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

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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 CHRISTOPHER NEUDECK, WIC**
16) **EXHIBIT 4A ATTACHMENT EXHIBIT**
17) **3V AND WIC EXHIBIT 4D**

18 **I. INTRODUCTION**

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

1 groundwater of Roberts Island is directly connected to the waters in the main channels in the
2 San Joaquin River Delta because the Roberts Island groundwater is the underground flow of
3 the Middle River or the San Joaquin River. In his testimony for WIC, Mr. Neudeck has
4 included his previous testimony regarding this underground flow theory, which he submitted
5 to the State Board In the Matter of Administrative Civil Liability Complaints for Violations
6 of Licenses 13444 and 13274 of Lloyd L. Phelps, Jr.; License 13194 of Joey P. Ratto, Jr.;
7 License 13315 of Ronald D. Conn and Ron Silva, et al. ("Term 91 ACL") in February of
8 2003. The Modesto Irrigation District ("MID") objects to this testimony of Mr. Neudeck
9 pursuant to the Government Code section 11513, which prohibits the admission of evidence
10 that is not relevant, prohibits the admission of evidence upon which responsible persons are
11 not accustomed to relying in the conduct of serious affairs, and also may prohibit the
12 admission of evidence "if its probative value is substantially outweighed by the
13 probability that its admission will necessitate undue consumption of time." (Cal. Govt. Code
14 § 11513.) In the Term 91 ACL, the State Board found that Mr. Neudeck's testimony was
15 insufficient to establish riparian rights for the respondents in that hearing based upon his
16 theory that the Roberts Island groundwater is the underground flow of the Middle River or
17 the San Joaquin River. Therefore, MID requests the State Board strike all portions of Mr.
18 Neudeck's testimony that refer to and are excerpted from his Term 91 ACL testimony
19 because it is not relevant, it is not the sort of evidence upon which a responsible person
20 would rely, and it will necessitate undue consumption of time.

21 II. STATEMENT OF FACTS

22 On December 28, 2009, the State Board issued a Draft CDO against the WIC
23 requesting that it cease and desist its unauthorized diversion, collection and use of water in
24 violation of section 1052 of the Water Code regarding its use of water from Middle River in
25 San Joaquin County on Roberts Island. (Exhibit PT-7.)
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1 On January 11, 2010, Dennis Donald Geiger, the attorney for WIC, requested a
2 hearing before the State Board regarding the allegations presented in the Draft CDO against
3 WIC.

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

5 On April 7, 2010, the State Board issued a Notice of Public Hearing to inform the
6 public of a hearing scheduled for June 7, 2010 to determine whether to adopt the CDO
7 against WIC.

8 Mr. Neudeck, a registered Civil Engineer in the State of California, submitted expert
9 testimony on behalf of WIC to establish that the Roberts Island groundwater is the
10 underground flow of the Middle River or the San Joaquin River and is connected to the
11 waters in the main channels in the Delta. (WIC-4; WIC-4A; WIC-4D.)

12 The testimony Mr. Neudeck submitted consisted in part of excerpts from and a copy
13 of his entire previous testimony from the February 2003 Term 91 ACL hearing. (Id.)

14 In the previous testimony submitted by Mr. Neudeck for the Term 91 ACL hearing,
15 he testified that the lands of the respondents in that case, which were located on Roberts
16 Island, overlie subterranean water that is in contact with Middle River or the San Joaquin
17 River and are thus riparian to Middle River or the San Joaquin River even though the lands
18 have no contact with the surface streams of either Middle River or the San Joaquin River.
19 (Id.) While Mr. Neudeck did not specifically mention riparian rights; the State Board found
20 these assertions were submitted for the purpose of establishing riparian rights because
21 riparian water rights are based upon a parcel's connectivity to a watercourse. (Order WRO
22 2004-0004.)

