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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	**MOTION TO STRIKE**

The Modesto Irrigation District, State Water Contractors, and San Luis & Delta-Mendota Water Authority ("MSS Parties") hereby move to strike Woods Irrigation District, Central Delta Water Agency, and South Delta Water Agency's ("WIC") Joint Closing Brief ("WIC Brief") from page 53, line 27, through page 54, line 13, as illustrated in Exhibit A hereto. MSS parties move to strike that portion of the WIC Brief because it cites to, and relies upon, the testimony of Christopher H. Neudeck contained in "Exhibit 3V" to WIC Exhibit 4A. That evidence, however, was excluded by the State Water Resources Control Board ("State Water Board") as irrelevant. (July 19, 2010 Ruling.)

Government Code section 11513 applies to adjudicative proceedings before the State Water Board. (23 Cal. Code. Reg. § 648(b).) The Government Code prohibits the introduction or use of irrelevant evidence in State Water Board Proceedings. (Cal. Gov. Code § 11513(c) (Limiting admission of evidence to "relevant evidence").) The subject Neudeck testimony is not relevant, the MSS Parties moved to strike its admission during these proceedings, and the Hearing Officers agreed that the testimony is inadmissible:

> 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 WRO 2004-0004 . . . ["Exhibit 3V" to WIC Exhibit 4A, and WIC Exhibit 4D] . . . [T]his evidence is not relevant to the proceeding, and the motion to strike is granted on that ground.

(July 19, 2010 Ruling at 2-3.) WIC cannot use its closing brief to circumvent the Hearing Officer's ruling excluding the Neudeck testimony. The evidence remains inadmissible, ineligible for consideration by the State Water Board, and the WIC Brief should be stricken accordingly.

For the foregoing reasons, the MSS Parties respectfully request that this motion be granted.

Dated: August 25, 2010

O'LAUGHLIN & PARIS LLP

By: _____

TIM O'LAUGHLIN

Attorneys for Plaintiff
MODESTO IRRIGATION DISTRICT

Dated: August 25, 2010

DIEPENBROCK HARRISON
A Professional Corporation

By: _____
Jon D. Rubin
Attorneys for Plaintiff
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

Dated: August ___, 2010

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
A Professional Corporation

By: _____
For Clifford W. Schulz
Attorneys for Plaintiff
STATE WATER CONTRACTORS

Exhibit A

"the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from the surface stream, and there apply it to use on the latter, *to the injury of lands which abut upon the proper banks of the surface stream* . . . ." (Id., p. 332, emphasis added.) The question left unresolved by *Anaheim*, and at issue herein, is whether such a landowner can lawfully make such diversions if there is no alleged, much less actual, injury to any such lands or to any other riparian or overlying water user with rights to that common underground/surface water supply, which is the case in the instant proceedings. As will be explained, the answer should be yes, it *can* lawfully make such diversions. Such a determination is entirely consistent with, and in furtherance of, *Anaheim*, *Hudson v. Dailey* (1909) 156 Cal. 617, *Turner v. James Canal Co.* (1909) 155 Cal. 82, and the well-established "no-injury rules" set forth in case law and statutory law with regard to changing points of diversion from a common supply.

1. **The Shallow Groundwater Is In "Immediate Connection" With The Surface Streams And, Hence, The Landowners Overlying That Groundwater Are Riparian To Those Streams.**

In *Hudson v. Dailey* (1909) 156 Cal. 617 (*Hudson*), the Court held:

> If the water in the underground strata is in such *immediate connection* with the surface stream as to make it a part of the stream, as the plaintiff seems to contend, *then the defendants' lands overlying such water must be considered as also riparian to the stream*, and, under the law of riparian rights, they have a common right with the plaintiff to the use of the water.
> (*Id.*, pp. 626-627, emphasis added.)

In such an "immediate connection" situation, being "riparian to the stream" means the landowner has "a right to take its share of the water from the main river at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land." (*Turner v. James Canal Co.* (1909) 155 Cal. 82, 91-92.)

WIC submits that the shallow groundwater underlying WIC's lands is indeed "in such immediate connection with the surface stream[s] as to make it a part of the stream[s] . . . ." (*Hudson*, pp. 626-627.) ~~Civil Engineer, Christopher H. Neudeck, for example, explains this immediate connection as follows:~~

~~For the area of concern [the California Department of Water Resources] has a recent study [see WIC Exhibit 4D, "Reclamation District 544 Seepage Monitoring Study 2000-2001] which . . . confirms my prior conclusions that due to the subsurface soils, there is a direct connection between the shallow groundwater and the waters in the neighboring channels. When the river goes up, the groundwater goes up and vice-a-versa.~~

~~This hydrologic conductivity is important to understand the local water supplies. The entire Delta is one big pool of water; some in the channel and some in the soils. There is no net difference in the amount of water in the Delta channels when local diverters take from neighboring channels, pump from shallow groundwater, or farm crops which draw from the shallow groundwater. Taking water from one place is virtually the same as from another. . . .~~

~~I therefore conclude that if these four diverters which are the subject of [the *Phelps* WRO 2004-0004] hearing were forced to shift to shallow wells for irrigation, or farm crops which had root zones reaching to the shallow groundwater, there would be no difference in the amount of water available in the surrounding channels.~~

~~(Exhibit 3V to WIC Exhibit 4A, pp. 4-5.)~~

~~In addition to Mr. Neudeck's testimony and the DWR study referenced therein,~~ there is considerable ~~additional~~ evidence supporting the immediacy of the connection between the shallow groundwater underlying the lands within WIC (and within the entire Delta for that matter) and the surface streams. See for example, the Testimony of Dante J. Nomellini, Sr. (WIC Exhibit 8) and the following exhibits: WIC Exhibit 8E, "Estimation of Delta Island Diversions and Return Flows, DWR, February 1995"; WIC Exhibit 8F, "DWR's January 30, 2009, letter to MWD, et al. re proposed Delta Wetlands water transfer"; WIC Exhibit 8G, "Excerpts from DWR's 2009 Webb Tract Transfer Pilot Study and Office Memos"; and WIC Exhibit 8H, "Investigation of the Sacramento-San Joaquin Delta Report No. 4, Quantity and Quality of Waters Applied to and Drained From the Delta Lowlands, Department of Water Resources, July 1956."

While it is difficult to imagine a more immediate connection, as well as one that is more well-recognized, if the SWRCB does not believe the requisite "immediate connection" within the meaning of *Hudson* exists between the shallow groundwater and the surface streams, then the SWRCB must thoroughly explain the basis for that belief and, unlike its decision in WRO 2004-0004, it should meaningfully define what it believes would constitute such an "immediate connection" and the authority it is relying on to so define such a connection. If the SWRCB equates "immediate connection" with so-called "underflow" or "underground flow," then the

PROOF OF SERVICE

I, Gilberto J. Castro, 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 25, 2010, I served a copy of the foregoing document entitled: **MOTION TO STRIKE** on the following interested parties in the above-referenced case number to the following:

See attached Service List

[ ] **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.

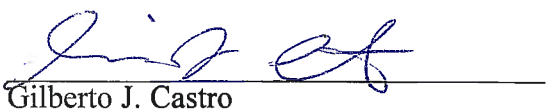
[X] **ELECTRONIC MAIL**
I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Diepenbrock Harrison, originating from the undersigned at 400 Capitol Mall, Suite 1800, Sacramento, California, to the e-mail address(es) indicated 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 25, 2010, at Sacramento, California.



Gilberto J. Castro

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.	

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