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BEFORE THE STATE OF CALIFORNIA

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STATE WATER RESOURCES CONTROL BOARD

14

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

**OPENING BRIEF OF SAN LUIS & DELTA-
MENDOTA WATER AUTHORITY,
MODESTO IRRIGATION DISTRICT, AND
STATE WATER CONTRACTORS**

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Date: April 10, 2015

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Time: 12:00 p.m.

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{00452839; 6}

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1 San Luis & Delta-Mendota Water Authority, Modesto Irrigation District, and State Water
2 Contractors (collectively, the “Water Agencies”) submit this optional Opening Brief for the
3 Supplemental Public Hearing regarding Cease and Desist Order (“CDO”) No. 2011-0005 against
4 Woods Irrigation Company (“Woods”).

5 The State Water Resources Control Board (“State Water Board”) has a very clear, very
6 crucial job—to implement and enforce California’s water rights priority system. The dire water
7 shortage Californians are suffering serves to highlight the importance of the State Water Board’s
8 consistent and faithful discharge of its regulatory duties. Those duties include, by express
9 Legislative mandate, taking “vigorous action” to prevent the unlawful diversion and use of water.
10 Water Code § 1825 (“It is the intent of the Legislature that the state should take vigorous action to
11 enforce the terms and conditions of permits licenses, certifications, and registrations to appropriate
12 water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water”).

13 The lengthy and contentious nature of this CDO proceeding is obscuring the State Water
14 Board’s straightforward responsibilities and tasks for bringing the matter to a lawful end. This
15 proceeding is about whether to issue a CDO against Woods for its potentially unlawful water
16 diversions from Middle River. In 2010, the State Water Board received evidence regarding Woods’
17 and/or its landowners’ asserted water rights. During this supplemental hearing process, however,
18 Woods’ landowners will be allowed to provide additional evidence so that the State Water Board
19 can consider that evidence, together with the evidence already in the record, and determine whether
20 and to what extent to issue a CDO against Woods. While some of the parties to the hearing have
21 changed since 2010, the State Water Board’s job remains the same—it needs to determine whether
22 to issue a CDO against Woods. In order to make that determination it must make findings about the
23 water rights asserted in support of Woods’ diversions, whether those rights are asserted by Woods
24 or its landowners, and issue an order in accordance with those findings. The findings are not only
25 legally required, they will provide all certainty on a critical issue for the Bay-Delta.

26 Other parties to the proceeding have and will continue to mischaracterize what the Water
27 Agencies seek through this proceeding, suggesting that the State Water Board is being asked to act
28 in excess of its jurisdiction. Those parties are wrong, however, and the State Water Board should

1 reject their invitations not to fully discharge the State Water Board’s legal duties during this CDO
2 process. The State Water Board is authorized to issue CDOs against unauthorized diversions and
3 uses of water. Water Code § 1831(a) (“When the board determines that any person is violating, or
4 threatening to violate, any requirement described in subdivision (d), the board may issue an order to
5 that person to cease and desist from that violation”). A CDO may be issued for actual or threatened
6 unauthorized diversions and uses of water. Water Code § 1831(d) (“The board may issue a cease
7 and desist order in response to a violation or threatened violation of any of the following: [¶] (1)
8 The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject
9 to this division”). Under Water Code section 1052, an unauthorized diversion or use of water is a
10 trespass. Water Code § 1052(a) (“The diversion or use of water subject to this division other than
11 as authorized in this division is a trespass”).

12 In deciding whether to issue a CDO under Water Code section 1831 the State Water Board
13 needs to conclude (1) whether there is an actual or threatened violation of Water Code section
14 1052, (2) which requires a determination of the existence of any actual or threatened trespass, (3)
15 which requires a determination of the scope and existence of any water rights asserted by the
16 diverter. The conclusion of an actual or threatened trespass requires State Water Board findings on
17 the scope and existence of any water rights asserted by the diverter. *Young v. State Water*
18 *Resources Control Board*, 219 Cal. App. 4th 397, 406 (2013) (“[T]o determine whether the
19 diversion and use of water is unauthorized, it is necessary to determine whether the diversion and
20 use that the diverter claims is authorized by riparian or pre-1914 appropriative rights”). The State
21 Water Board’s findings must be firmly supported by facts. *Topanga Ass’n. For a Scenic*
22 *Community v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974) (Code of Civil Procedure section
23 1094.5 requires the decision-maker to “set forth findings to bridge the analytic gap between the raw
24 evidence and ultimate decision or order”).

