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TO: Woods Irrigation Company CDO Hearing Parties

FROM: Frances Spivy-Weber
Hearing Officer 

DATE: July 19, 2010

SUBJECT: WOODS IRRIGATION COMPANY HEARING MOTIONS AND EVIDENTIARY OBJECTIONS

This memo rules on the evidentiary objections and motions raised concerning the submission of exhibits by Woods Irrigation Company (Woods), and Modesto Irrigation District. It also rules on County of San Joaquin and San Joaquin County Flood Control and Water Conservation District's (jointly "County") motion for official notice.

Overarching Evidentiary Objections

The San-Luis and Delta-Mendota Water Authority (SLDMWA) (joined by State Water Contractors [SWC]) and the prosecution team have raised relevance objections to testimony and exhibits relating to riparian rights on lands within the Woods service area. These objections are overruled because the existence of such rights is relevant to the issue of whether Woods has diverted or is threatening to divert water illegally. It is not illegal for an irrigation company to divert water on behalf of water right holders who apply the water to beneficial use. Such actual or threatened illegal diversion is a threshold issue in the decision whether the State Water Resources Control Board (State Water Board) may properly issue a Cease and Desist Order (CDO). Additionally, the proposed draft CDO prepared by the Division of Water Rights Enforcement Unit requests information concerning the water rights of individual water users within the Woods service area. Any such information already provided to the satisfaction of the State Water Board is relevant to potential changes to the CDO, should one be ultimately issued.

Additionally, Modesto Irrigation District (MID) and SLDMWA (both joined by SWC) make objections to accepting and a motion to strike evidence or testimony based on hearsay. The State Water Board may accept and consider hearsay evidence, but is limited in using such evidence. Hearsay evidence may be used to supplement or explain other evidence in the proceeding, "but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d); Cal. Code Regs., tit. 23, § 648.5.1.) The hearing officers decline to exclude or strike evidence on ground of hearsay, but will consider it subject to the limitations in Government Code section 11513, subdivision (d).

As stated during the proceeding, the hearing officers generally prefer to admit evidence that would be admissible under our regulations, using the more liberal standards applicable to

administrative proceedings. (See Gov. Code, § 11513; Cal. Code Regs., tit. 23, § 648, subd. (d).) However, the circumstances that led to the objections may limit or undermine the trustworthiness of that information, and such limits will be taken into account in determining the weight to give the evidence in the proceeding.

Specific Prosecution Team Objections

The prosecution team objected to submission of testimony regarding riparian rights on grounds of relevance. As discussed above, this objection is overruled.

Specific MID Motions (joined by SLDMWA and SWC)

1) Motion to Strike the Testimony of Timothy Grunsky

MID moves to strike the testimony of Mr. Grunsky on grounds of: (a) hearsay; (b) being oral testimony to prove a writing, as prohibited under Evidence Code section 1523; and (c) not being the type of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs.

(a) Parts of Mr. Grunsky's testimony are hearsay and will be admitted subject to the limits of hearsay evidence. For example, the statements he relates hearing from his grandmother are hearsay. Other parts of his testimony give his opinion based on his review of specific documents in the record. These are not hearsay, and the evaluation of their weight will not be subject to the hearsay requirements.

(b) Evidence Code section 1523 does not apply to administrative hearings at the State Water Board. (See Gov. Code, § 11513, Cal. Code Regs., tit. 23, § 648.5.1.) However, insofar as the exclusion exists because it reduces the reliability of the evidence, the State Water Board will take this into account in weighing the evidence.

(c) MID's argument concerning whether Mr. Grunsky's testimony is the sort of information upon which responsible persons are accustomed to rely in the conduct of serious affairs is that the testimony consists of oral testimony regarding written documents not in evidence. As discussed above, some of Mr. Grunsky's testimony relies on documents that are in evidence. Because the documents themselves are in evidence, the State Water Board is not in a position where Mr. Grunsky's testimony regarding these documents is the only evidence of their contents. To the extent that Mr. Grunsky's testimony purports to rely on documents not in the record, the State Water Board will take this into account in weighing the evidence.

2) Motion to Strike the Testimony of Christopher Neudeck, WIC Exhibit 4A Attachment Exhibit 3V and WIC Exhibit 4D.

MID moves to strike certain testimony by Christopher Neudeck presented in the pending proceeding, but originating as testimony in a prior proceeding based on: (a) relevance; (b) not being the sort of information upon which responsible persons are accustomed to rely in the conduct of serious affairs; and (c) probative value being outweighed by undue consumption of time.

