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BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Draft Cease and Desist Order No. 2009-00XX DWR Enforcement Action 73 Against Woods Irrigation Company	**CLOSING BRIEF**

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I. INTRODUCTION

The State Water Resources Control Board (State Water Board) held the subject hearing to receive evidence relevant to determining whether to adopt, with or without revision, a cease and desist order against Woods Irrigation Company. (Notice of Public Hearings, April 7, 2010, p. 1.) Fundamental to achieving the stated purpose is the need to answer a critical question of California water law:

> *What evidence must a water right holder present to support a claimed pre-1914 appropriative water right?*[1]

In this closing brief, the Modesto Irrigation District, State Water Contractors, and San Luis & Delta-Mendota Water Authority ("MSS" or "MSS parties") will answer that question and demonstrate that, based on the evidence received, the State Water Board must issue a cease and desist order substantially different from the draft issued by the Prosecution Team. It must order WIC to cease and desist appropriation of water, unless WIC is diverting water: (1) pursuant to and consistent with valid water rights held by landowners or water users within its service area, or (2) consistent with any rights WIC may acquire.

The applicable rules of evidence demand that the State Water Board consider only "the sort of evidence that responsible persons are accustomed to rely in the conduct of serious affairs, (Gov. Code, § 11513(c)), and hearsay evidence if it "supplement[s] or corroborate[s] non-hearsay evidence." (Gov. Code, § 11513(d).) In this matter, the administrative record is replete with testimony and documents that run counter to those two rules.[2]

For example, Mr. Grunsky testifies, based solely upon his reading of WIC's corporate and historical records, WIC has been continuously delivering water to its service area, without cessation

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[1] WIC has not clarified if it asserts a riparian water right. To the extent the WIC does claim its own riparian water right, the MSS parties address that assertion in Appendix A to this closing brief, which is incorporated herein by this reference. In summary, WIC does not own any irrigated land in fee, and so cannot hold a riparian water right.

[2] The MSS parties renew their objections to the testimony and evidence submitted by WIC, including: (1) the Motion in limine filed by MID on June 24, 2010 seeking to prevent the submission of any evidence suggesting WIC has either a riparian or a pre-1914 water right; (2) the Motion to Strike the Testimony of Timothy Grunsky filed by MID on June 24, 2010 to prevent Mr. Grunsky from testifying as to the contents of documents that were not otherwise entered into evidence; (3) SLDMWA's objection to the admission of WIC Exhibits 2E-2M for lack of foundation and hearsay; (4) SLDMWA's objection to the testimony of Mr. Blake as irrelevant and outside the scope of the hearing; (5) SLDMWA's objections to the testimony of Dante John Nomellini, Sr. and Exhibits WIC 8, 8B,8D, 8F, 8G, 8H and 8J for lack of foundation; (6) SLDMWA's objection to the admission of the testimony of Mr. Pritchard as hearsay., and (7) all of the oral objections registered during the hearing by the MSS parties including, but not limited to, those based upon hearsay, lack of foundation, and relevance.

or decrease in deliveries, since at least 1910. (Exhibit WIC-11.) On cross-examination, Mr. Grunsky clarified that his conclusions were based upon four specific documents – the 1909 Articles of Incorporation, the two 1911 Agreements, and the Complaint filed in 1957, all of which are in evidence. (RT, at 503-504.) Yet, a closer look at Mr. Grunsky's oral testimony shows that he was not merely repeating what the documents said, but rather he was making assumptions based upon his own interpretation of what the documents contained.

On cross-examination, Mr. Grunsky stated that nothing in the four agreements specifically supported his conclusions that WIC had continuously and without decrease delivered water since 1910. Rather, "[t]hat was just basically **an assumption** that they formed this company to move water, you know, through the lands that the brothers owned. (RT, at 479 (emphasis added).) Later, on re-direct, Mr. Grunsky further acknowledged that his conclusions were not recitations of what the documents said, but rather his assumptions from incomplete or inconclusive information contained in the documents. Mr. Herrick asks Mr. Grunsky why the 1909 Articles of Incorporation and 1911 Agreements support his conclusion that water has been delivered since 1910 as follows:

> [Mr. Herrick]: And part of the reason you make the conclusion is that the documents don't talk about building a system; they talk about an existing system. Is that correct?
>
> [Mr. Grunsky]: Correct.
>
> [Mr. Herrick]: And since the Woods brothers then owned the land before the company was formed, **you are assuming then** that they were supplying themselves with water before the company was constituted; is that correct?
>
> [Mr. Grunsky]: Right. Well, they formed the company.

(RT, at 492.) Moreover, one of the documents that allegedly informed Mr. Grunsky's testimony, the 1957 Complaint, had not even been read by Mr. Grunsky. (RT, at 504: 8 ["No, just –I didn't read it."].)

All of the documents which Mr. Grunsky allegedly based his testimony upon – the 1909 Articles of Incorporation, the 1911 Agreements, and the 1957 Complaint – have been accepted into evidence. Mr. Grunsky's hearsay testimony as to the content of those documents must be stricken in its entirety and cannot be relied upon by the State Water Board since the testimony does not

"corroborate" the evidence contained in those documents, but rather interprets it and makes assumptions thereon. WIC's counsel can argue that the State Water Board should, as Mr. Grunsky apparently did, make certain assumptions based upon the content of these documents. However, Mr. Grunsky cannot be permitted to provide his assumptions under the guise of "testimony."

The administrative record in this case is replete with assumptions, guesses, speculation, innuendo and hearsay. The objections made by the MSS parties were specifically made to separate the chaff from the wheat. The State Water Board can only rely upon hearsay testimony if it corroborates other evidence in the record. And, in all cases, the State Water Board must state clearly and unequivocally each of its findings, and cite to the specific testimony that supports each individual finding.

When the record is viewed in light of the rules of evidence, several finding can be made. There should be no dispute that WIC diverts water from Middle River at a rate of at least 90 cubic feet per second, at least at times. (Exhibit PT-01, 2.)[3] And, there may not be a dispute that prior to 1914, landowners within WIC were diverting some quantities of water to some lands on Roberts Island. (RT, at 989:3 to 991:24.) That may just evidence some landowners within WIC hold valid water rights. However, there is no direct, reliable evidence in the record sufficient to find WIC holds a pre-1914 water right. Absent from the administrative record is direct, reliable evidence regarding the amount of water WIC appropriated and put to reasonable and beneficial use prior to 1914.[4] Indeed, the Prosecution Team acknowledged:

> [F]ormal evidence outlining all bases of right under which [WIC] claims its diversions and how water is delivered pursuant to any particular basis of right has not been submitted to the Division.

(Exhibit PT-01, at 4.) And, the overall state of the record may have been best reflected by Co-

[3] In its effort to establish a pre-1914 water right, WIC relies heavily upon current agricultural practices. For example, Mr. Pritchard based his analysis on recent soils maps (RT, at 450:26 to 451:22), even though Mr. Nomellini noted changes in the soils resulting from oxidation of peat soils (RT, at 387:7-10). Conditions in the southern Delta have changed to such a great degree that current practices are of little probative value in determining water use prior to 1914.

