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8 **BEFORE THE CALIFORNIA**
 9 **STATE WATER RESOURCES CONTROL BOARD**

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 11 In the Matter of Draft Cease and Desist) **RESPONSE BY SOUTH DELTA WATER**
 Order No. 2009-00XX-DWR Enforcement) **AGENCY AND CENTRAL DELTA WATER**
 12 Action 73 Against Woods Irrigation) **AGENCY TO EVIDENTIARY**
 Company) **OBJECTIONS BY THE SAN LUIS AND**
 13 _____) **DELTA-MENDOTA WATER AUTHORITY**
) **AND THE PROSECUTION TEAM**

14
 15 Prosecution Team:

16 Objection to riparian testimony:

17 **Response:** The Draft CDO requests that WIC "Provide sufficient evidence supporting a pre-1914
 18 appropriative right or any other type of right being exercised at WIC's diversion(s). The Draft
 19 CDO also requests information related to " the basis of right of any properties receiving water
 20 either outside WIC's service area, or in excess of WIC's claimed pre-1914 right. The
 21 Prosecution Team witnesses testified that the Draft CDO seeks the above information and that it
 22 has not been received. Thus, evidence offered by WIC of it shareholder members' riparian rights
 23 is directly relevant in these proceedings. Similarly The Prosecution Team has requested any
 24 evidence to support WIC's position that it has a pre-1914 right to divert above the 77.7 cfs
 25 amount. Any relevant evidence shall be admitted if it is the sort of evidence on which
 26 responsible persons are accustomed to rely in the conduct of serious affairs regardless of the
 27 existence of any common law or statutory rule which might make improper the admission of the
 28 evidence over objection and civil actions. *Govt. Code section 11513(c).*

1 San Luis and Delta Mendota Water Authority:

2 1. Moore: Exhibits 2E through 2K and 2L and 2M. Lack of foundation and hearsay. Original
3 photos not provided; relied on stereo pairs analysis and stereo strip analysis and on original and
4 unaltered photos which were not provided.

5 **Response:** It does not seem plausible that San Luis is actually questioning if Mr. Moore falsified
6 the photos by enhancing their visual effect to create the subject exhibits. Mr. Moore testified that
7 the process which he employed was to simply display and enhance the 1937 and 1940 aerials and
8 to overlay other specific maps on those photos through stitching and the use of the mosaic
9 process. There can be no credible suggestion that Mr. Moore falsified or altered the actual 1937
10 or 1940 aerials before using them in his analysis. Mr. Moore testified that the exhibits are
11 enhanced visually using standard protocols and procedures from his industry and clearly
12 explained what viewing the photos in stereo means. The foundation was laid for these exhibits in
13 that he explained where they came from and their origin. There is obviously no requirement that
14 he actually take the photos upon which the exhibits are based. Opinions of experts such as Mr.
15 Moore may be based on matter (including special knowledge, skill, experience, training, and
16 education), perceived by or personally known to the witness or made known to him at or before
17 the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an
18 expert forming an opinion upon the subject to which his testimony relates, unless an expert is
19 precluded by law from using such matter as a basis for his opinion. See, *Evid. Code section*
20 *801(b)*.

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24 If a witness testifying as an expert testifies that his opinion is based in whole or in part
25 upon the opinion or statement of another person, such other person may be called and examined
26 by any adverse party under cross-examination concerning the opinion of the statement. See,
27 *Evid. Code section 804(a)*. Mr. Moore specifically testified in writing, and orally, that his
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1 analysis, including the preparation of the specific exhibits objected to by San Luis, were
2 developed based on data recently developed by he and Kenneth Lajoe for the SWRCB CDO
3 Hearings for Mussi, et al., and Pak and Young, from maps published as early as 1909, aerial
4 photography from 1937 and 1940 and from his thirty-six years of photo-geology experience. The
5 specific maps and/or photos were timely identified and discussed. Thus, the foundation for same
6 has been laid. As an expert Mr. Moore is allowed to rely on such information as Mr. Lajoe's
7 work which was personally known by Mr. Moore and developed with his assistance, and was
8 known to Mr. Moore prior to the hearing. Mr. Lajoe's work is in evidence in the Dunkel matter
9 and has been the subject of cross-examination in that proceeding. Moreover, San Luis could
10 have called Mr. Lajoe as a witness and cross-examined him in this matter to the extent that Mr.
11 Moore utilized Mr. Lajoe's analysis and opinions. See, *Evid. Code section 804(a)*. Moreover,
12 Mr. Moore's testimony, including the specific exhibits objected to by San Luis, is clearly
13 admissible under *Govt. Code sections 11513(c)(d)*.