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 (hereinafter "Phelps"). This evidence is presented solely to support the theory that lands in the area have riparian water rights because the groundwater they overlie is connected to the surface waters from which they are diverting, also known as the "Delta Pool" theory. This theory was rejected in State Water Board's Phelps Order, which was upheld on judicial review. (See *Phelps et. al. v. SWRCB* (Super. Ct. Sacramento County, 2006, No. 04CS00368); *Phelps v. SWRCB* (2007) 157 Cal. App. 4th 89.) Because a riparian water right cannot attach through groundwater, this evidence is not relevant to the proceeding, and the motion to strike is granted on that ground.

3) Motion *In Limine*

MID moves to bar all evidence concerning the existence of Woods' riparian or pre-1914 rights under the doctrines of *res judicata* and/or collateral estoppel or judicial estoppel, based on the case *Woods Irrigation Company v. Department of Employment* (1958) 50 Cal.2d 174. MID contends that these doctrines prevent consideration of any such evidence, and that the evidence is not the type of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs.

The estoppel arguments MID raises are appropriate for closing briefs, and may be addressed by all parties through that venue. Motions *in limine* were not requested by the hearing officers in this administrative hearing, and permission to file such was not granted. Moreover, the purpose of a motion *in limine* is to resolve evidentiary issues before trial. The testimony regarding Woods' water rights had already been heard at the time of the motion. There is no purpose in making a ruling before briefing.

Specific SLDMWA Objections (Joined by SWC)

1) Objections to Evidence in Moore Testimony, Exhibits WIC 2E-2M.

SLDMWA objects to this evidence based on lack of foundation and hearsay. These exhibits are photographs, stereo-analysis, and mapping of the area including the Woods' service area, based at least in part on a series of aerial photographs taken in 1937 and 1940 that have not been submitted into evidence.

It is unclear to which statement by a declarant not at the proceeding SLDMWA objects for Exhibits 2E-2K. (See Evid. Code, § 1200.) All writing on the photographs constitutes written statements and will be admitted subject to the hearsay limitations. However, it is unclear whether the content of the photographs themselves constitute statements for the purposes of hearsay. The State Water Board requests that the parties address this issue in briefing.

Mr. Moore testified that he obtained the photographs from Mr. Nomellini for purposes of evaluation. The photographs are dated. Neither Mr. Moore nor Mr. Nomellini in his subsequent testimony described further how the photos were obtained, who dated them, whether they were or could have been altered, or under what conditions they were taken. Mr. Moore testified that

the photographs overlap a significant amount, and presented a mosaic of the different photographs. The photographs were also used in conjunction with a map and a more recent photograph that are not challenged. Mr. Herrick stated that the photographs had been provided to SLDMWA, SWC, and MID under a subpoena request in another matter. SLDMWA, in its rebuttal testimony, relied similarly on photographs from 1937 that are similarly dated, but also presented no testimony describing how the photos were obtained, who dated them, whether they were or could have been altered, or under what conditions they were taken. In both Woods' and SLDMWA's testimony, the evidence objected to was used in conjunction with more recent photographs. The fact that these opposing parties both presented evidence based on the photographs, and their at least partial corroboration in their overlying nature and by more recent aerial photos of the area provide grounds to allow evidence based on the photos into evidence. However, the uncertainty regarding the origin and chain of custody of the photographs, particularly in light of the fact that it would have been simple for any of the parties to put the photographs into evidence, will be taken into account in weighing the evidence which used the photographs as a basis. Mr. Moore laid a proper foundation for the analysis of the photographs.

SLDMWA further supports its objection to WIC 2L & 2M based on the inclusion in these maps of drawings of historic riparian features done by Mssrs. Lajoe and Atwater, who were not present at the hearing to testify. Because the drawings by Mssrs. Lajoe and Atwater are their representations and interpretations of historic features, according to Mr. Moore's testimony, these drawings are assertive in nature. Mr. Atwater's map is a United States Geological Survey publication which falls within the hearsay exception for publications concerning facts of general notoriety and interest, which includes "published maps or charts, made by persons indifferent between the parties." (Evid. Code, § 1341.) Additionally, both Mr. Atwater's and Mr. Lajoe's work are of a type upon which an expert might reasonably rely, even if it is hearsay evidence which would be inadmissible in court. (See Evid. Code, § 802.) Therefore, the hearsay objection to the reference to the Lajoe and Atwater work is rejected. As with the photographs discussed above, the fact that not all¹ of the actual drawings were submitted into evidence and that Mr. Lajoe did not testify will be taken into account in weighing the evidence.

2) Objections to Neudeck's Testimony and Exhibits

(a) SLDMWA objects to the inclusion of paragraphs 3 – 6 and 21 of Mr. Neudeck's testimony (Exhibit WIC-4) as irrelevant. Additionally, it objects to paragraphs 3 – 6 as an untimely attempt to bolster evidence in another matter. Paragraphs 3 – 6 and 21 relate to a riparian rights theory put forth by Woods, and are relevant as discussed above. Additionally, they are relevant to a pre-1914 rights theory. Paragraphs 3 – 6 will not be used in this hearing for any other reason than as evidence regarding issues pending in this hearing. Whether they may be used in a different matter depends on decisions made in that proceeding.

