the case anew.  
11 (*Armstrong, supra*, 380 U.S. at p. 552.) “Only that would have wiped the slate clean. Only that  
12 would have restored the petitioner to the position he would have occupied had due process of law  
13 been accorded to him in the first place.” (*Ibid.*)

14 California appellate courts have also found fault when the government shifts the burden of  
15 proof onto an alleged wrongdoer. In *Brown v. City of Los Angeles* (2002) 102 Cal. App. 4th 155,  
16 the court considered, among other things, the adequacy of a city department’s hearing procedures  
17 when a government employee’s pay is downgraded. (*Id.* at p. 174.) Under the department’s  
18 rules, an employee who requested a hearing on a pay downgrade would have the burden to show  
19 that the decision was improper. (*Id.* at p. 175.) The court found this procedure denied employees  
20 due process. (*Ibid.*) The department, the court explained, was required not only to “provide the  
21 employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action,”  
22 but also to shoulder the burden of proof at the hearing. (*Id.* at pp. 175-76.)

23 Likewise here, the Board must carry the burden of proof—only in that manner may the  
24 Board satisfy the requirement to provide an opportunity for a hearing in a meaningful manner.  
25 (See *Brown, supra*, 102 Cal. App. 4th at pp. 174-76.)

26 **C. The Board denies Landowners their right to be heard at a meaningful time by not**  
27 **allowing Landowners to participate in the CDO proceedings until nearly six years**  
28 **after the proceedings began and over four years since the Board issued Order 2011**

The Board must provide an opportunity for a hearing at a meaningful time. (See  
*Mathews, supra*, 424 U.S. at p. 333; *Armstrong, supra*, 380 U.S. at p. 552.) The Board does not  
satisfy this requirement by allowing Landowners to participate for the first time in the  
proceedings in June 2015—nearly six years after the proceedings began and over four years since



1 the Board issued its 2011 Order. (See *Armstrong, supra*, 380 U.S. at p. 522; cf. *McCuin v. Sec’y*  
2 *of Health & Human Servs.* (1st Cir. 1987) 817 F.2d 161, 174 [finding that constitutional due  
3 process concerns are seriously implicated when the Department of Health and Human Services  
4 attempts to reopen a decision long since finalized to force a recipient of benefits to disgorge years  
5 of past benefits].)

6 If the Board desires to maintain an action that determines Landowners’ water rights, its  
7 remedy is not to reopen the CDO proceedings but to begin the proceedings anew. To use the  
8 words of the Supreme Court in *Armstrong*, “Only that would have restored the petitioner[s] to the  
9 position [t]he[y] would have occupied had due process of law been accorded . . . in the first  
10 place.” (*Armstrong, supra*, 380 U.S. at p. 552.)

11 Woods and the Landowners have submitted Statements of Diversion and Use for five  
12 years since the 2009 Woods investigation took place. It is illogical to drag Woods and the  
13 Landowners back into a CDO proceeding, based on a 2009 investigation of only Woods, without  
14 updating the investigation and draft CDO to include the information submitted over the last five  
15 years.

16 **V. CONCLUSION**

17 Landowners are bringing this petition to avoid additional procedural pitfalls and allow the  
18 parties and the Board to get to the real issues that need resolution. If we are going to do this, let’s  
19 do it right.

20 For the reasons stated above, Landowners respectfully request that the Board grants this  
21 Petition for Reconsideration.

22  
23 Date: November 14, 2014

Respectfully submitted,

24 

25  
26 \_\_\_\_\_  
Jennifer Spaletta, Esq.  
SPALETTA LAW PC  
27 Attorneys for Landowners  
28

**PROOF OF SERVICE**

I am employed in the County of San Joaquin; my business address is 225 West Oak Street, Lodi, California; I am over the age of 18 years and not a party to the foregoing action.