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17 San Luis did not challenge Mr. Moore's expertise and experience as a geologist and as a
18 certified Hydro geologist. Further MID and San Luis, during rebuttal, offered their own
19 geologist (Philip Johnson) who submitted Exhibits MSS-R14-18-23 based on the same stereo
20 pairs and stereo strip analysis of the 1937 ariel photographs used by Mr. Moore. It is of course
21 inconsistent for MID and San Luis to object to the much more detailed and expansive analysis
22 provided by Mr. Moore as compared to the incomplete and, obviously, unformed analysis
23 provided by Mr. Johnson.

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25 **Response to the Specific Exhibits objected to by San Luis:**

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27 WIC 2E. Mr. Moore clearly testified both orally and in writing that this exhibit was
28 simply a 1937 black and white aerial photograph of the WIC service area which was rectified and

1 stitched into a seamless aerial photograph mosaic resulting in and “aerial photograph map”. He
2 further explained that the photograph map was registered and overlaying onto the 2005 color
3 national agricultural image program base and that the WIC District Map was similarly registered
4 to fit and overlay on the photographic base. Mr. Moore testified and explained the 1937 aerial
5 used in his analysis, and there is no requirement that all the sources used by an expert such as Mr.
6 Moore, be included into evidence. Said sources were explained and identified by Mr. Moore
7 such that San Luis and MID could challenge them through cross examination, rebuttal, and in
8 post hearing arguments.
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11 WIC 2F. Said exhibit was developed in the same manner as exhibit 2E except that Mr.
12 Moore used 1940 black and white aerial photographs. SDWA and CDWA otherwise incorporate
13 their response to San Luis’ objection to WIC Exhibit 2E.

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15 WIC 2G. Mr. Moore explained in writing and in oral testimony that this is merely a
16 digitally enhanced image of WIC 2E using a Photoshop tool known as a “directional filter”. Mr.
17 Moore testified that use of Photoshop in this manner is standard in his industry and San Luis and
18 MID did not provide evidence to challenge and/or discredit the process Mr. Moore used in
19 creating WIC Exhibit 2G. SDWA and CDWA herein incorporates their response to San Luis’
20 objection to 2E above.
21

22 WIC 2H. Mr. Moore explained in writing and in oral testimony that this is merely a
23 digitally enhanced image of WIC 2F using a Photoshop tool known as a “directional filter”. Mr.
24 Moore testified that use of Photoshop in this manner is standard in his industry and San Luis and
25 MID did not provide evidence to challenge and/or discredit the process Mr. Moore used in
26 creating WIC Exhibit 2H. SDWA and CDWA herein incorporates their response to San Luis’
27 objection to Exhibit 2E and 2F above.
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1 WIC 2I. Mr. Moore testified in writing, and earlier that this exhibit is simply the 1937
2 aerial photograph mosaic (Exhibit 2E) reduced in opacity to 40% which allowed viewing the
3 underlying 2005 color NAIP photograph. Mr. Moore further testified that the process to create
4 this exhibit overlaid a non-lanyard contrast to stretch the NAIP photograph. Mr. Moore again
5 testified that the process that he used a standard accepted industry technique in creating this
6 exhibit and MID and San Luis did not provide evidence to challenge the process used. SDWA
7 and CDWA herein incorporates their response to San Luis' objection to Exhibit 2E, 2F, 2G
8 above.
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11 WIC 2J. Mr. Moore's testimony indicates that the only difference between Exhibit 2I and
12 2J is that Mr. Moore utilized the 1940 aerial photograph mosaic which is itself Exhibit 2E.
13 SDWA and CDWA herein incorporates their response to San Luis' objection to Exhibit WIC 2I
14 above.
15