[4] The Prosecution Team also asserted that because mutual water companies can legally hold water rights owned by others for convenience in management and distribution, the decision of the California Supreme Court that WIC holds no water rights of its own is of little value. (Exhibit PT-01, at 3-4.) While the legal proposition cited by the Prosecution Team is not in dispute, there was simply no evidence submitted, either at the time the written submission was made or during the hearings, to support a finding that landowners within WIC conveyed their water rights to WIC which now "holds them" for the purpose of management and convenience. To the contrary, WIC has and is asserting that it does now hold a pre-1914 appropriative right in its own name, despite expressly contradictory finding of the California Supreme Court in *Woods Irr. Co. v. Department of Employment* (1958) 50 Cal.2d 174. (Exhibit PT-10.)

Hearing Officer Pettit. To paraphrase him, the "beliefs" and "conclusions" expressed by WIC and the Prosecution Team during the hearing reflected a level of precision that greatly exceeded the accuracy of the direct evidence. (RT, at 1086:14-17.)

For all of these reasons and as explained in detail below, the State Water Board must conclude WIC has not provided evidence sufficient to establish it holds a pre-1914 appropriative right. Therefore, the MSS parties respectfully request the State Water Board issue an order demanding WIC cease and desist any diversions under any claim that pre-1914 appropriative water rights are held by WIC. The hearing did not address appropriative or riparian water rights held by landowners within WIC's service area, and the CDO should allow WIC to deliver water to landowners that hold valid water rights. The validity of such water rights must be determined in separate proceedings specifically addressing landowner water rights.

II. DISCUSSION OF ISSUES AND ARGUMENTS

A. Burden of Proof

The person or entity that alleges a water right has the burden to prove such right exists. (*California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 737.) This burden requires the trier of fact have a requisite belief that each element of the asserted water right has been established by evidence in the record. (*See Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205.) The elements of a pre-1914 water right require proof of (1) an intent prior to 1914 to apply water to some existing or contemplated beneficial use; (2) some diversion of water prior to 1914 from the natural channel by some mode sufficient for the purpose; and (3) appropriation and beneficial use of water to the full extent asserted under the water right within a reasonable time. (*Simons v. Inyo Cerro Gordo Min. & Power Co.* (1920) 48 Cal.App. 524, 537; *Thompson v. Lee* (1857) 8 Cal. 275, 280.) A pre-1914 right may be established either through statutory filing or non-statutory water use. (Civil Code § 1418; *Haight v. Constanich* (1920) 184 Cal. 426, 433.)

B. The Administrative Record Lacks Sufficient, Credible Evidence To Support A Conclusion That WIC Holds A Pre-1914 Appropriative Water Right

WIC has not met its burden of proving it holds a pre-1914 water right. WIC did not make a Civil Code filing, (RT, at 8-17; 850:7 to 852:3), and thus can only assert a non-statutory right; an assertion that cannot be supported by substantial evidence in the administrative record. WIC has not demonstrated it had an intent to appropriate water or that it actually diverted water prior to 1914. Nor did WIC provide evidence it exercised the full extent of the asserted right within a reasonable time. And, while WIC submitted a substantial volume of evidence to the record, it has not entered any direct evidence and very little of the indirect evidence relevant to prove the elements of an appropriation, such as rate of diversion, season(s) of use, and place of use. (State Water Board Order 2006-0001 (circumstantial evidence relied on to find the quantity must be substantial and show water was actually put to use); Decision No. 1433, at 5 (allowing a statutory notice of appropriation detailing the planned uses to evidence quantity); *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 777-778 (holding a homestead proof and two corroborating declarations detailing the acreage and use of part of the land, combined with evidence of the current irrigation of the other part, were not sufficient to establish an amount of water used prior to 1914).) As a result, the State Water Board cannot make the findings of fact necessary to conclude WIC holds a pre-1914 water right.

1. WIC Has Not Presented Sufficient Evidence To Allow The State Water Board To Conclude WIC Intended To Establish A Pre-1914 Water Right

WIC alleges the 1909 Articles of Incorporation and the 1911 Agreements are evidence of WIC's intent to appropriate water.[5] This allegation is faulty for four reasons. First, there is no language in either the Articles or the Agreements that indicates WIC intended to establish a pre-1914 water right – that WIC would beneficially use water. The 1911 Agreements specifically state WIC's intent was to furnish water for landowner use. (Exhibit WIC 6O, at 1.)

[5] Mr. Grunsky apparently did not fully review the 1911 agreements. (RT, at 491:25 to 492:5.) Also, while Mr. Grunsky asserted that he relied on the 1957 quiet title case (RT, at 492:24 to 493:4), on cross examination he acknowledged that he did not read that case. (RT, at 503:20 to 504:8).

Second, the 1911 Agreements specifically state they do not intend to create any right to water:

> It is understood and agreed between the parties hereto that this contract is not intended to and does not operate or convey any lien, estate, covenant, or servitude, legal or equitable, in any manner upon or in the canal of [Woods Irrigation Company], or in or to the water flowing therein or which may hereinafter flow therein.

(Exhibit WIC 6O, at 3; Exhibit WIC 6P, at 2.) WIC has not entered any evidence that explains or otherwise contradicts this declaration that the 1911 Agreements do not intend to create any right to water.

Third, evidence in the record indicates that the Woods brothers – not WIC – had a limited gravity system in place before 1909. WIC cites to the existence of this system to prove WIC, the Company, intended to appropriate and establish a right unto itself. This cannot be. WIC did not exist at the time the landowners put a gravity system in place and therefore could not have intended anything. WIC provides no evidence the landowners transferred their rights to WIC. Without such evidence, WIC cannot proffer notice provided by landowners as a basis for a WIC right.

Fourth, the claims of landowners within WIC preclude WIC or anyone else from claiming the Agreements reflect an intent to establish a pre-1914 water right. For instance, in the Dunkel matter, the Dunkels' asserted that the 1909 Articles of Incorporation and the 1911 Agreements are evidence of a reservation of their riparian rights. (Dunkel-3, p. 1, 4, 8-9; *see also* State Water Board Order WR 2004-0004, p. 27.) This contention directly contradicts WIC's assertion that the very same documents are evidence of WIC's intent to appropriate water. California law is clear that an appropriative right cannot attach to the diversion of riparian water. (*Rindge v. Crags Land Co.*, (1922) 56 Cal. App. 247, 252; Cal. Water Code, § 1201.) By definition under the California Water Code section 1201, riparian and appropriative rights are mutually exclusive:

> All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code. (Cal. Water Code § 1201.)

