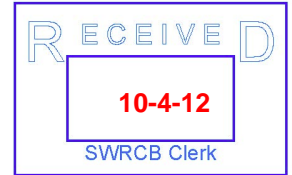




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October 4, 2012



VIA E-MAIL COMMENTLETTERS@WATERBOARDS.CA.GOV

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: COMMENT LETTER - 10/16/12 BOARD MEETING: DUNKEL CDO
HEARING - Comments Concerning the Draft Order Declining to Issue
Cease and Desist Order – In the Matter of the Alleged Unauthorized
Diversion or Use of Water by Mark and Valla Dunkel – Middle River in
San Joaquin County

Dear Ms. Townsend:

This letter provides joint comments from the State Water Contractors (“SWC”) and the San Luis & Delta-Mendota Water Authority (“SLDMWA”) on the Draft Order Declining to Issue Cease and Desist Order against Mark and Valla Dunkel (“Draft Order”), dated September 19, 2012. The arguments presented previously in the “Closing Brief in the Matter of Draft Cease and Desist Order No. 2009-00XX DWR Enforcement Action No. 75 Against Mark and Valla Dunkel” for Modesto Irrigation District, SWC, and SLDMWA are incorporated by reference.¹ These arguments have not been adequately addressed in the Draft Order.

The Draft Order relies on two September 29, 1911 agreements between Woods Irrigation Company (“WIC”) and the predecessor in interest of Mark and Valla Dunkel

¹ A copy of this brief is available at http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/dunkelcdo_closingbriefs_mss091310.pdf.

("Dunkels") to furnish water and build canals ("1911 Agreements") as the sole piece of evidence that "provide[s] sufficient intent to find that the Dunkels' property has maintained riparian rights to Middle River." (Draft Order at 9.) However, as discussed in this letter, the 1911 Agreements are not sufficient to show intent to maintain riparian rights.² The SWC and SLDMWA therefore respectfully request that the State Water Resources Control Board ("State Water Board") not adopt this Draft Order. Alternatively, if the State Water Board still believes the 1911 Agreements may demonstrate intent to preserve a riparian right, we respectfully request that the State Water Board defer issuance of an order until after the re-opened hearing on the WIC matter is held, which may provide further information on proper interpretation of the 1911 Agreements.

I. BACKGROUND

The predecessor owners of what is now the Dunkels' property severed its contiguity with Middle River on November 29, 1911. The predecessor owners did not explicitly reserve a riparian right for the Dunkel property. (Draft Order at 6.) The deed does not contain the word "riparian" or make any reference to water rights. (See MSS Closing Brief at 5.) Absent explicit language in the deed, preservation of the riparian water right must depend on showing intent at the time of the severance to maintain the riparian right. (*Hudson v. Dailey* (1909) 156 Cal 617, 624.) Knowing this, the Dunkels asserted during the hearing that the intent is reflected in a single provision of the deed, which makes the deed "subject to" the 1911 Agreement to furnish water. (Dunkel Closing Brief at 6:15-28.) As with the deed, the 1911 Agreements does not make reference to preserving a riparian water right. Instead, the 1911 Agreements provides for service of water to "consumers." (MSS Closing Brief at 7:4-12.) Notwithstanding these considerations, the Draft Order relies on the 1911 Agreements to find intent to preserve the riparian water right on the Dunkel property.

II. THE 1911 AGREEMENTS DO NOT DEMONSTRATE INTENT TO PRESERVE RIPARIAN RIGHTS FOR THE DUNKEL PROPERTY

The general rule is that conveying a non-contiguous portion of a riparian parcel results in the loss of riparian rights for that non-contiguous land, if the conveyance is silent as to the riparian rights. (*Anaheim Union Water Co. v. Fuller* (1907) 150 Cal 327, 331-332; *Rancho Santa Margarita v. Vail* (1938) 11 Cal. 2d 501, 538-539.) The November 29, 1911 conveyance which severed the Dunkels' property from contiguity with Middle River was silent as to the riparian water right for that property. Therefore, applying the general rule, the conveyance resulted in a loss of riparian water rights for the non-contiguous Dunkels' property.