16 WIC 2K. Mr. Moore's testimony indicates that this exhibit is simply Mr. Moore's
17 compilation of historic riparian features within the WIC service area. The blue lines represent
18 Mr. Moore's interpretation of historic riparian features. For all the reasons set forth above, there
19 is nothing improper or objectionable related to the admissibility of Mr. Moore's interpretation.
20 The red lines on this exhibit, as explained by Mr. Moore both in writing and orally, represent the
21 interpreted historic riparian features drawn by Brian Atwater in 1982 and by Ken Lajoe in 2010.
22 As discussed above, the Lajoe work, which utilizes the Atwater work from 1982, is proper, and
23 was and is at issue and was the subject of cross-examination in the Mussi and Pak and Young
24 hearing. Like the other exhibits which San Luis objects to, this exhibit is admissible under *Evid*
25 *Code section 801, 804 and Govt. Code section 11513(c)(d)*. Moreover, the Atwater map is
26 included as part of Mr. Moore's testimony (Exhibit 8L).
27
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1 WIC 2L: This exhibit is simply a compilation fo the information depicted in Exhibit 2A,
2 2B, 2A, 2C, 2D, 2B and 2K. This is explained in Mr. Moore's written testimony and he testified
3 to same orally. Exhibit 2L was created to simply show the visual effect of having the
4 aforementioned exhibits shown on a single exhibit. Based on the response to objections set forth
5 above relative to Exhibits 2E, 2A, 2C, 2D, 2B, 2K, this exhibit is admissible.
6

7 WIC 2M: Similar to 2L, Exhibit 2M provides a visual effect on a single exhibit of the
8 information depicted in Exhibits 2E, 2A, 2C, 2D, 2B, and 2K. For the reasons set forth above,
9 Exhibit 2M should be admitted into evidence.
10

11 **Objections to Neudeck Evidence**

12 WIC 4, page 4 paragraphs 3 thru 6: Not relevant and untimely evidence, and an attempt to
13 bolster evidence in another matter.

14 Paragraph 21: irrelevant

15 **Response:** Paragraphs 3 through 6 of the Neudeck testimony simply helps to explain some of the
16 information which Mr. Neudeck considered in reaching his opinion that Duck Slough existed
17 through at least 1926, and the location of same. The subject paragraphs simply refer to
18 information/matter presented by him in the Mussi, et al., proceeding (Paragraph 3), discusses the
19 case of *Nelson, et al., v. Robinson*, which is a matter of public opinion, (Paragraphs 4, 5 and 6).
20 In addition to being a matter of public record, the *Nelson, et al., v. Robinson, et al.*, has been put
21 into evidence by Neudeck and he was cross-examined about same..
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24 The historical location and existence of Duck Slough are directly relevant to WIC's
25 establishment of *any*, other than pre-1914 rights, and is revelant to the issue of WIC establishing
26 a basis for pre-1914 deliveries above the 77.7 cfs rate.
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1 WIC 4D testimony of Phelps: One-sided testimony and advocacy piece without entire
2 administrative record.

3 Response: It is unclear how Neudeck's testimony at Paragraph 21 could be considered irrelevant.

4 The prosecution team has taken the position that WIC has a pre-1914 right for up to 77.7 cfs.

5 WIC contends that it has a pre-1914 right beyond and above the 77.7 cfs rate and Mr. Neudeck's
6 testimony directly addresses that issue.

7
8 Testimony offered by Neudeck in Paragraphs 3-6 and Paragraph 21 is clearly the type of
9 evidence admissible under *Govt. Code sections 11513(c)(d)*. Neudeck has been squarely cross-
10 examined on all these issues, and the SWRCB should admit all of his testimony and assign the
11 weight it deems appropriate to same.

12
13 **Objection to Blake Evidence**

14 Blake: Object to entire testimony outside scope of hearing due to focus on riparian rights
15 of individual landowner.

16 Response: As part of its case in chief the PT has put in evidence that WIC has failed to show,
17 prior to the issuance of the draft CDO, evidence of a pre-1914 right OR ANY other rights to
18 support its diversions. Additionally, by conducting this hearing without including all of the
19 landowners within the WIC service area - which WIC, CDWA, SDWA, the County, and other
20 parties objected to, the lines have been blurred and it would be unfairly prejudicial for WIC
21 particularly in response to the testimony that WIC hadn't shown evidence of ANY OTHER right.
22 Additionally, Mr. Blake's testimony is directly relevant to WIC's position that it has a pre-1914
23 right well above the 77.7 cfs rate.