(b) SLDMWA asserts that Mr. Neudeck's testimony in the State Water Board's Phelps proceeding, Exhibit WIC-4D, should not be admitted because it is advocacy and that it should

¹ A 1982 map by Mr. Atwater was submitted into evidence as WIC 8L; however, this map is one of a series and does not depict fully the area in WIC 2L & 2M, both of which include lines attributed to the Atwater map that are outside of the area. It is unclear that these are the same map, although CDWA and SDWA assert that they are.

not be admitted without including the entire administrative record for the Phelps proceedings. As described above, the Neudeck testimony will be excluded on relevance grounds.

3) SLDMWA objects to the testimony by Mr. Blake as irrelevant and outside the scope of the hearing. As discussed above, riparian rights are relevant to and within the scope of this hearing.

4) SLDMWA objects to certain testimony by Mr. Nomellini and certain exhibits attached thereto.

(a) SLDMWA objects to paragraphs 4 and 7 of Mr. Nomellini's testimony (Exhibit WIC-8) as unsupported legal conclusions. The information in these paragraphs is helpful in framing the testimony and is based on a specific factual set of circumstances about which Mr. Nomellini testified, and it is therefore admitted.

(b) SLDMWA objects to paragraphs 10, 12 and 32 of Mr. Nomellini's testimony (Exhibit WIC-8) as outside Mr. Nomellini's expertise. These are paragraphs in which Mr. Nomellini interprets texts (attached as exhibits) regarding hydrologic, historic and geological information about the Delta. Because the exhibits are included as evidence, the board can evaluate them independently, and is not reliant solely on Mr. Nomellini's interpretation of the documents. While Mr. Nomellini's interpretation of these texts will be evaluated differently than would the testimony of a hydrologist, a licensed engineer practicing in the field, or a historian, the State Water Board will accept the evidence.

(c) SLDMWA objects to Paragraph 10 as irrelevant because it relates to riparian rights. This objection is overruled, per the reasoning above.

(d) SLDMWA objects to Exhibits WIC-8B, 8D, 8F-H and 8J for lack of foundation, but suggests that this lack of foundation might be cured by taking official notice of the documents, rather than accepting them for the truth of the matters asserted within them.

Exhibits WIC-8B, 8F, 8G and 8H all appear to be documents issued by or under the authority of agencies in the executive branch. Given the broad construction of "official acts" as they relate to documents produced by and records of executive branch agencies, the State Water Board will take official notice of these documents. This eliminates the potential concern of a document lacking foundation, which is that the evidence is not what it purports to be. The State Water Board is not noticing the truth of all matters contained in the documents; however, to the extent that they were discussed in Mr. Nomellini's testimony, they will be entered into and weighed as evidence.

The other two documents are excerpts from a 1957 dissertation entitled *The Settlement Geography of the Sacramento-San Joaquin Delta, California* (Exhibit WIC-8D) and excerpts from the 1923 *History of San Joaquin County*, written by George H. Tinkham. (Exhibit WIC-8J.) There is no indication that these are official acts, or are otherwise noticeable. The documents will be accepted into evidence, but the fact that there is no testimony regarding how these documents were found and excerpted will be taken into consideration in evaluating their weight.

5) SLDMWA objects to Mr. Pritchard's testimony as hearsay. It appears that the hearsay objection stems from Mr. Pritchard's use of the Gateway Map, Exhibit WIC-10B. It is unclear from the map whether it was prepared by a person indifferent among the parties to the hearing. The only indication of who prepared the map is that the first page states that the map is "Used by permission of the San Joaquin Valley Counties Association." San Joaquin County is a party to this matter, and it is unknown whether it was a member of the referenced Association. Woods' Irrigation Company has not provided sufficient information to evaluate whether this map fits a hearsay exception. Mr. Pritchard's testimony will be admitted but the parts of it that are based on the Gateway Map will be treated as hearsay.

Specific County Motions

The County requests that the State Water Board take official notice of two documents accessed on the State Water Board's website as "official acts." (See Evid. Code, § 452, subd. (c).)

The documents were produced and placed on the State Water Board's website by an unknown staff person or persons at an undefined time. There is no indication that the documents were approved by the State Water Board and they are not official orders, resolutions, decisions, or policies. It is questionable whether merely posting a document on a website constitutes an official act of a state agency. However, the realm of "official acts" has been construed broadly by the California courts. (*Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 143 [affirming judicial notice of the files and an order of the Public Utilities Commission]; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [affirming judicial notice of files connected to a report made to the Board of Medical Quality Assurance].)

Therefore, the State Water Board will take official notice that these documents were posted on the Board's website, without accepting them for the truth of the matter asserted. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064 [partially overruled on different grounds].)