² The Dunkels generally reference the 1911 Agreement to furnish water (Dunkel Closing Brief at p. 6). However, both the Draft Order in §4.2 (beginning at p. 6) and the Phelps Order at pages 27-28 evaluate retention of riparian rights by considering both of the 1911 Agreements. The MSS Closing brief demonstrates that neither of the 1911 Agreements are sufficient to preserve riparian rights for the Dunkel property.

However, the California Supreme Court has found that a riparian right may be retained even if the conveyance is silent under limited circumstances:

A subsequent conveyance by one of the original owners, or a part of the tract not abutting upon the creek, would not carry any riparian or other right in the creek, unless it was so provided in the conveyance, or unless the circumstances were such as to show that the parties so intended, or were such as to raise an estoppel. If the tract conveyed was not contiguous, had never received water from the creek, and there were not ditches leading from the creek to it at the time of conveyance, nor other conditions indicating an intention that it should continue to have the riparian right, notwithstanding its want of access to the stream, the mere fact that it was part of the rancho to which the riparian right had extended while the ownership was continuous from it to the banks of the stream, would not preserve that right to the severed tract. The severance under such circumstances would cut off such tract from the riparian right ...

(*Hudson v. Dailey, supra*, 156 Cal. at pp. 624-625.) The record from the Dunkels' hearing does not show that the Dunkels' property received water from Middle River prior to the severance in November of 1911, or that there were ditches leading from Middle River to the Dunkels' property at the time of conveyance.³ (MSS Closing Brief at 17:12-14.) Also, because many of the terms of the 1911 Agreements are inconsistent with the scope of riparian water rights, it is unreasonable to conclude that the 1911 Agreements would have been used as the vehicle to express the intent to maintain a riparian water right. Inconsistencies between the 1911 Agreements and the scope of riparian rights (as identified in the MSS Closing Brief) include:

- Quantification of the amounts to be delivered under the 1911 Agreements, while a riparian right is not defined by fixed quantities;
- Statements that landowners have no water rights to water made available under the 1911 Agreements, which is incompatible with WIC delivering water pursuant to riparian rights held by landowners;
- Expiration of the 1911 Agreements after 50 years, while riparian rights persist in perpetuity, absent a severance;

³ These factors identified in *Hudson v. Dailey* indicate that retention of riparian rights should be demonstrated by clear and concrete evidence of a conscious intent to retain the water right. Intent should not be construed after the fact based on a need for water - for example, "the mere fact that [land] was part of the rancho to which the riparian right had extended while the ownership was continuous from it to the banks of the stream, would not preserve that right to the severed tract." (*Hudson v. Dailey, supra*, 156 Cal. at pp. 624-625; see also MSS Closing Brief at 3:1-6.)

- Payments to WIC for the water made available pursuant to the 1911 Agreements (in addition to and separate from the total costs to pay expenses incidental to operation of the WIC facilities), when the right to the water is already held by the landowners under their own riparian rights;
- Restrictions in the purpose of use, time of use, method of use, and amount of water under the 1911 Agreements, which are inconsistent with the scope of riparian water rights; and
- Proration of water deliveries based on acres during shortages under the 1911 Agreements, which is inconsistent with the distribution of riparian water based on reasonable and beneficial use;

The use of the 1911 Agreements to show intent to preserve riparian water rights, when those agreements are filled with terms inconsistent with exercise of riparian water rights, is nonsensical. There are no “conditions indicating an intention that [the Dunkel property] should continue to have the riparian right, notwithstanding its want of access to the stream.” (*Hudson v. Dailey, supra*, 156 Cal. at p. 624.)