23 In the February 19, 2004 order issued pursuant to the Term 91 ACL, WRO 2004-
24 0004, the State Board found, in section 4.1.1.2 Riparian Status of Severed Lands Overlaying
25 Underflow of the Stream, that Mr. Neudeck's testimony was insufficient to establish riparian
26 rights because the evidence did not support that the Roberts Island groundwater was the
27 underground flow of the Middle River or the San Joaquin River. (Id. at 12-13.)
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1 The respondents in the Term 91 ACL challenged the State Board's decision in the
2 Superior Court of Sacramento. On February 14, 2006, the Superior Court found that Mr.
3 Neudeck's testimony "did not overcome the lack of solid, credible evidence to establish
4 retained and preserved riparian rights by their assertion of a riparian rights theory based on
5 connections between groundwater flowing under their parcels and the San Joaquin or Middle
6 Rivers. By settled caselaw, any connections between the groundwater and the rivers do not
7 establish the contiguity between the parcels and the rivers necessary to confer riparian rights
8 to divert water from the river surfaces." (*Lloyd L. Phelps, Jr.; Gary Phelps; Joey P. Ratto,*
9 *Jr.; and Ronald D. Conn v. State Water Resources Control Board*, Case No.: 04CS00368,
10 February 14, 2006, pp. 9-10, citing Anaheim Union Water Co. v. Fuller (1907) 150 Cal. 327,
11 332.)

12 On October 29, 2007, the appellate court affirmed the trial court's decision,
13 specifically referencing that the trial court had detailed reasons for rejecting Mr. Neudeck's
14 testimony. (Phelps v. State Water Resources Control Bd. (2007) 157 Cal. App. 4th. 89,117-
15 118.)

16 In the current testimony for WIC submitted by Mr. Neudeck, to which his Term 91
17 ACL testimony is attached, Mr. Neudeck offers no new or additional evidence to support his
18 Term 91 ACL claims that riparian rights have been established based upon his theory that the
19 Roberts Island groundwater is the underground flow of the Middle River or the San Joaquin
20 River. (WIC-4; WIC-4A; WIC-4D.)

21 III. ARGUMENT

22 A. Mr. Neudeck's Testimony Cannot be Admitted to Prove that the Roberts 23 Island Groundwater Is the Underground Flow of the Middle River or the 24 San Joaquin River Because it is Not Relevant.

25 For evidence to be relevant, it must have "any tendency in reason to prove or disprove
26 any disputed fact that is of consequence to the determination of the action." (Cal. Evid. Code §
27 210.) This includes evidence relevant to whether a witness or hearsay declarant is credible. (Id.)

1 Mr. Neudeck's testimony from the Term 91 ACL should be stricken because it is not relevant
2 to establish which riparian parcels are served by WIC. The State Board is holding this CDO
3 hearing so WIC may prove its legal right to divert water from Middle River in San Joaquin
4 County for use on lands within and upon Roberts Island. (Draft Cease and Desist Order No.
5 2009-00XX-DWR Enforcement Action 73, Wood Irrigation Company.) Specifically, WIC
6 must provide a delineation of the area served and the amount of water delivered under any
7 pre-1914 appropriative water right that WIC claims to have, and also to provide a list of
8 riparian parcels that it serves on behalf of the property owners through its diversion works.
9 (Id.) Mr. Neudeck's testimony from the Term 91 ACL hearing, however, merely attempts to
10 establish that the groundwater of Roberts Island is the underground flow of the Middle River
11 or the San Joaquin River and is connected to the waters in the main channels in the Delta.
12 (WIC-4; WIC-4A; WIC-4D.) Whether the groundwater of Roberts Island is the underground
13 flow of the Middle River or the San Joaquin River and is directly connected to the waters in
14 the main channels in the Delta offers nothing to prove which riparian parcels receive water
15 from WIC. (Order WRO 2004-0004, pp. 12-13.) The State Board has already found that even
16 if Mr. Neudeck's assertion that the groundwater of Roberts Island is the underground flow of
17 the Middle River or the San Joaquin River and is connected to the waters in the main
18 channels in the Delta, it is not sufficient to establish riparian rights. (Id.)

19 Not only is Mr. Neudeck's testimony not relevant because it has no tendency to prove,
20 disprove, or even demonstrate which riparian parcels receive water from WIC, Mr. Neudeck's
21 testimony fails to include any no new or additional information. (WIC-4; WIC-4A; WIC-4D.) As
22 Mr. Neudeck does nothing more than continue to rely on his earlier insufficient testimony, Mr.
23 Neudeck's testimony should be stricken.

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1 **B. Mr. Neudeck's Testimony Cannot be Admitted to Prove that the Roberts**
2 **Island Groundwater Is the Underground Flow of the Middle River or the**
3 **San Joaquin River Because it is Not the Sort of Evidence Upon Which**
4 **Reasonable Persons Would Rely When Conducting Serious Affairs.**

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

10 Mr. Neudeck's testimony should be stricken because no responsible person would
11 rely on it in the conduct of serious affairs. The State Board already heard, considered, and
12 found Mr. Neudeck's testimony in the Term 91 ACL to be insufficient to establish riparian
13 rights.