The 1911 Agreements cannot be all things to all parties.[6] (*Rindge v. Crags Land Co.*, *supra*, 56 Cal. at 252; Cal. Water Code § 1201.)[7]

2. WIC Has Not Presented Sufficient Evidence To Allow The State Water Board To Conclude WIC Diverted Water Prior to 1914

A claimant of a pre-1914 water right can establish a pre-1914 water right by demonstrating it appropriated water prior to 1914. Under well established principles of California water law, elements of an appropriation are defined by the quantity of water appropriated, the point(s) of diversion, the place(s) of use, and the season(s) of use. WIC failed to provide such evidence.

a. WIC Provides The State Water Board With No Evidence Of The Quantity Of Water Appropriated Prior To 1914

A claimant of a pre-1914 water right must provide evidence to establish the quantity of water it diverted prior to 1914. (State Water Board WR 2009-0061, at 9; *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal. App. 4th 555; *Pleasant Valley Canal, supra,* at 778-779.) In the draft CDO, the Prosecution Team concluded WIC had a pre-1914 right to 77.7 cfs. (Exhibit PT-07, at. 2.) On cross examination, however, it became clear the Prosecution Team's conclusion was not supported by substantial evidence. The Prosecution Team conceded WIC may not have used 77.7 cfs of water until at least 1964. (RT, at 123:5-25; 103:21-25.)

The evidence of actual use advanced by WIC was equally lacking. WIC did not produce

[6] Not only is this precluded by law, the practical limitations of providing a riparian and appropriative water right for a single diversion should give the State Water Board a great deal of concern.

[7] A similar issue was addressed in *Evans v. BJB* (2003) Case No. E032367 (2003 WL 22701483 (Cal.App. 4 Dist.)). This case is no longer good law and is not being offered as legal precedent that the State Water Board must follow. Nonetheless, how the court treated deeds that expressly discussed "water rights," but which otherwise failed to provide any detail as to the nature or character of the "water rights" so referenced, is instructive. MSS Parties submit that the court's treatment of those issues in *Evans* provides a template that the State Water Board should follow in regards to the meaning and intent of the 1911 Agreements.

In that case, a grant deed conveyed all water and water rights. A subsequent purchaser asserted the deed preserved a riparian rights. The court disagreed. The court found that while the deeds did expressly mention water rights, they did not make it clear as to whether the water rights conveyed included the riparian rights, the pre-1914 rights, or a portion of both. While court recognized that the intention of the parties in making the deeds was key, the deeds themselves failed to distinguish between the various types of water rights that were being conveyed such that the intent of the parties could not be established. As a result, the court found that the deeds were not evidence that a riparian right was intended to attach to the noncontiguous lot in question.

As in the Evans case, the 1911 Agreements simply do not contain sufficient information for the SWRCB to determine what type of water right WIC held and intended to use to furnish water within its service area. In the absence of any additional evidence, the 1911 Agreements and 1909 Articles of Incorporation cannot be treated as evidence of WIC's intent to develop and establish a pre-1914 appropriative right. While the 1909 Articles of Incorporation and the 1911 Agreements may be evidence of some intent, what that intent may have been is unclear.

sufficient evidence to determine the amount of water WIC actually diverted prior to 1914. WIC did not provide any water orders prior to 1914 or since (RT, at 481:24 to 482:3), it did not submit any bills or other records of payment for water delivered before 1914 (RT, at 463:15-23), it did not provide a single historical account of WIC providing water or landowners in the WIC service area receiving water from WIC prior to 1914 or since (RT, at 455:23 to 456:1), and it did not enter any corporate minutes stating the amount of water diverted prior to 1914 or since (RT, at 482-14-18).

Indeed, one of the principal witnesses for WIC, Mr. Nuedeck, conceded the 1911 Agreements do not state the quantity of water WIC was putting to use, (RT, at 735:12-17), and that he does not know when WIC put water to use. (RT, at 735:21 to736:1.) He further conceded that his written testimony was based on a series of assumptions, concerning general farming practices, which have occurred in the area, none of which were supported by other evidence and none of which necessarily relate to practices that occurred in 1914. (RT, at 736:2 to737:7.) The State Water Board found evidence regarding general farming practices inadequate in *Phelps* and it is of no more value here. (State Water Board WR 2004-0004, p. 24-25.)

Give the weakness in the evidence; it was not surprising WIC argues that proof of a pre-1914 should not be so exacting to require direct evidence of the quantity of water diverted prior to 1914. (RT at, 179:4-8 (Mr. Herrick's opening statement endorses a relaxed standard of making conclusions based on available information).) Simply stated, WIC's argument is based upon a misstatement of law. (State Water Board Decision 1644, at 271 (requiring flow measurements to quantify respondents pre-1914 right); *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555; *Pleasant Valley Canal*, at 778-779 (defining a pre-1914 right on amount of water less than what he was actually using).) The State Water Board previously rejected similar arguments based on a "relaxed standard" which have been advanced in other enforcement actions in the Delta. (State Water Board WR 2004-0004, at 27 (holding an irrigation company agreement does not establish amount of water appropriated or that water was actually put to use prior to 1914), *Id.*, at 24 (holding general evidence of farming on the same island did not show irrigation occurred on respondent's property).)[8] The State Water Board must find insufficient the

[8] Even if direct evidence were not required, a pre-1914 water right would need to be based on a substantial amount of indirect evidence showing WIC diverted a specific quantity of water based on a diversion rate and season of use (time).

level of evidence advanced by the Prosecution Team and WIC to support their assertion that WIC diverted water prior to 1914.

b. WIC Has Not Presented Sufficient Evidence To Support A Determination Of The Point of Diversion Associated With WIC's Claimed Pre-1914 Water Right

Under the present statutory scheme the point of diversion must be included in the application (Cal. Water Code, § 1260(e)), and in the notice (Cal. Water Code, § 1301(g)), while the prior Civil Code procedure required that notice be posted at the point of diversion. (Cal. Civil Code § 1415.) For non-statutory appropriations, the point of diversion may be established by posting notice, (*see Weaver v. Eureka Lake Co.* (1860) 15 Cal 271, 273-274), or from the location of the as constructed diversion works. (*See DeNecochea v. Curtis* (1889) 80 Cal. 397, 405-406.) WIC has not presented any reliable evidence to support the point(s) of diversion for its claimed pre-1914 water right.[9]

Mr. Nomellini testified that he believes the points of diversion from Middle River were established prior to 1914 at their present locations. He provided photographs of what he believes may be the facilities for "tide gates" at these locations (WIC Exhibit 8I, photos 7, 9, 10, 11) which are constructed with brick and plaster, and which he believes may be "part of the original or very early structures." (RT, at 369:25 to 370:9; 370:20 to 371:3; 371:5-10; 372:22-25; and 392:6-19.) His opinion -- that these facilities are older than 1914 -- is based on "agreements that talk about these facilities being in place," that "these are the types of facilities that were being used," and that "farmers were farming big time from the 1800s." (RT, at 394:3-20.) However, Mr. Nomellini acknowledged he could not point to any documents that identified the specific tide gates which he believes were present in 1911. (RT, at 406:25 to 407:5.) Nor did he provide any evidence of drawings, expenses, or budgets from WIC depicting the construction of the facilities.

