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8 **STATE OF CALIFORNIA**
9 **STATE WATER RESOURCES CONTROL BOARD**

12)
 13 In the Matter of Draft Cease and Desist Order)
 14 No. 2009-00XX-DWR Enforcement Action 73) **MOTION TO STRIKE THE TESTIMONY**
 15 Against Wood Irrigation Company) **OF TIMOTHY GRUNSKY**
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17 **I. INTRODUCTION**

18 Pursuant to a Draft Cease and Desist Order ("CDO") issued by the California State
 19 Water Resources Control Board ("SWRCB") against Woods Irrigation Company ("WIC") on
 20 December 28, 2009, the SWRCB requested that WIC provide proof of its legal right to divert
 21 water from Middle River in San Joaquin County for use on lands within and upon Roberts
 22 Island. Specifically, WIC was instructed to provide a delineation of the area served and the
 23 amount of water delivered under any pre-1914 appropriative water right that WIC claims to
 24 have, and also to provide a list of riparian parcels that it serves on behalf of the property
 25 owners through its diversion works. WIC requested a hearing before the SWRCB for which
 26 WIC has submitted the testimony of Timothy Grunsky ("Mr. Grunsky"), the president of
 27 WIC, as the only evidence to establish the existence, nature, and extent of WIC's diversions

1 of water. In his testimony, Mr. Grunsky claims that after he reviewed the corporate
2 documents of WIC, he concluded that WIC “began delivering water to all the lands within it
3 [*sic*] boundaries from at least 1910 through the present.” (Exhibit WIC-11.) The Modesto
4 Irrigation District (“MID”) objects to this testimony of Mr. Grunsky pursuant to the
5 Government Code section 11513, which prohibits the admission of evidence upon which
6 responsible persons are not accustomed to relying in the conduct of serious affairs, and also
7 prohibits the admission of hearsay evidence when not offered to supplement or explain other
8 evidence. (Cal. Govt. Code § 11513.) Additionally, MID objects to the testimony of Mr.
9 Grunsky pursuant to the California Evidence Code section 1523, which prohibits the
10 admission of oral testimony to prove the content of a writing. (Cal. Evid. Code § 1523.)
11 Therefore, MID requests the SWRCB strike Mr. Grunsky’s testimony.

12 13 **II. STATEMENT OF FACTS**

14 On December 28, 2009, the SWRCB issued a Draft CDO against the WIC requesting
15 that it cease and desist its unauthorized diversion, collection and use of water in violation of
16 section 1052 of the Water Code regarding its use of water from Middle River in San Joaquin
17 County on Roberts Island. (Exhibit PT-7.)

18 On January 11, 2010, Dennis Donald Geiger, the attorney for WIC, requested a
19 hearing before the SWRCB regarding the allegations presented in the Draft CDO against
20 WIC.

21 On February 9, 2010, MID requested to intervene as a party in WIC’s proceeding.

22 On April 7, 2010, the SWRCB issued a Notice of Public Hearing to inform the public
23 of a hearing scheduled for June 7, 2010 to determine whether to adopt the CDO against WIC.

24 Mr. Grunsky, the President of WIC, testified that “Although some of the corporate
25 records are missing or destroyed, the records indicate the corporation began delivering water
26 from at least 1910.” (WIC-11.)
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1 Mr. Grunsky also testified that “[m]y familiarity of the records and history of the
2 corporation lead me to conclude that Woods Irrigation Company has been delivering water to
3 all the lands within it [sic] boundaries from at least 1910 through the present. The records
4 show no cessation or decrease in deliveries.” (WIC-11.)

5 WIC has offered no other evidence to prove the existence, nature, and extent of its
6 diversions of water.

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8 **III. ARGUMENT**

9 **A. Mr. Grunsky’s Testimony Cannot be Admitted to Prove the Contents of the**
10 **WIC Corporate Documents Because it is Not the Sort of Evidence Upon**
11 **Which Reasonable Persons Would Rely When Conducting Serious Affairs.**

12 Under California Government Code section 11513, formal administrative hearings
13 “need not be conducted according to technical rules relating to evidence and witnesses[.]”
14 (Cal. Govt. Code § 11513.) Thus, relevant evidence will be admitted so long as it “is the sort
15 of evidence on which responsible persons are accustomed to rely in the conduct of serious
16 affairs,” even if it would be inadmissible when objected to in civil actions. (Id.)