25 When it comes time for the State Water Board to make its findings, and issue its order, it
26 must avoid and correct the legal deficits in CDO No. 2011-0005. Chief among those was the State
27 Water Board’s improper deference to the Prosecution Team’s decision not to “assert[] or establish[]
28 that a threat of unauthorized diversion exists as to Woods’s diversion of up to 77.7 cfs from Middle

1 River.” CDO No. 2011-0005 at p. 28. The State Water Board decided to do so despite the Water
2 Agencies’ evidence to the contrary, and despite aptly observing that Woods’ proffered evidence
3 was insufficient “to establish that Woods actually developed and put to beneficial use the full 77.7
4 cfs within a reasonable time, or that the diversion facilities as they existed at the time were capable
5 of delivering the full amount.” CDO 2011-0005 at p. 30. Not only was the State Water Board’s
6 acquiescence to the Prosecution Team’s election not to further investigate antithetical to the State
7 Water Board’s duty to take vigorous action to prevent the unlawful diversion and use of water
8 (Water Code § 1825), but the error was compounded when the State Water Board “concluded”
9 thereupon that “Woods’s diversions to its original service area from Middle River up to 77.7 cfs do
10 not likely constitute unauthorized diversions” (CDO 2011-0005 at at p. 30) and that Woods and/or
11 its landowners “likely” have water rights of some nebulous type or quantity. Thus, the State Water
12 Board cannot begin the hearing assuming that the evidence in the prior hearing established a kind of
13 “floor” of “likely” right to divert at a maximum instantaneous rate at or below 77.7 cfs. Indeed, the
14 prior order lacked any determination of a season of diversion, overall volume of diversion during
15 one or more seasons. Thus, it is unclear how such an order could be enforced. In summary, at the
16 close of the evidentiary record, the State Water Board must make findings on whether any lands in
17 the Woods service area have riparian rights; and whether lands in the Woods service area have pre-
18 1914 rights, and if so, the terms of each pre-1914 right – e.g., season(s) of use, rate of diversion,
19 and amount. Only with those findings can the State Water Board render the conclusion(s) need to
20 support a decision on whether to issue a CDO.

21 In closing, the State Water Board cannot rely on evidence the State Water Board, itself,
22 recognizes is insufficient to establish a water right as a basis for finding that any “likely” water
23 rights exist. The Water Code, interpreting jurisprudence, and laws applicable to administrative
24 proceedings do not permit such an equivocal outcome. The legal mandates imposed upon the State
25 Water Board in this matter are well understood—the State Water Board needs to take incremental
26 investigatory steps to determine whether to issue a CDO, which requires making findings about the
27 water rights that are asserted by Woods and/or Woods’ landowners, and to issue an order setting
28 forth the State Water Board’s conclusions, supported by factual findings, supported by evidence.

1 The Water Agencies simply request that the State Water Board discharge those duties, and reject
2 competing requests seeking a lesser discharge of those duties.

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Dated: April 10, 2015

DIEPENBROCK ELKIN LLP
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

By:

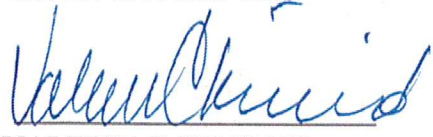

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4 Dated: April 10, 2015

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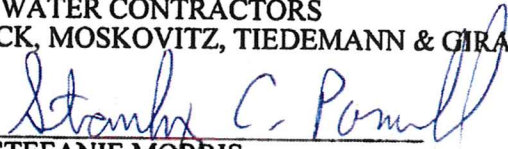
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1 **PROOF OF SERVICE**

2 I, the undersigned, declare:

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

6 On April 10, 2015, I caused to be served a copy of the following document(s):


7 **OPENING BRIEF OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY,
8 MODESTO IRRIGATION DISTRICT, AND STATE WATER CONTRACTORS**

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

10 **SEE ATTACHED SERVICE LIST**

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

17 I declare under penalty of perjury under the laws of the State of California that the
18 foregoing is true and correct and that this declaration was executed on April 10, 2015 at
19 Sacramento, California.

20 
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