

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0012

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

Source: Middle River

County: San Joaquin County

ORDER GRANTING RECONSIDERATION

BY THE BOARD:

1.0 INTRODUCTION

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

2.0 GROUNDS FOR RECONSIDERATION

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

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

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

3.0 LEGAL AND FACTUAL BACKGROUND

3.1 Facts

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

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

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

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

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

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

(Ibid.)

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

3.2 Order WR 2011-0005

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

3.3 Litigation

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

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

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

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

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

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

4.0 PETITION OF THE CUSTOMERS

The Customers' contentions are addressed below.

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

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

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

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

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

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

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

4.2 Customers’ Notice and Due Process Claims

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

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

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

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

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

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

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

4.3 Legal issues

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

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

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

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

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

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

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

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

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

5.1 Procedural Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.2 Rate of Diversion

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

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

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

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

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

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

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

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

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

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

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

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

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

The State Water Board found:

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

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

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

6.0 CONCLUSION

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

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

ORDER

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

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

CERTIFICATION


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

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

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board