(State Water Board Order WR 2006-0001 (circumstantial evidence relied on to find the quantity must be substantial and show water was actually put to use); Decision No. 1433, at 5 (allowing a statutory notice of appropriation detailing the planned uses to evidence quantity); *Pleasant Valley Cana,* at 777-778 (holding a homestead proof and two corroborating declarations detailing the acreage and use of part of the land, combined with evidence of the current irrigation of the other part, were not sufficient to establish an amount of water used prior to 1914).)

[9] As noted later in this section, Mr. Wee did provide evidence to support a single point of diversion used by the Woods Brothers and pre-dating the formation of WIC.

Mr. Nomellini's vague testimony is the sole evidence provided by WIC to support the location of its point of diversion. This type of testimony is not sufficient to support a finding regarding the location of WIC's original point of diversion. (State Water Board WR 2004-0004 (finding that general witness testimony of removal of old floodgates and general allegations that farming and irrigation occurred before 1914 were not sufficient to establish a link between the location of irrigation and point of diversion of water).)

The only additional evidence was submitted by Mr. Wee, who testified that in 1898 the Woods Brothers had a gravity system of limited extent. (Exhibits MSS-R-14, 5 and 6; RT, at 991:4-13.) This evidence established that the Woods Brothers, not WIC, had constructed a single, not double, substantial headgate in the vicinity of the current canal. (*Id.*) The headgate, which pre-date formation of WIC, therefore, cannot be used to establish a right by WIC.

As explained above, the evidence does suggest that there was a point of diversion at the location of the present WIC point of diversion that predates the formation of WIC. The most reasonable inference from the facts is that the intent of the Woods brother when they transferred facilities to WIC was to allow WIC to deliver water under rights the Woods brothers believed they held. For these reasons, the evidence on the point of diversion does not support a finding that WIC holds an appropriative water right.

c. WIC Has Not Presented Sufficient Evidence To Support A Determination Of The Rate of Diversion Associated With WIC's Claimed Pre-1914 Water Right

WIC's only evidence regarding the rate of diversion under its asserted pre-1914 water right is the testimony Mr. Neudeck, in which he estimated the rate of diversion for two headgates he posited could have existed prior to 1914.[10] And, Mr. Neudeck testified that the two headgates in combination could have a diversion capacity of a maximum of 182 cfs, and a minimum of 88 cfs. (RT, at 1036:9-22, 1041:23 to 1042:2.) As noted above, there is no evidence two headgates existed within the WIC area prior to 1914. Mr. Neudeck's testimony reflects a theoretical exercise. Mr. Neudeck has no knowledge of the pre-1914 slope or gradient of the canal, (RT, at 663:12-19),

[10] The State Water Board should place little weight on Mr. Neudeck's testimony. As he candidly acknowledged during cross examination, he did not objectively investigate the facts. Instead, he only sought documents that might support WIC's assertion of a pre-1914 water right. (RT, at 711:12 to 712:16.)

elevation of the invert of the headgates (RT, at 665:11-16), operation of the gates, whether by gravity or by pump, (RT, at 590:18 to 592:7)[11], and he did not know the depth or width of any canal (RT, at 655, 633; *see also, Id.*, at 470-472).

A theoretical diversion rate, however, does not support a pre-1914 appropriative water right. California case law provides that "[a]ctual diversion (the taking of possession) creates the right; actual use (the amount in possession) measures the right." (*Simons v. Inyo Cerro Gordo Min. & Power Co.* (1920) 48 Cal.App. 524, 538.) No evidence has been presented of an actual diversion rate and thus, WIC cannot define the rate of diversion as required to prove an appropriative water right.

d. WIC Has Not Presented Sufficient Evidence To Support A Determination Of The Season of Use Associated With WIC's Claimed Pre-1914 Water Right

Under the present statutory method of appropriation, the diversion season must be explicitly included in the notice of the application (Cal. Water Code, § 1301(f)) and is implied by nature and amount of the proposed water use identified in the application for appropriation (Cal. Water Code § 1260(c)). The Prosecution Team acknowledged that a season of use is a necessary component of an appropriative right. (RT, at 102:12-15.) Nonetheless, it did not address season of use in their written testimony, nor did it identify documents reflecting the season in which WIC used water. (RT, at 102:16-22.) Instead, the Prosecution Team simply **assumed** that the purported pre-1914 water right would be for year-round diversions. (RT, at 153:3-18.) It made that assumption despite acknowledging the water requirements in WIC probably were not 77.7 cfs in the winter, (RT, at 156:11-19), and without knowing how much water was diverted in spring, summer, or fall seasons prior to 1914 (RT, at 163:9-22).

Similar to the Prosecution Team, WIC did not submit any written testimony which documented the season of water use prior to 1914. Testimony offered on cross examination indicated that there are seasonal demand patterns, but did not define a season of use that may have

[11] Mr. Nomellini asserted his belief that WIC was using pumps to move water. (RT, at 408:17 to 409:6.) However, he did not have any specific documentation on which to base that belief (RT, at 409:9-20), or documentation of the energy source for such pumps (RT, at 409:21 to 410:11). Mr. Grunsky also assumed that WIC used pumps to move water in their system prior to 1914, because in his opinion the slope was inadequate to move the water by gravity, but he did not cite any documents to support that assumption. (RT, at 464:5-23.)

existed prior to 1914. Mr. Nomellini opined that water use in WIC is "lower in the winter, higher in the spring and summer." (RT, at 397:6-7.) Mr. Pritchard indicated that moisture from precipitation could be stored in the soil for later use during the "season," implying that he sees irrigation as being seasonal rather than year-round. (RT, at 1070:20-24.) Mr. Grunsky indicated that "the general season for irrigating, just practical purposes, is say . . . from March to October, typically." (RT, at 480:7-11.) These statements amount to unsupported opinions and do not establish WIC's pre-1914 season of diversion. (State Water Board WR 2004-004, at 24 (general evidence of farming and farm activities was not adequate to define pre-1914 farm activities on specific properties).)

The MSS parties provided actual documentation of the season in which WIC historically used water. The Rules and Regulations adopted by WIC in January of 1940 state:

> No water will be furnished for irrigation purposes between September 15th of one year and January 1st of the succeeding year, except and unless an additional charge therefore be paid in advance and at the time of demanding the water. . . .
>
> No water shall be furnished by the Company for irrigation purposes, nor will any water be maintained in any irrigation ditches between January 1st and April 15th of each year, unless by special permission of the Board of Directors.