On November \_\_, 2014, I served a true and correct copy of:

**PETITION FOR RECONSIDERATION OF OCTOBER 15, 2014 RULING OF STATE WATER RESOURCES CONTROL BOARD**

**BY ELECTRONIC MAIL (EMAIL).** By sending the document(s) to the person(s) at the email address(es) listed below.

<p>WOODS IRRIGATION COMPANY  S. Dean Ruiz, General Counsel  HARRIS, PERISHO &amp; RUIZ  ATTORNEYS AT LAW  Brookside Corporate Center  3439 Brookside Road, Suite 210  Stockton CA 95219  dean@hprlaw.net</p> <p>WOODS IRRIGATION COMPANY  John Herrick, Co-Counsel  4255 Pacific Avenue, Suite 2  Stockton, CA 95207  jherrlaw@aol.com</p>	<p>DIVISION OF WATER RIGHTS  PROSECUTION TEAM  David Rose  John O’Hagan  State Water Resources Control Board  1001 I. Street  Sacramento, CA 95814  David.Rose@waterboards.ca.gov  John.O’Hagan@waterboards.ca.gov</p>
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<p>THE SAN LUIS &amp; DELTA-MENDOTA  WATER AUTHORITY  Jon Rubin, Senior Staff Counsel  San Luis &amp; Delta-Mendota Water  Authority  400 Capitol Mall, 27th Floor</p>	<p>CENTRAL DELTA WATER  AGENCY  S. Dean Ruiz, Esq.  Harris, Perisho &amp; Ruiz  3439 Brookside Road, Suite 210  Stockton, CA 95219</p>

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1  
2 [X] **BY U.S. MAIL.** By enclosing the document(s) in a sealed envelope addressed to the  
3 person(s) set forth below, and placing the envelope for collection and mailing, following our  
4 ordinary business practices. I am readily familiar with this business's practice for collecting  
5 and processing of correspondence for mailing. On the same day that correspondence is placed  
6 for collection and mailing, it is deposited in the ordinary course of business with the United  
7 States Postal Service, in a sealed envelope with postage fully prepaid.

8 9 10 11 12	WOODS IRRIGATION CO 3439 BROOKSIDE ROAD, # 210 STOCKTON, CA 95219	STOCKTON PORT PROPERTY LLC 700 CARY DR. SAN LEANDRO CA 94577	MENCONI, RENZO G MENCONI, EVELYN J 1129 W EL MONTE ST STOCKTON, CA 95207
13 14 15 16 17 18	LILLIAN MAZZANTI SURVIVORS TRUST 1002 S ROBERTS ROAD STOCKTON, CA 95206	DEL SOLDATO, JOSEPHINE 5400 S MAYBECK RD STOCKTON, CA 95206	MUSSI, LORY TR ETAL 4362 W MULLER RD STOCKTON, CA 95206
19 20 21 22 23	ISONE, INC 611 N MAIN ST MANTECA, CA 95336	SILVA, BERNIECE L TR ETAL 1431 W WALNUT ST STOCKTON, CA 95203	STOCKTON PORT DISTRICT PO BOX 2089 STOCKTON, CA 95201
24 25 26 27 28	RUDY M MUSSI INVESTMENT LP ETAL 4362 W MULLER RD STOCKTON, CA 95206	SANGUINETTI, JOHN ROBERT 2420 KAISER RD STOCKTON, CA 95215	KENNEDY, PATRICK J & PATRICIA 1100 SAN LEANDRO BLVD, # 310 SAN LEANDRO, CA 94577
	D ALONZO, LARRY & DONETTE TR 4101 S WILHOIT RD STOCKTON, CA 95206	MARCHINI LAND CO PTP 9000 W HOWARD RD STOCKTON, CA 95206	SCHMIDT HIGHWAY 4 RANCH LLC 4290 W ST RT 4 HWY SAN JOAQUIN CITY, CA 93660
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	R D C FARMS INC 6717 STARK RD STOCKTON, CA 95206	DEL CARLO, GINA TR ETAL 7215 STARK RD STOCKTON, CA 95206	VIERRA, LARRY E ETAL PO BOX 317 HOLT, CA 95234
	YOUNG, DIANNE ELIZABETH TR PO BOX 222104 CARMEL, CA 93922	GRUNSKY, CURTIS P 5417 SAINT ANDREWS DR STOCKTON, CA 95219	GRUNSKY, TIMOTHY J & LYNN M TR 5417 SAINT ANDREWS DR STOCKTON, CA 95219