A. The Draft Order Improperly Associates Entry into 1911 Agreements with Intent to Preserve a Riparian Water Right

The Draft Order rejected the argument that the inconsistencies between the terms of the 1911 Agreements and the scope of riparian water rights demonstrate that the 1911 Agreements show an intent to preserve riparian water rights, stating that “[w]hile MSS parties assert that ‘no riparian water right holder’ would agree to certain terms [in the 1911 Agreements], the State Water Board finds it could be reasonable to do so.” (Draft Order at 8.) However, the relevant issue is not whether a riparian rights holder might enter into agreements with such terms, but rather whether such agreements are sufficient to show the intent required under *Hudson v. Dailey* to preserve riparian rights on the severed parcel. For the reasons stated above, intent of the parties at the time of severance to maintain a riparian right cannot be demonstrated by the 1911 Agreements.

B. The Draft Order Does Not Evaluate the 1911 Agreements as a Whole

The Draft Order fails to consider the 1911 Agreements as a whole, with the many inconsistencies between the terms of the 1911 Agreements and terms of riparian water rights, and instead only considers selected inconsistencies in a piecemeal fashion. Many of the inconsistencies between the 1911 Agreements and the scope of riparian water rights, as identified in the MSS Closing Brief and summarized earlier in this letter, are not considered at all in the Draft Order. This violates the principle that “[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the

other.” (Cal. Civ. Code §1641.)⁴ For example, the Draft Order’s discussion of restrictive water delivery terms is presented in a separate paragraph from discussion that the contracts do not “create or convey” water rights. This selective consideration of the 1911 Agreements does not provide an adequate basis to judge the intent of the 1911 Agreements, and does not properly consider the cumulative inconsistencies identified herein and in the MSS closing brief.⁵

C. Assertions in the Draft Order that the Dunkels’ Property Received Riparian Water Prior to Severance are Unsupported

The Draft Order states that the 1911 Agreements were “crafted to ensure that all subdivided lands would get the same water access as lands prior to subdivision,” and concludes that “[t]he intent to continue Middle River water deliveries after subdivision suffices” to show intent to preserve riparian water rights. (Draft Order at 8.) However, the Draft Order makes no finding that: (1) riparian water deliveries were occurring before the severance of the Dunkel lands on November 29, 1911; (2) deliveries of water from WIC to the Dunkel lands were a continuation of deliveries initiated before the severance occurred; or (3) that water eventually delivered to the Dunkel lands by WIC was riparian water, rather than appropriated water. Without such findings, the 1911 Agreements do not provide a basis to find intent to preserve a riparian water right.⁶

⁴ This principle is also established in case law: “A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself” (*Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) (citing *Kennevick*, 880 F.2d at 1032; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1549 (9th Cir. 1989)); “We consider the contract as a whole and interpret its language in context so as to give effect to each provision, rather than interpret contractual language in isolation” (*Service Employees Internat. Union, Local 99 v. Options—A Child Care & Human Services Agency* (2011) 200 Cal.App.4th 869, 879.)

⁵ For example, with respect to quantification of the amount of water in the 1911 Agreements, the MSS closing brief notes that “it would be unreasonable to conclude [the 1911] Agreements were used as a vehicle for express intent to maintain a riparian right” (MSS Closing Brief at 8:11-13); with respect to landowners acknowledging they obtain no lien, estate, easement, or servitude in or to the water flowing in WIC’s canals, the MSS closing brief notes that such acknowledgement “is so contradictory to the substance and objective of riparian rights such that no riparian proprietor would have . . . employed it as the vehicle for expressing his intention to maintain their riparian rights” (MSS Closing Brief at 9:6-9); with respect to the expiration of the 1911 Agreements in 50 years, the MSS closing brief notes that “[i]t is unreasonable to think that a party intending to maintain its riparian rights would have used an agreement that expired as the vehicle for expressing its intention” (MSS Closing Brief at 10:20-21).