17 Mr. Grunsky’s testimony should be stricken because it consists of nothing more than
18 oral testimony offered to prove the content of multiple writings. In Exhibit WIC-11, Mr.
19 Grunsky states, “[a]lthough some of the corporate records are missing or destroyed, **the**
20 **records indicate** the corporation began delivering water from at least 1910.” (WIC-
21 11.)(emphasis added). Mr. Grunsky also testified that “[**m]y familiarity of the records** and
22 history of the corporation lead me to conclude that Woods Irrigation Company has been
23 delivering water to all the lands within it [sic] boundaries from at least 1910 through the
24 present. **The records show** no cessation or decrease in deliveries.” (WIC-11.)(emphasis
25 added). Both of these statements are offered to prove the truth of the writings, which allege to
26 prove WIC has been delivering water from at least 1910 and thus has a pre-1914 water right.
27 Such testimony however, is inadmissible under California Government Code section 11513
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1 because any responsible person when conducting serious affairs, such as proving water
2 rights, would review and consider the documents themselves, and not simply rely upon the
3 word of one whose sole testimony is nothing more than a summary of the documents he has
4 alleged to have read.

5 The SWRCB, as a responsible agency, has relied on the following forms of evidence
6 to prove a water right:

7 "a chain of title supporting riparian status for the parcel;
8 evidence supporting an existing or implied preservation of the
9 riparian right established prior to severance of the parcel from
10 the stream or another riparian parcel; evidence which verifies
11 irrigation on the parcel prior to 1914 and documents the
12 subsequent continuous use of water; or statements which
13 provide an alternative valid basis of right for diversions of
14 water to the parcel." (See Draft CDO Mark and Valla Dunkel,
15 Enforcement Action 75; Draft CDO Mussi and Mussi
16 Investment, Enforcement Action No. 80.)

17 While the SWRCB is not solely limited to those forms of proof, the SWRCB has
18 consistently relied upon tangible, admissible evidence to prove a water right, not mere oral
19 testimony that documents may substantiate a water right. No responsible person would be
20 accustomed to relying upon such oral testimony when seeking to prove the existence of a
21 water right, particularly one as large as the right asserted by WIC. A responsible person
22 would instead review the actual documents since the documents are readily available.

23 Additionally, absent a justifiable basis for relying on Mr. Grunsky's conclusion, a
24 responsible person would not trust in Mr. Grunsky's word exclusively. Thus, the SWRCB
25 should look to the original documents rather than merely take Mr. Grunsky's testimony at
26 face value. Therefore, as Mr. Grunsky's testimony is not the sort upon which a responsible
27 person would rely, it should be stricken.

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1 **B. Mr. Grunsky's Testimony Cannot be Admitted to Prove the Contents of the**
2 **WIC Corporate Documents Because it is Inadmissible Hearsay Since it is Not**
3 **Offered to Supplement or Explain Other Evidence.**

4 Mr. Grunsky's testimony should be stricken as inadmissible hearsay because it is not
5 offered to supplement or explain other evidence, as it is the only source of evidence
6 submitted by WIC to establish the existence, nature, and extent of WIC's diversions of water.
7 Under the California Government Code section 11513, hearsay evidence will be admitted
8 "for the purpose of supplementing or explaining other evidence," unless it would be
9 inadmissible when objected to in civil actions. (Id.)

10 In this case, Mr. Grunsky's testimony is not offered to supplement or explain other
11 evidence because no other evidence was submitted by WIC to establish the existence, nature,
12 and extent of WIC's diversions of water before 1914. To the contrary, the only evidence
13 offered is Mr. Grunsky's statements concerning the content and meaning of documents he
14 has allegedly read but has not provided. Had the actual documents about which Mr. Grunsky
15 is testifying been admitted, then his testimony might arguably be admissible as
16 supplementary and explanatory. However, by failing to provide the actual documents, Mr.
17 Grunsky's testimony is inadmissible under the Government Code section 11513 and should
18 be stricken.

19 **C. Mr. Grunsky's Testimony Cannot be Admitted to Prove the Contents of the**
20 **WIC Corporate Documents Because it is Hearsay and Would Be**
21 **Inadmissible When Objected to in Civil Actions**

22 Mr. Grunsky's testimony should be stricken as inadmissible hearsay because it would
23 not be admissible over objection in a court of law. Under the California Government Code
24 section 11513, hearsay evidence will be admitted "for the purpose of supplementing or
25 explaining other evidence," unless it would be inadmissible when objected to in civil actions.
26 (Cal. Govt. Code § 11513.) Pursuant to the California Evidence Code section 1523, which
27 applies to civil actions, "oral testimony is not admissible to prove the content of a writing,"
28 unless otherwise permitted by statute. (Cal. Evid. Code § 1523.) Exceptions to this
 requirement include the following situations: 1) when the original is lost or has been

1 destroyed at no fault of the proponent, and the proponent is not in possession or control of a
2 copy; 2) when the proponent is not in possession or control of the original or a copy and is
3 not able to procure it via the court's process or other means; 3) when the proponent is not in
4 possession or control of the original or a copy and the writing is "not closely related to the
5 controlling issues and it would be inexpedient to require its production[;]" and 4) when the
6 writing is a summary of numerous other writings which "cannot be examined in court
7 without great loss of time" and the summary is all that is wanted. (Id.)