24 **Objection to Nomellini Evidence:**

25 Dante John Nomellini, Sr.
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1 a. Paragraph 4. Legal conclusion

2 **Response applicable to all of the objections to the Nomellini evidence:** Nomellini testified in
3 writing and orally to his qualifications and expertise related to the Delta. Although the hearing
4 officer requested that objections to evidence come at the close of the proceedings, San Luis and
5 MID were not prevented from challenging Mr. Nomellini's qualification through voir dire.
6 Neither chose to do so and thus, has waived such right. Nomellini's testimony is clearly the kind
7 of evidence admissible under *Govt. Code section 11513(c)(d)*. Moreover, Mr. Nomellini, as an
8 expert is allowed to rely in part or in whole on opinions or statements of others. See, *Evid. Code*
9 *section 804(a)*.

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12 Response to specific objections:

13 Paragraph 4: Mr. Nomellini is simply rendering his opinion as to whether or not the land
14 in the Delta can be physically separated from the Delta waters and is expressing his opinion as to
15 whether there would be any benefit derived from curtailing irrigation. Such is not a legal
16 conclusion, it is merely Nomellini's expert opinion. SWRCB is clearly capable of admitting the
17 testimony and determining its value.

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19 Paragraph 7: Nomellini is simply stating his opinion as to the intent of the Federal
20 Government and State Government's obligations and policy in connection with the Swamp And
21 Overflowed Lands. Mr. Nomellini is also appropriately citing to a portion of a study prepared by
22 DWR. He may properly do so as an expert.

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24 Paragraph 10: Mr. Nomellini's credentials were not challenged on voir dire and it is not
25 necessary that be a geologist or hydro-geologist to opine as he has in paragraph 10. Moreover,
26 the testimony in this paragraph is supported by the Thompson and West work included as WIC
27 Exhibit 8C.
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1 Paragraph 20: Evidence relating to Duck Slough is relevant for the reasons set forth
2 above. Mr. Nomellini has worked as a farmer, laborer, and attorney in the Delta for over fifty
3 years. Mr. Nomellini testified to same. Mr. Nomellini cites to the Settlement Geography of the
4 Delta to support his opinion. This is proper as an expert. Mr. Nomellini was thoroughly cross-
5 examined on these topics.
6

7 Paragraph 21: Opinions of experts may be based on matter, including his (special
8 knowledge, skill, experience, training and education) perceived by or personally known to the
9 witness or made known to him at or before the hearing. See, *Evid. Code section 801(b)*. Mr.
10 Nomellini clearly relied on his experience and knowledge in providing the testimony herein.
11

12 Paragraph 22: Opinions of experts may be based on matter, including his (special
13 knowledge, skill, experience, training and education) perceived by or personally known to the
14 witness or made known to him at or before the hearing. See, *Evid. Code section 801(b)*. Mr.
15 Nomellini clearly relied on his experience and knowledge in providing the testimony herein.
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17 Paragraph 32: Outside of expertise: SDWA and CDWA herein incorporate to response to
18 Paragraphs 10, 20, 21, and 22 above.

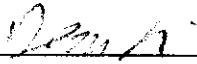
19 Exhibit 8B, 8D, 8F, 8G, 8H, 8J: The Exhibits cannot be offered for the truth of the
20 matters asserted; Judicial notice would be objectionable, but lacks foundation.
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22 SDWA and CDWA reserves the right to submit the documents via a request for judicial
23 notice. Additionally, Exhibit 8B is the CVP Delta Lowlands Report which is a publication by the
24 CVP. This is an official public record. Exhibit 8D is the Settlement Geography of the Delta and
25 excerpts of same have been put in evidence in this proceeding. Exhibit 8F is a letter to DWR
26 regarding Delta Wetlands. As indicated on said letter, it was carbon copied to Les Grover who is
27 a member of the SWRCB staff. Exhibit 8G is a report prepared by DWR regarding the Delta
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1 Wetlands transfer. Any such transfer of said report is believed to be part of SWRCB official
2 records as any transfer of Delta Wetlands would require SWRCB's approval. Exhibit 8H is a
3 Delta Lowlands Report which hearing officer Petit asked to be included within the record.
4 Exhibit 8J is a History of San Joaquin County and is an appropriate historical reference upon
5 which an expert may rely in whole or in part.
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7 All of the above exhibits were put into evidence and Mr. Nomellini and the opposition
8 had ample ability to conduct cross-examination relative to same. These documents have all been
9 made available in public proceedings, should be considered official records, and comply with
10 *Govt. Code section 11513 et. seq.*
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13 Dated: July 1, 2010

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