(Exhibit MSS-5.) When Mr. Grunsky was asked about these Rules on cross examination, he was not aware of any instance in which WIC Board permission had been given to take water from January 1 until April 15. (RT, at 463:8 to 464:4.) Mr. Grunsky was also not aware of any payments being made for water for September 15 through January 1. (RT, at 462:21 to 463:1.) Notably, WIC offered no evidence that either permission or payment was provided. Therefore, the only evidence in the record indicates that the historical WIC season of use was from April 15 to September 15; if WIC is determined to have any appropriative water right, it must be limited accordingly.

e. WIC Has Not Presented Sufficient Evidence To Support A Determination Of The Place Of Use Associated With WIC's Claimed Pre-1914 Water Right

A pre-1914 water right requires proof of the place that water was used. (State Water Board WR 2009-0061, at 5; RT, at 75:22-23; *Lower Tule River Ditch Co. v. Angiola Water Co.* (1906) 149 Cal. 496, 498 (holding a living witness who aided in the creation of the diversion and application of the water to be sufficient).) Circumstantial evidence is not sufficient. (State Water Board WR

2004-0004, at 24-27 (holding that (1) a 1912 map with hand-drawn canals was uncorroborated and insufficient to establish a place of use, (2) general evidence of farming in an area insufficient to establish place of use because of contradictory evidence showing most of the farming does not require irrigation, and (3) an irrigation company agreement with the parcels in question was insufficient as it did not prove actual use).)

The Prosecution Team conceded it did not make a determination as to WIC's place of use prior to 1914. (RT, at 101:12-102:6.) WIC asserts the 1911 Agreements define the place of use. However, WIC ignores the fact that the 1911 Agreements state explicitly that they do not reflect an intent or notice to establish a water right. (Exhibit WIC 60, at 3.) And, the 1911 Agreements, in and of themselves, are not clear what the place of use might be. They clearly point out that there are "dry lands" in the service area which did not receive water at the time the 1911 Agreements were executed. (Exhibit WIC-6O, at 7.) WIC provided no testimony as to when, where or how these lands were serviced with water and whether WIC was diligent in establishing service to these areas. Additionally, the WIC minutes contain evidence of lands being released or let out of the WIC contract and service area (Exhibit WIC-4E, at 2-4) and on cross-examination, Mr. Blake testified that additional lands have been added to the service area as defined in the 1911 Agreements. (RT, at 804:10 to 805:1.) Without quantification of the lands added to and subtracted from the 1911 Agreements base map, it is not clear if such lands could support an appropriation of pre-1914 water. As a result, WIC fails to present evidence sufficient to allow the State Water Board to define the place of use for WIC's claimed pre-1914 appropriative water right.

C. <u>The Administrative Record Lacks Sufficient, Credible Evidence To Support A Conclusion That WIC Reasonably and Beneficially Used Water Prior to 1914</u>

To establish a pre-1914 water right, it must be proven that the use of water appropriated under the right was both reasonable and beneficial. (Cal. Water Code, § 1240; *see Haight*, at 433; *Thorne v. McKinley Bros.* (1936) 5 Cal.2d 704, 710; RT, at 75:23-25.) Beneficial uses have been defined to include, but are not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan. (Cal. Water Code,

§ 1257.)

Reasonable use is that which is "reasonably necessary" to provide for a beneficial use. Such use does not require the most economical means to use water, but prohibits wasteful application. (*Haight*, at 436 (holding even if the plaintiff's diversion works and transmission facilities were capable of taking 48 miner's inches, and even if the plaintiff had in fact diverted that amount, given the plaintiff only needed enough water to irrigate six acres, the plaintiff could not support a water right of 48 miner's inches).)

The Prosecution Team relied primarily on the 1911 Agreements as the basis of a pre-1914 water right, and has not attempted to determine whether the water use they assume WIC made was either reasonable or beneficial. (RT, at 114:4-14.) Because the 1911 Agreements only provide that WIC will furnish water to landowners, and does not establish any actual use of water, it follows that the 1911 Agreements did not establish such use is either reasonable or beneficial. WIC also failed to provide evidence (1) that any surface water was applied to the lands within its service area, (2) of the rate or quantity of which the water was applied to these lands, or (3) of crops grown with surface diversions. Absent any such evidence, given that WIC only asserted that it would furnish (not use) water in the 1911 Agreements, WIC has failed to provide evidence that the water was put to a reasonable or beneficial use. Without such documentation, it is not possible to determine if the use of water by WIC was and is reasonable and beneficial.

D. The Administrative Record Lacks Sufficient, Credible Evidence To Support A Conclusion That WIC Diligently Developed Any Pre-1914 Water

Appropriative rights are required to be developed with due diligence. (*See, e.g., Nevada County and Sacramento Canal Company v. G.W. Kidd* (1869) 37 Cal. 282, 314 ("*Kidd*"); *see also* Cal. Water Code §§ 1395, 1396 and 1397; Cal. Code Regs., tit. 23, § 840.) The purpose of this requirement is to ensure that water is put to full and beneficial use; water rights not diligently developed will be revoked and made available for others to appropriate. (*See Sierra Land & Water Co. v. Cain Irr. Co.* (1933) 219 Cal. 82, 83-84; Cal. Water Code §§ 1395-1398.)

Whether or not a party has exercised due diligence in perfecting its claimed appropriative right is a question of fact. (*Weaver v. Eureka Lake Co.* (1860) 15 Cal. 271, 273-274.) Under the

State Water Board's current regulations, failure to diligently pursue perfection of the right will not be excused by lack of finances, occupation of other work, physical disability or other conditions relating to the party and not the enterprise. (Cal. Code Regs., tit 23, § 844; *Kimball v. Gearhart* (1859) 12 Cal. 27, 30.)

From the evidence in the record, it is not clear when WIC is claiming to have perfected its right. Mr. Grunsky testified that he was not aware of any information regarding WIC's rate of diversion until the 2009 site visit was conducted by Mr. Stretars on behalf of the Division of Water Rights. (RT, at 482-483.) Mr. Stretars testified that he did not believe that WIC's claimed diversion rate of 77.7 cfs could be confirmed until at least 1964, more than 50 years after the 1911 Agreements. (RT, at 123:11-19.)

While there is admittedly little evidence to go on, it appears at first blush that WIC did not pursue the perfection of its claimed pre-1914 appropriative right with the requisite diligence. There are many instances in which a passage of time of less than 50 plus years has been sufficient, absent good cause, to either revoke a permit or cancel an application. (State Water Board Order WR 2009-0014-EXEC; *see also* State Water Board WR 2008-0045, (wherein the State Water Board revoked the permits issued to the United States Bureau of Reclamation in 1970 for the Auburn Dam project); *Sierra Land & Water Co. v. Cain Irr. Co.* (1933) 219 Cal. 82, 84 ("no amount of diligence elsewhere will overcome the submission, without complaint, to said injunction for a period of nearly twenty years").)

Absent the exercise of diligence, a water right cannot be established, let alone be permitted to "relate back" to the date of initiation. (*Kidd*, at 314.) Therefore, if the State Water Board were to provide WIC with a pre-1914 water right, the priority of this appropriative right must be set as of the date WIC completed its appropriation. Without further evidence or record of diversion, this date must be set no earlier than 1964, the date that Mr. Stretars identified when diversion of 77.7 cfs might be demonstrated. (RT, at 123:11-19.)

III. CONCLUSIONS

Based on the evidence presented, it is apparent that WIC was created before 1914 with the intent to furnish water to the lands within its service area. However, none of the corporate records

which pre-date 1914 establish or describe the underlying right by which WIC would divert water in the first instance. Moreover, while WIC primarily argues that its corporate records are evidence of a pre-1914 appropriative right, those records do not support the argument. On their face, they state unambiguously that the documents are not intended to create a water right. Further, none of the documents establish the quantity of water to be diverted, that an actual appropriation took place, or that the water diverted was applied to a reasonable and beneficial use within WIC's service area.