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3	VIEIRA, MICHAEL 4185 MULLER RD STOCKTON, CA 95206	PERRY, MARY R 18700 S TOM PAINE AVE TRACY, CA 95304	DEL CARLO, DINO & NICOLE 6033 S WILLHOIT RD TRACY, CA 95378
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5	DEJEU, ANCUTA D 5977 S WILHOIT RD STOCKTON, CA 95304	RUDY M MUSSI INVESTMENT LP ETAL 3580 MULLER RD STOCKON, CA 95206	COELHO, MARY PEREIRA TR 3701 POINT OF TIMBER RD BRENTWOOD, CA 94513
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8	VIEIRA, ELYSE RODGERS TR PO BOX 1025 TRACY, CA 95378	GONZALES, JOSE LUCKY 6881 ROBERTS ROAD STOCKTON, CA 95206	RATTO, LOIS V (LF EST) 6955 S ROBERTS RD STOCKTON, CA 95206
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11	RODGERS, CECIL J & SANDRA J 7569 S ROBERTS RD STOCKTON, CA 95206	TRACY UNIFIED, SCHOOL DIST 7915 S ROBERTS ROAD STOCKTON, CA 95206	PETER R OHM REVOCABLE TRUST 1513 MCCLELLAN WAY STOCKTON, CA 95207
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13	MENCONI, RENZO & EVELYN 1129 W EL MONTE STOCKTON, CA 95206	LINDA A. LEHMANN- KITZMILLER C/O MARCHINI LAND CO PTP 3234 S ROBERTS ROAD STOCKTON, CA 95206	JOHN E. AND DIXIE L. BRASS TRUST C/O MARCHINI LAND CO PTP 5072 WILLOW VALE WAY ELK GROVE, CA 95758
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17	CABRAL, EMILY MARIE 129 FOREST AVE (PO BOX HL) PACIFIC GROVE, CA 93950	PETERS, MARIE C TR ETAL 8125 DUNBARTON WAY STOCKTON, CA 95210	BALCAO, HELLEN LIMA TR 3824 S MONITOR CIR STOCKTON, CA 95219
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20	LOPEZ, THOMAS A & I V 7603 S BORBA RD STOCKTON, CA 95206	MUSSI AG 4362 W MULLER RD STOCKTON, CA 95206	KLEIN, RICHARD G PO BOX 7424 STOCKTON, CA 95267
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22	RODGERS, MANUEL JEANE JR 8707 BORBA RD STOCKTON, CA 95206	BALCAO, JUDITH L TR ETAL 6634 CUMBERLAND PL STOCKTON, CA 95219	BALCAO, JUDITH L TR 6634 CUMBERLAND PL STOCKTON, CA 95219
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27			
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6 7	HONKER LAKE RANCH LP 7000 S INLAND DR STOCKTON, CA 95206	YKILP0880 LLC 490 GIANNI ST SANTA CLARA, CA 95054	A ROSSI INC 611 N MAIN ST MANTECA, CA 95336
8 9	WENZEL, MARK S & GAYLE D PO BOX 216 HOLT, CA 95234	A ROSSI INC 611 N MAIN ST MANTECA, CA 95336	WENZEL, MARK S & GAYLE D PO BOX 216 HOLT, CA 95234
10 11 12	HOLGUIN, BENITO 1927 A ST ANTIOCH, CA 94509	HARRAGON, JOAN E TR 110 PARK RD APT 604 BURLINGAME, CA 94010	ROSASCO, VICTOR R & TINA TR 1708 WOODSBRO RD STOCKTON, CA 95206
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16 17	OHM, LOREN C & DELORES S 7634 S ROBERTS RD STOCKTON, CA 95206	VIEIRA, ELYSE RODGERS TR PO BOX 1025 TRACY, CA 95378	RODGERS, MARCELLA L PO BOX 1025 TRACY, CA 95378
18 19 20	MESA, RICHARD D & FLORENE E 6528 HERNDON PL STOCKTON, CA 95219	RICHARD MARCHINI 9000 HOWARD ROAD STOCKTON, CA 95206	SIERRA CONSTRUCTION & SEPTIC CORP 5617 NORTH JACK TONE RD LINDEN, CA 95215
21 22 23 24	DUNKEL, MARK & VALLA 4536 W HOWARD RD STOCKTON, CA 95206-9630	DEL CARLO, DINO & NICOLE 6966 S INLAND DR SAN JOAQUIN CITY, CA 93660	DEL CARLO, DINO & NICOLE 4141 W MUELLER RD STOCKTON, CA 95206- 9625

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

Dated: November \_\_, 2014

\_\_\_\_\_  
DIANA MARTIN