14 “The respondents assert that to the extent that they are on lands
15 severed from the stream but overlying the subterranean flow of the
16 stream, they have riparian rights to the stream. This is not the rule.
17 ... Even if the respondents' legal position were correct that
18 riparian rights can attach to a stream if the parcel involved overlies
19 the underground flow of the stream, the respondents would not be
20 able to establish a riparian right based on the evidence they
21 presented in this proceeding. On redirect examination, the
22 respondents' engineering expert testified that the groundwater has
23 a high salt content that makes the groundwater unusable for
24 irrigation. The difference in quality of the groundwater and the
25 surface water does not support, and actually tends to contradict, the
26 assertion that the groundwater is the underground flow of the
27 Middle River or the San Joaquin River. In the absence of other
28 evidence, the respondents' factual contention is unfounded and
 provides no support to the legal contention.” (Order WR0 2004 –
 0004, pp. 12-13.)

25 The State Board has already rejected Mr. Neudeck's assertions that riparian rights were
26 established because the groundwater of Roberts Island is the underground flow of the Middle
27 River or the San Joaquin River and is connected to the waters in the main channels in the
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1 Delta. (Id.) As Mr. Neudeck's testimony was rejected by the State Board, no responsible
2 person would continue to rely on such assertions in the conduct of serious affairs.

3 Moreover, when the respondents in the Term 91 ACL challenged the State Board's
4 decision in the Superior Court of Sacramento, the Superior Court found that they "did not
5 overcome the lack of solid, credible evidence to establish retained and preserved riparian
6 rights by their assertion of a riparian rights theory based on connections between
7 groundwater flowing under their parcels and the San Joaquin or Middle Rivers. By settled
8 caselaw, any connections between the groundwater and the rivers do not establish the
9 contiguity between the parcels and the rivers necessary to confer riparian rights to divert
10 water from the river surfaces." (*Lloyd L. Phelps, Jr.; Gary Phelps; Joey P. Ratto, Jr.; and*
11 *Ronald D. Conn v. State Water Resources Control Board*, Case No.: 04CS00368, February
12 14, 2006, pp. 9-10, citing *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 332.)

13 Furthermore, the appellate court affirmed the trial court's decision, specifically
14 referencing that the trial court had detailed reasons for rejecting the testimony of Mr.
15 Neudeck. (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal. App. 4th. 89,117-
16 118.)

17 The State Board, the Superior Court of the County of Sacramento, and the California
18 Court of Appeal for the Third District all found Mr. Neudeck's testimony to be insufficient to
19 establish riparian rights based on the theory that the groundwater of Roberts Island is the
20 underground flow of the Middle River or the San Joaquin River and is connected to the
21 waters in the main channels in the Delta between Roberts Island. Additionally, Mr. Neudeck
22 has offered no new or additional information related to this theory. Mr. Neudeck has done
23 nothing more than continue to rely on his earlier insufficient testimony. Therefore, Mr.
24 Neudeck's testimony is inadmissible under California Government Code section 11513
25 because any responsible person when conducting serious affairs, such as proving water
26 rights, would not rely on Mr. Neudeck's testimony since neither the State Board, the
27 Sacramento Superior Court nor the Third District Appellate Court found his testimony
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1 sufficient. Thus, as Mr. Neudeck's testimony is not the sort upon which a responsible person
2 would rely, it should be stricken.

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4 **C. Mr. Neudeck's Testimony Cannot be Admitted to Prove that the Roberts**
5 **Island Groundwater Is the Underground Flow of the Middle River or the**
6 **San Joaquin River Because Its Probative Value is Substantially Outweighed**
7 **by the Probability that Its Admission Will Necessitate Undue Consumption**
8 **of Time.**

9 In an administrative hearing, when the probative value of evidence presented is
10 substantially outweighed by the probability that the admission of such evidence will "necessitate
11 undue consumption of time," the presiding officer has discretion to exclude it. (Cal. Govt. Code
12 § 11513 subd. (f).)