It is clear that WIC is hoping the State Water Board will rely upon evidence regarding the current diversion and use of water and simply fill in the gaps created by the absence of any evidence regarding diversions by WIC in and around 1914. The State Water Board must refuse the invitation to do so. In *Phelps*, the State Water Board recognized that the corporate records of WIC may provide some evidence, but more was needed to establish a pre-1914 appropriative water right. At the end of the hearing, it was clear that WIC simply had no additional relevant information to submit. Unless and until WIC can acquire and submit the necessary additional information, the State Water Board has no choice but to find that WIC has failed to establish a pre-1914 appropriative right to any amount of water, and issue a CDO which prevents WIC from diverting water under its own right.

For these reasons, the State Water Board should draw the following conclusions:

1. **WIC did not make a pre-1914 filing pursuant to the Civil Code.**
2. **WIC does not holds its own Pre-1914 appropriative water right.** The evidence was insufficient to demonstrate a satisfactory basis to find that WIC has a pre-1914 appropriative right. WIC did not provide evidence sufficient to establish a pre-1914 water right. It did not demonstrate: (1) intent to establish a pre-1914 water right, (2) the quantity of water WIC appropriated prior to 1914, (3) the rate of diversion and the volume of water diverted prior to 1914; (4) the place water was put to use; (5) the point(s) of diversion for the water, and (6) that water has been reasonably and beneficially used.
3. **WIC's diversions must be limited to exercise of water rights held by landowners within the WIC service area.** Because insufficient evidence was provided to

demonstrate that WIC has either riparian or appropriative water rights, WIC can only divert water based on riparian and/or appropriative water rights held by landowners within its service area.

4. **Diversions to lands within WIC occurred during a limited season.** The evidence presented suggests the diversion season is limited to April 15 to September 15.

5. **WIC does not hold its own riparian water rights.** WIC did not prove the elements required to establish a riparian water right. It has not presented evidence that: (1) it owns real property contiguous to Middle River; 2) that the real property WIC owns is the smallest parcel held under one title in the chain of title leading to WIC as the current owners; and 3) that the real property WIC owns is located within the Middle River watershed. In addition, WIC may not assert that it holds riparian water rights based on the *Woods Irrigation Company v. Dept. of Employment* case, and the doctrines of *res judicata* and/or collateral estoppel, and judicial estoppel.

IV. PROPOSED FINDINGS AND ORDER

The evidence presented at the hearing supports the following findings of fact, upon which a revised order should be based: (1) WIC is a corporate entity whose purpose is to serve the lands within its service area with irrigation and drainage services; (2) WIC has not provided evidence sufficient to establish it has either a riparian or pre-1914 appropriative water right. Based on these findings, the order should read as follows:

IT IS HEREBY ORDERED THAT:

1. Without producing further evidence, WIC must cease and desist diverting water pursuant to any claim that it has a riparian or pre-1914 water right.

2. WIC may divert water: (1) to any landowners currently within its service area that have valid water rights, consistent with the terms and limitations of those rights, or (2) consistent with any rights it may acquire.

3. WIC diversions must be limited to the total water rights held by landowners within its service area, or consistent with the terms and conditions of any right it acquires. If the State Water Board or a Court determines a landowner or landowners within the

3. WIC diversions must be limited to the total water rights held by landowners within its service area, or consistent with the terms and conditions of any right it acquires. If the State Water Board or a Court determines a landowner or landowners within the WIC service area do not have valid water right(s), WIC diversions must be reduced to reflect such a determination(s).

4. If WIC diverts water in excess of the amounts allowed under valid water rights held by the landowners within the WIC service area or any right it acquires, the Division may initiate further adjudicative action, impose administrative civil liabilities, and/or issue a cease and desist order against WIC.

Dated: August 18, 2010

O'LAUGHLIN & PARIS LLP

By: _____
Tim O'Laughlin
Attorneys for Plaintiff
MODESTO IRRIGATION DISTRICT

Dated: August 18, 2010

DIEPENBROCK HARRISON
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SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

Dated: August 18, 2010

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
A Professional Corporation

By: _____
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Attorneys for Plaintiff
STATE WATER CONTRACTORS

APPENDIX A

(Response To Possible Assertion By Woods Irrigation Company That It Holds Riparian Water Rights)

A. Introduction

In its opening argument, WIC did not assert that it held its own riparian water rights. Rather, it asserted its belief that WIC holds pre-1914 appropriative water rights, and that landowners may hold their own pre-1914 appropriative and riparian water rights. (RT, at 179:9-14.) Similarly, the opening statement of San Joaquin County and the San Joaquin County Flood Control & Water Conservation District recognized that WIC "by law can't hold riparian water rights unless they have been assigned." (RT, at 15:5-8.) However, when WIC requested a hearing, it may have been asserting riparian rights. (Request for Hearing, January 11, 2010 (stating "the diversion of water by Woods under its pre-1914 rights, as well as, riparian rights").) Also, some of WIC's witnesses discussed potential riparian rights of lands within the WIC service area, but did not opine whether or not those potential riparian water rights were held by individual landowners, or by WIC. Mr. Neudeck did not offer any opinion whether WIC owns riparian water rights (RT, at 561:16-24), and Mr. Blake did not know if WIC can hold a riparian water right. (RT, at 784:7-12.) In the end, the law bars WIC from asserting a riparian water right. And, the evidence clearly shows that WIC does not and cannot hold a riparian water right, in any case.

B. The State Water Board Cannot Find WIC Holds Riparian Water Rights

1. WIC Is Barred By The Doctrines Of *Res Judicata* And/Or Collateral Estoppel And Judicial Estoppel From Asserting Ownership Of Riparian Water Rights

WIC is barred by the doctrines of *res judicata* and/or collateral estoppel and judicial estoppel from asserting a riparian water right. *Res judicata*, or claim preclusion, prevents the re-litigation of a claim previously tried and decided. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897.) Collateral estoppel, or issue preclusion, prevents the re-litigation of issues actually adjudicated between the parties in a previous litigation. (*Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 910.) The prerequisite elements for applying either doctrine

are the same: (1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior action, (2) the prior action resulted in a final judgment on the merits, and (3) the party against whom the doctrine is to be applied was a party, or is in privity with a party, to the prior action. (*People v. Barragan* (2004) 32 Cal.4th 236, 252-253.) All three elements are met here.