8 In this case, the only way Mr. Grunsky's testimony would be admissible is if one of
9 the exceptions listed above were to apply. However, Mr. Grunsky states that he has reviewed
10 the documents, which clearly shows the documents have not been lost or destroyed and that
11 they are under his possession and control. Thus, none of the first three exceptions applies.
12 The fourth exception also does not apply to Mr. Grunsky's situation, as the content of the
13 writings about which Mr. Grunsky is testifying is not in the nature of a summary of an
14 extensive volume of documents. As Mr. Grunsky is in possession and control of the original
15 documents about which he is testifying, his oral testimony as to the contents of said
16 documents is inadmissible and must be stricken.

17 The SWRCB has repeatedly demanded that WIC provide sufficient evidence to
18 support its claim of a pre-1914 appropriative water right. To the extent that WIC intends to
19 comply with this demand, it must submit the original documents upon which its claim is
20 based. If, for any reason, WIC fails to do so, the SWRCB should determine that WIC has not
21 met its burden of proof and the SWRCB should conclude that Woods IC does not have a pre-
22 1914 appropriative water right.

23 24 **IV. CONCLUSION**

25 WIC's only purpose in submitting the testimony of Mr. Grunsky is to prove the
26 content of multiple WIC corporate documents, which allege WIC has been delivering water
27 from at least 1910 and thus has a pre-1914 water right. Mr. Grunsky, however, has no
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1 personal knowledge that WIC was diverting water before 1914; rather, all Mr. Grunsky has
2 done is claimed that he read some WIC corporate documents. Since the documents allegedly
3 read by Mr. Grunsky have not been lost or destroyed, are in his possession and control, and
4 are the only evidence of WIC's actual diversion of water, the documents themselves must be
5 provided and Mr. Grunsky's testimony regarding the content and meaning of such documents
6 must be stricken. Therefore, MID requests the SWRCB strike Mr. Grunsky's testimony.

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8 DATED: June 4, 2010

9 Respectfully submitted,

10 O'LAUGHLIN & PARIS LLP

11 By:

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13 TIM O'LAUGHLIN
14 *Attorney for Modesto Irrigation District*

PROOF OF SERVICE
(Government Code §11440.20)

I, TIM O'LAUGHLIN, declare that:

I am employed in the County of Butte, State of California. I am over the age of eighteen years and not a party to the within cause. My Business address is P.O. Box 9259, Chico, California 95927-9259. On this date, in the following manner, I served the foregoing document(s) identified as:

**MOTION TO STRIKE THE TESTIMONY OF
TIMOTHY GRUNSKY**

_____ **UNITED STATES MAIL** [CCP §1013] I enclosed the documents in a sealed envelope addressed to the following persons and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our practice for collection processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid at Chico, California addressed as below:

_____ **FACSIMILE** Based on prior consent, I caused the documents to be sent to the following persons via telecopier/facsimile machine a true copy thereof to the parties indicated below:

_____ **OVERNIGHT DELIVERY** [CCP §1013(c)] I enclosed the documents in a sealed envelope provided by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope for collection at a regularly utilized drop box of the overnight carrier.

_____ **E-MAIL** [CCP §1010.6] Based on a court order or an agreement of the parties to accept service by e-mail, I caused the documents to be sent to the e-mail addresses indicated in the attached Service List of Participants.

▶▶▶ **PERSONAL DELIVERY** [CCP §415.10] I personally delivered the documents to the persons identified below:

I declare 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 **June 24, 2010**, at Chico, California.



Tim O'Laughlin

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

**REVISED SERVICE LIST
(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.)

<p>WOODS IRRIGATION COMPANY c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p> <p>c/o Dennis Donald Geiger, Esq. 311 East Main Street, Suite 400 Stockton, CA 95202 dgeiger@bgrn.com</p>	<p>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</p>
<p>MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin O'Laughlin & Paris LLP PO. Box 9259 Chico, CA 92927 towater@olaughlinparis.com kpetruzzelli@olaughlinparis.com</p>	<p>STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moscovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 spowell@kmtg.com</p>
<p>THE SAN LUIS & DELTA-MENDOTA WATER AUTHORITY Jon D. Rubin/Valerie C. Kincaid Diepenbrock ♦ Harrison 400 Capitol Mall, 18th Floor Sacramento, CA 95814 jrubin@diepenbrock.com vkincaid@diepenbrock.com</p>	<p>CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>

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

REVISED SERVICE LIST OF PARTICIPANTS
(April 23, 2010)

PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (The participants listed below AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)

<p>SOUTH DELTA WATER AGENCY c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT c/o DeeAnn M. Gillick Neumiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 dgillick@neumiller.com mbrown@neumiller.com</p>
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