

1 **DEAN RUIZ - SBN #213515**
 2 Harris, Perisho & Ruiz
 3 3439 Brookside Road, Suite 210
 4 Stockton, CA 95210
 5 Telephone: (209) 957-4254
 6 Facsimile: (209) 957-5338
 7 E-mail: dean@hp LLP.com

8 Attorneys for SOUTH DELTA WATER AGENCY
 9 and CENTRAL DELTA WATER AGENCY

10
 11 **BEFORE THE CALIFORNIA**
 12 **STATE WATER RESOURCES CONTROL BOARD**

13 In the Matter of Draft Cease and Desist) **OPPOSITION TO MOTION TO STRIKE**
 14 Order No. 2009-00XX-DWR Enforcement) **TESTIMONY OF CHRISTOPHER**
 15 Action 73 Against Woods Irrigation) **NEUDECK, WIC EXHIBIT 4A**
 16 Company) **ATTACHMENT EXHIBIT 3V AND WIC**
 17) **EXHIBIT 4D**

18 **I.**

19 **INTRODUCTION**

20 South Delta Water Agency ("SDWA") and Central Delta Water Agency ("CDWA") herein
 21 oppose the motion to strike testimony of Christopher Neudeck, WIC Exhibit 4A, attachment Exhibit
 22 3V and WIC Exhibit 4D brought by the Modesto Irrigation District ("MID"). SDWA and CDWA
 23 reserve the right to make additional oral arguments on the record in opposition to MID's motion to
 24 strike.

25 **II.**

26 **ARGUMENT**

27 **A. Neudeck's Testimony is Irrelevant and Prohibitive in this Proceeding.**

28 Any relevant evidence shall be admitted if it is the sort of evidence on which responsible
 persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any
 common law or statutory rule which might make improper the admission of the evidence over
 objection in civil actions. See, *Govt. Code section 11513(c)*. MID incorrectly asserts that the

1 opinion in *Phelps, et al., v. SWRCB, et al.* (2007) 157 Cal.App. 4th 89 some how prohibits
2 Neudeck's testimony concerning the connectivity of the groundwater of Roberts Island to the
3 main channels.

4 The Appellate Court's decision in *Phelps* did not reject the validity or relevance of the
5 Delta Pool theory advanced by Neudeck. Rather it determined that when evidence conflicts, the
6 trial court determination will control. Specifically, the court found that where evidence is in
7 conflict, it must resolve the conflict in favor of the trial court's finding. See *Phelps, Id.* at 118.
8 There was no ruling or determination that prevents the SWRCB from evaluating the facts and
9 evidence presented concerning the Delta pool theory in the WIC or related CDO proceedings.

10 In the pending WIC proceeding, WIC presented not only the prior testimony of Neudeck
11 from the *Phelps* administrative proceeding and the associated exhibits (including the July 2001
12 DWR report regarding upper Roberts Island which surmised that "San Joaquin River Stage
13 Elevation Data and Groundwater Elevation Data indicate that permeable strata underlying Island
14 are laterally continuous and are likely to be in contact with the riverbed", which is included as
15 WIC Exhibit 4D. WIC has also included new testimony and evidence as well. The new
16 evidence and testimony in the pending WIC proceeding regarding the Delta pool theory includes,
17 but is not limited to:

- 18 ○ additional testimony of Chris Neudeck (WIC Exhibit 4);
- 19 ○ new testimony of Dante John Nomellini, Sr. (WIC Exhibit 8);
- 20 ○ new exhibits including WIC Exhibit 8E Estimation of Delta Island
21 Diversions and Return Flows, DWR February 1995;
- 22 ○ new exhibit WIC Exhibit 8F DWR's January 30, 2009 letter to
23 Metropolitan Water District et al., regarding the proposed Delta Wetlands
24 water transfer;
- 25 ○ new exhibit WIC Exhibit 8G excerpts from DWR's 2009 Webb Tract
26 Transfer Pilot Study and Office Memos;

- 1 ○ New exhibit WIC Exhibit 8H Investigation of the Sacramento San
- 2 Joaquin Delta Report No. 4, Quantity and Quality of Water Applied to and
- 3 Drained from the Delta Lowlands, Department of Water Resources, July
- 4 1956.
- 5 ○ Photographs Five and Six attached to WIC Exhibit 8 regarding seepage
- 6 during the 2004 flooding of Jones Tracts.
- 7 ○ Cross examination of WIC witnesses including cross examination
- 8 questions from Mr. O’Laughlin acknowledging that within the service area
- 9 of Woods Irrigation Company, plants obtain water from the subsurface
- 10 without the application of surface water for irrigation purposes.

11 Clearly, the evidence presented by Mr. Neudeck concerning the Delta Pool Theory
12 pertains to the issues of whether WIC can establish rights other than its pre-1914 rights - - such
13 as riparian rights - - and to establish WIC’s position that it has historically diverted over the 77.7
14 cfs rate. The witnesses and evidence relative to all the evidence in this proceeding were available
15 for cross-examination and answer questions from the Board. The evidence presented in this
16 proceeding is different and supplemental to that provided in the *Phelps* proceeding.

17 **B. The Probative value of Mr. Neudeck’s Testimony clearly outweighs any**
18 **probability that its admission will necessitate undo consumption of time.**

19 The SWRCB has the ability and expertise to consider the evidence presented by Neudeck
20 in this proceeding, as well as in the *Mussi, et al.*, and *Pak and Young* proceeding relative to the
21 Delta pool theory and relative to riparian rights held within WIC, and regarding WIC’s historic
22 diversion rate. In fact, the SWRCB is the body most appropriately tasked with considering this
23 type of evidence in a timely and efficient manner.

24 ///

25 ///

26 ///

27 ///


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III.

CONCLUSION

For the reasons set forth above, Mr. Neudeck's testimony in the form of Exhibit 4A, 3V and 4D should be admitted.

Dated: June 29, 2010


S. DEAN RUIZ
Attorney for South Delta and
Central Delta Water Agency