The California Supreme Court considered WIC's assertion that it holds a riparian water right and judged that it does not. (*Woods Irr. Co. v. Department of Employment* (1958) 50 Cal.2d 174 ("*Woods*")). In *Woods*, WIC sought to recover unemployment insurance contributions assessed and paid under protest pursuant to the Unemployment Insurance Act. (*Woods*, *supra*, 50 Cal.2d at 176.) WIC alleged that it was exempt from paying the taxes because the irrigation and drainage services provided by its employees fell into the exempt category of agricultural labor. (*Id.*) In order to determine the nature of the labor WIC's employees performed, the nature of WIC itself was considered. (*Id.*)

The Supreme Court specifically evaluated two in issues in *Woods*. First, it had to decide if the work being performed by WIC's employees constituted "agricultural labor" as defined by the Unemployment Insurance Act. (*Id.*, at 177-179.) Second, it had to decide if there was any significance to the fact that the work was being performed on easements owned by WIC, as opposed to the on the farms of WIC's landowners. (*Id.*)

In evaluating the first issue, the Court looked at the purposes for which WIC had been formed. (*Id.*, at 176.) The Court specifically ruled that WIC "own[ed] no land or water rights of its own," and was not a water corporation that provided water to the general public. (*Id.*) From this, the Court determined that WIC and its employees provided a mere service, consisting of the construction, operation and maintenance of irrigation and drainage ditches to support the agricultural activities of its landowners. (*Id.*, at 179.) This was a key and integral finding because the appellate court had found that WIC was in fact a water corporation capable of providing water to the general public pursuant to the authority vested in WIC's articles of incorporation. (*Woods Irrigation Co. v. Department of Employment* (1957) 316 P.2d 1003, 1006 (vacated 50 Cal.2d 174.).) Although WIC specifically characterized itself as a corporation organized primarily for furnishing irrigation water and for the drainage of shareholder lands, (*id.*, at 1003), and asserted that the nature

of its employees' work was indeed agricultural, (*id.*, at 1004), the appellate court disagreed. (*Id.*, at 1006.) Because WIC's articles of incorporation granted it the authority to furnish irrigation water to the public, (*id.* at 1003), the appellate court found that the services provided by WIC were:

> [N]o more agricultural labor than are the services of employees of corporations engaged generally and commercially in the sale and distribution on water or of power to pump water even though it may be said that crops could not be grown on the farms without the water or power so furnished.

(*Id.*) The Supreme Court, however, reached the opposite conclusion and found that although the services provided by WIC could be the same as those provided by a water corporation, because WIC had no water rights of its own, it was not in fact a water purveyor to the general public. Focusing on the services actually being provided, and not those that WIC may possibly provide in the future, the Supreme Court stated WIC:

> [I]s a nonprofit California corporation, engaged in furnishing irrigating and drainage services to land owned by its farmer shareholders. It owns no land or water rights of its own but instead maintains its pumping stations, canals and coordinating irrigating and drainage facilities on the property of its shareholders, from whom it has received grants of easements in perpetuity. Although plaintiff's articles of incorporation also permit it to furnish its services to persons other than its shareholders, it has never done so, it thus appears that plaintiff is not a mere water company supplying water to the public for general purposes but that it is an 'irrigation company,' engaged in performing irrigating and drainage services solely for its farmer stockholders and operating solely upon the farms of said farmer stockholders. In other words, the only services which it is performing are services in line with its purposes stated in its articles of incorporation 'of constructing, operating and maintaining ditches for the irrigation of the lands of the stockholders' and 'for the construction, operation and maintenance of ditches for the drainage of lands owned by the stockholders.'

(*Woods,* at 176.) As a result, the Supreme Court reversed the decision of the appellate court and found:

> [T]he services in question, performed on farm lands as a necessary incident to the cultivation of the agricultural land and the crops produced thereon, must be classed as 'agricultural labor,' though somewhat similar services might not be so classed if performed under different circumstances.

(*Woods*, at 181.)

Additionally, in evaluating the second issue, the Supreme Court went on to find that there

was no legal distinction created by the fact that WIC's employees worked on facilities placed on easements owned by WIC, instead of directly on the farms of WIC's landowners, and therefore ruled that WIC and its employees were exempt from paying certain corporate unemployment contributions. (*Id.*, at 179, 181.)

Thus, the question of whether or not WIC owned property and water rights in its own name was central to the reasoning and decision of the Supreme Court, was specifically litigated, and the result is binding upon WIC in accordance with the doctrines of *res judicata* and/or collateral estoppel and judicial estoppel.

2. WIC Is Barred By The Doctrine Of Judicial Estoppel From Asserting Ownership Of Riparian Water Rights

WIC's contention that it possesses riparian water rights is barred by the doctrine judicial estoppel because WIC took the position that it did not own riparian water rights in *Woods,* (*Wood*, at 176), and in that case, the Supreme Court of California adopted WIC's position and determined it to be true. "Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) The crucial objective of judicial estoppel is to protect the integrity of the judiciary by preventing the intentional use of self-contradiction for the purpose of obtaining an unfair advantage. (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 118.) Judicial estoppel applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson,* at 183; *see also New Hampshire v. Maine* (2001) 532 U.S. 742, 750; *Swahn Group, Inc. v. Segal* (2010) WL 1347700.)

In this case, if WIC asserts riparian rights, the judicial estoppel factors will have been met and thus WIC's recent claim that it has riparian water right must be barred by judicial estoppel. First, WIC will have taken two different positions; originally in 1958, in *Woods*, WIC asserted that it held no water rights of its own, and in the present CDO case, WIC will have alleged it holds

riparian water rights. Second, the original position taken by WIC was in a judicial proceeding and the current will contradict the position taken by WIC is in a quasi-judicial administrative proceeding. Third, WIC successfully asserted the first position, that it held no water rights, in *Woods*, as this assertion was critical to the California Supreme Court's finding that WIC merely provided a service maintaining the irrigation and drainage infrastructure for its shareholders, and thus the labor of WIC's employees was exempt from taxation under the Unemployment Insurance Act. (*Woods,* at 179.) Fourth, the two positions that WIC will have taken, originally that it owns no water rights and now that it does, are totally inconsistent. Fifth and finally, the first position taken by WIC, that it owned no water rights, was not taken as a result of ignorance, fraud or mistake because its own attorney, Gilbert L. Jones, in the original Sacramento County Superior Court case, *Woods Irrigation Company v. Department of Employment*, testified that WIC did not have its own water right. (Exhibit MSS-IE, at 49, 140.)

Therefore, the State Water Board should find WIC does not have riparian water rights with which to divert water from Middle River in San Joaquin County for use on lands within and upon Roberts Island because WIC is barred by the doctrine of judicial estoppel from asserting ownership of any water rights.

C. The Evidence Before The State Water Board Does Not Support A Finding That WIC Holds Riparian Water Rights

A person or entity claiming a riparian right is burdened with proving: 1) it owns real property contiguous to a watercourse; 2) the real property it owns is the smallest parcel held under one title in the chain of title leading to that party as the current owners; and 3) the real property the party owns is located within the watershed of the watercourse to which it is contiguous. (*See Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 528-529; *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 116.) WIC cannot make any of those showings. It owns no property that could support riparian water rights.