⁶ The difficulty in evaluating the intent of the 1911 Agreements with respect to the water rights basis for the water delivered by WIC can be seen in the analysis in Water Rights Order No. 2011-0005. That order concludes that “Woods or landowners within the Woods original service area had the intention before 1914 to divert up to 77.7 cfs of water for irrigation within its original service area,” and that “some of this water was diverted under the riparian rights of Woods landholders, while some of it was diverted under appropriative rights.” (Order 2011-0005 at 4.) In its analysis of development of a pre-1914 appropriative water right, that order asserts that “[t]o the extent that contracts covered lands that did not have water rights at the time of execution, the contracts demonstrate an intent to develop the remaining water by appropriation.” (Id. at 31). It is not reasonable to expect that landowners would use

D. Application of Analysis of Intent from Order WR 2004-0004 Cannot Be Applied to the Dunkels' Property Based on New Evidence Submitted in Dunkel Hearing

The Draft Order relies on analysis in Order WR 2004-0004 ("Phelps Order") to argue that the 1911 Agreements demonstrate intent to preserve riparian rights. (Draft Order at 7, citing Phelps Order at 27.) However, the Dunkels' hearing included new evidence that WIC alleges it owns the canals, ditches, and water therein.⁷ (MSS Closing Brief at 9, citing Exhibit Dunkel-2B at 2.) The assertion of ownership of the water by WIC contradicts a determination that the 1911 Agreements are sufficient to show intent to retain riparian rights.

III. CONCLUSION

The contiguity of the Dunkels' property was severed in the November 29, 1911 deed, which is silent as to a riparian water right. That deed was also made subject to the 1911 Agreements, which are also silent as to a riparian water right. Under the general rule, the riparian water right for the Dunkels' property was lost in this transaction. The Draft Order's finding that the riparian water right was preserved is based entirely on an interpretation that the 1911 Agreements (100 years after the fact) demonstrate intent to preserve the riparian water right. That interpretation is unreasonable on several bases: (1) the 1911 Agreements contain many terms which are inconsistent with the scope of a riparian right and would not be included in a document intended to preserve a riparian right; (2) there are many alternative interpretations of the 1911 Agreements which do not involve preservation of riparian rights (such as desire for access to drainage services, conveyance of water under a possible landowner pre-1914 appropriative right, conveyance of water under a possible WIC pre-1914 appropriative water right); and (3) there is a lack of corroboration of intent shown by actual deliveries of water under the riparian water right prior to the severance. Because of these issues, it is unreasonable to conclude that the riparian right on the Dunkels' property was preserved by intent demonstrated in the 1911 Agreements.

For the reasons stated in this letter and the MSS brief cited herein, the SWC and SLDMWA respectfully request that the State Water Board not adopt this Draft Order.

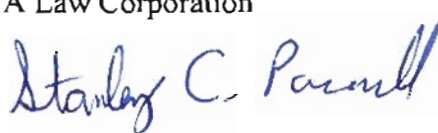
the 1911 Agreements as the vehicle to demonstrate intent to preserve a riparian water right if those same agreements could also be read to demonstrate intent to develop a pre-1914 appropriative water right.

⁷ The Draft Order incorrectly asserts that the "MSS parties did not point to evidence submitted in this hearing that provides reason to differ from the Phelps decision" in rejecting this argument.

Alternatively, if the State Water Board still believes that the 1911 Agreements may demonstrate intent to preserve a riparian right, the SWC and SLDMWA respectfully request that the State Water Board defer issuance of an order until after the re-opened hearing on the WIC matter is held, which may provide further relevant information on the proper interpretation of the 1911 Agreements.

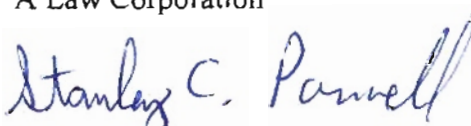
Sincerely,

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MAILING SERVICE LIST

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