13 In this case, Mr. Neudeck's testimony should be stricken because it was already rejected
14 by the State Board, the Superior Court, and the Third District Appellate Court due to its lack of
15 probative value. (See Order WRO 2004-0004, pp. 12-13; *Lloyd L. Phelps, Jr.; Gary Phelps; Joey*
16 *P. Ratto, Jr.; and Ronald D. Conn v. State Water Resources Control Board*, Case No.:
17 04CS00368, February 14, 2006, pp. 9-10; *Phelps v. State Water Resources Control Bd.* (2007)
18 157 Cal. App. 4th. 89,117-118.) To admit Mr. Neudeck's testimony will unnecessarily be a
19 waste of time. Not only is Mr. Neudeck's testimony not relevant to establish which riparian
20 parcels are served by WIC, his theory based on connections between groundwater flowing under
21 their parcels and the San Joaquin or Middle Rivers has already been found by the State Board to
22 be insufficient. Additionally, Mr. Neudeck has offered no new or additional information related
23 to this theory. (WIC-4; WIC-4A; WIC-4D.) Mr. Neudeck has done nothing more than continue
24 to rely on his earlier insufficient testimony. Permitting Mr. Neudeck to testify to the same theory
25 again would be a pointless waste of time. The State Board has already determined that Mr.
26 Neudeck's testimony in the Term 91 ACL was not sufficient to establish riparian rights and Mr.
27 Neudeck has offered nothing new in support of this theory in his present testimony. Therefore,
28 Mr. Neudeck's testimony on the theory of the connection between the Roberts Island
groundwater, as the underground flow of the Middle River or the San Joaquin River, to the main

1 channels in the Delta has no probative value. To hear the same testimony again, would be
2 nothing more than a waste of time. Thus, Mr. Neudeck's testimony should be stricken because it
3 has no probative value and it will unnecessarily be a waste of time.

4 **IV. CONCLUSION**

5 WIC's only purpose in submitting the Term 91 ACL testimony of Mr. Neudeck's is
6 to prove that the groundwater of Roberts Island is the underground flow of the Middle River
7 or the San Joaquin River and is connected to the waters in the main channels in the Delta.
8 This testimony was already submitted and found insufficient to prove riparian rights in the
9 Term 91 ACL. In his current testimony for WIC, Mr. Neudeck has offered no new or
10 additional information related to this theory. Mr. Neudeck has done nothing more than
11 continue to rely on his earlier insufficient testimony. As this testimony is not relevant to
12 establish which riparian parcels are served by WIC, it is not the sort that responsible persons
13 would rely on in the conduction of serious affairs, and its probative value is substantially
14 outweighed by the probability that it would necessitate an undue waste of time, this
15 testimony is not admissible. Therefore, MID requests the State Board strike Mr. Neudeck's
16 testimony.

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18 DATED: June 22, 2010

19 Respectfully submitted,

20 O'LAUGHLIN & PARIS LLP

21 By:

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23 TIM O'LAUGHLIN
24 *Attorney for Modesto Irrigation District*

1 **PROOF OF SERVICE**
2 (Government Code §11440.20)

3 I, KATIE J. SHEA, declare that:

4 I am employed in the County of Butte, State of California. I am over the age of eighteen
5 years and not a party to the within cause. My Business address is P.O. Box 9259, Chico, California
6 95927-9259. On this date, in the following manner, I served the foregoing document(s) identified
7 as:

8 **MOTION TO STRIKE THE TESTIMONY OF**
9 **CHRISTOPHER NEUDECK, WIC EXHIBIT 4A**
10 **ATTACHMENT EXHIBIT 3V AND WIC EXHIBIT 4D**

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

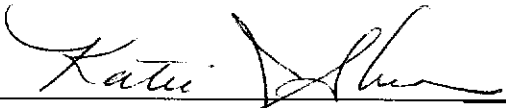
18 FACSIMILE Based on prior consent, I caused the documents to be sent to the following
19 persons via telecopier/facsimile machine a true copy thereof to the parties indicated below:

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

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

27 PERSONAL DELIVERY [CCP §415.10] I personally delivered the documents to the
28 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.


Katie J. Shea

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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
CHRISTOPHER NEUDECK, WIC EXHIBIT 4A
ATTACHMENT EXHIBIT 3V AND WIC EXHIBIT 4D**

_____ **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:

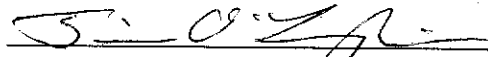
_____ **FACSIMILE** Based on prior consent, I caused the documents to be sent to the following persons via telecopier/facsimile machine a true copy thereof to the parties indicated below:

_____ **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 iherrlaw@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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