1. The California Supreme Court Already Determined That WIC Does Not Own Any Property In Fee

In *Woods*, the California Supreme Court found that WIC owns no land in fee but that WIC simply operates its facilities on the property of its shareholders, "from whom it has received grants of easements in perpetuity." (*Woods*, at 176.) The Supreme Court went on to state that "[t]he fees underlying the easements and the lands surrounding the easements are farm lands owned by the farmers whom [WIC] serves." (*Id.*, at 179.) The State Water Board is bound to comply with the findings of the California Supreme Court because the California court system asserted exclusive jurisdiction and its finding that WIC owns no land is conclusive and cannot be the subject of a collateral attack before a body with concurrent jurisdiction such as the State Water Board. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 977; *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 683.) The California Supreme Court has conclusively established that WIC does not own any property, let alone any property contiguous to Middle River. Therefore, the State Water Board is required to follow such findings.

2. WIC Admitted That It Only Obtained Easements For Its Facilities In WIC's 1957 Complaint to Quiet Title to Corporate Stock and for Declaratory Relief

In WIC's 1957 Complaint to Quiet Title to Corporate Stock and for Declaratory Relief, WIC admitted that it only obtained easements for its facilities pursuant to the 1911 agreements to furnish water to lands of E.W.S. Woods, Jessie Lee Wilhoit, and Mary L. Douglass. In 1957, WIC filed a Complaint to Quiet Title to Corporate Stock and for Declaratory Relief, in which WIC sued all of the real property owners within its service area to quiet title to WIC corporate stock. In its Complaint, WIC did not assert that WIC itself was one of the fee title owners of real property within its service area, nor that it had title to any shares of corporate stock. (*Id.*) Moreover, WIC admitted in its Complaint that the original shares of WIC corporate stock were to be appurtenant to the lands served within WIC's boundaries and issued to the property owners of all of the real property within WIC's service area. (*Id.*, at 6:25-28.) The Complaint went on to state, however, that the four original shareholders, among whom WIC was not listed, were the sole owners of all of the real property within WIC's boundaries. (*Id.*, at 6:11-21.) Thus, WIC did not receive of any shares of

corporate stock when they were originally issued because WIC did not own any real property in fee.

3. WIC Has Not Provided Any New Evidence Of Fee Title Ownership Of Real Property

WIC has not provided any new evidence of fee title ownership of real property contiguous to Middle River in San Joaquin County, which is necessary to substantiate a riparian right. (*Rancho Santa Margarita,* at 528.) While the CDO hearing provided WIC with an opportunity to present new and/or more recent evidence in order to establish WIC's riparian water rights, WIC failed to provide such evidence, and Mr. Grunsky testified that WIC does not own any of the lands it serves water to. (RT, at 451:25 to 452:7.) WIC did not provide any deeds showing that land has been conveyed to it in fee, nor did WIC submit new evidence to show that the findings of the California Supreme Court and WIC's admissions in the 1957 Complaint to Quiet Title to Corporate Stock and for Declaratory Relief were no longer controlling because WIC owns no property in fee that is contiguous to Middle River. [12]Therefore, the State Water Board should find that WIC possesses no riparian water rights.

As shown above, WIC did not present any evidence that it owns fee title to any real property contiguous to Middle River. As such, WIC therefore cannot possibly own the smallest parcel held under one title in the chain of title, nor can WIC own property within the Middle River watershed. Therefore, the State Water Board should find that WIC possesses no riparian water rights.

D. The "Delta Pool" Theory Add Nothing To WIC Claim Of A Riparian Water Right

WIC also attempted to establish riparian rights based upon the theory that lands within its service area have riparian water rights because the groundwater they overlie is connected to the surface waters from which they are diverting, also known as the "Delta Pool" theory. The State Water Board rejected this theory in its Phelps Order, which was upheld on judicial review. (*See Phelps et al. v. State Water Board* (Super. Ct. Sacramento County, 2006, No. 04CS00368; *Phelps v.*

[12] Evidence was provided as to the former existence and location of a watercourse referred to as Duck Slough. Without commenting on the quality of that evidence, MSS asserts that since WIC owns no real property in fee, it is likewise not an owner of property contiguous to the former Duck Slough. As such, WIC is not riparian to Duck Slough.

State Water Board (2007) 157 Cal.App.4th 89.) In the present CDO proceeding against WIC, the State Water Board again rejected this theory because riparian water rights cannot attach through groundwater:

> The portions of Mr. Neudeck's testimony that MID objects to in the current proceeding are copies of Mr. Neudeck's testimony in a prior enforcement hearing regarding Roberts Island properties, State Water Board Order WR 2004-0004 (hereinafter "Phelps"). This evidence is presented solely to support the theory that lands in the area have riparian water rights because the groundwater they overlie is connected to the surface waters from which they are diverting, also known as the "Delta Pool" theory. This theory was rejected in State Water Board's Phelps Order, which was upheld on judicial review. (See *Phelps et al. v. SWRCB* (Super. Ct. Sacramento County, 2006, No. 04CS00368); *Phelps v. SWRCB* (2007) 157 Cal.App.4th 89.) Because a riparian water right cannot attach through groundwater, this evidence is not relevant to the proceeding, and the motion to strike is granted on that ground.

(July 19, 2010 Hearing Officer's Ruling on the evidentiary objections and motions raised concerning the submission of exhibits by Woods Irrigation Company, and Modesto Irrigation District, at 3 (emphasis added).)

E. <u>Conclusion</u>

For the above stated reasons, the State Water Board should not and can not conclude WIC holds riparian water rights.

PROOF OF SERVICE

I, Jolanthe V. Onishi, declare as follows:

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

On August 18, 2010, I served a copy of the foregoing document entitled: **CLOSING BRIEF and Appendix A**on the following interested parties in the above-referenced case number to the following:

See attached Service List

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

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

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

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

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

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 18, 2010at Sacramento, California.

Jolanthe V. Onishi

HEARING REGARDING ADOPTION OF CEASE AND DESIST ORDER AGAINST: WOODS IRRIGATION COMPANY (MIDDLE RIVER)(-- SAN JOAQUIN COUNTY – SCHEDULED TO COMMENCE ON JUNE 7, 2010

REVISED SERVICELIST
(APRIL 23, 2010)

THE FOLLOWING MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)

WOODS IRRIGATION COMPANY c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com c/o Dennis Donald Geiger, Esq. 311 East Main Street, Suite 400 Stockton, CA 95202 dgeiger@bgrn.com	DIVISION OF WATER RIGHTS PROSECUTION TEAM c/o David Rose State Water Resources Control Board 1001 I Street Sacramento, CA 95814 drose@waterboards.ca.gov
MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin Ken Petruzzelli O'Laughlin & Paris LLP 117 Meyers Street, Suite 110 P.O. Box 9259 Chico, CA 95927-9259 towater@olaughlinparis.com kpetruzzelli@olaughlinparis.com	STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 spowell@kmtg.com
SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD CONTROL & WATER CONSERVATION DISTRICT c/o DeeAnne M. Gillick Neumiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 dgillick@neumiller.com tshephard@neumiller.com	CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com
Continued on next page.	

SOUTH DELTA WATER AGENCY c/o John Herrick Attorney at Law 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com	