
State Water Resources Control Board

VIA ELECTRONIC MAIL

October 30, 2012

TO: Enclosed Mailing List

ORDER WR 2012-0016 – DECLINING TO ISSUE A CEASE AND DESIST ORDER

Enclosed is Order WR 2012-0016, which was adopted by the State Water Resources Control Board (State Water Board) on October 16, 2012. A copy of the order will also be posted at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/dunkel/

No later than 30 days after adoption of the order, any interested person may petition the State Water Board for reconsideration of the matter upon any of the following causes: (Cal. Code Regs. tit. 23, § 768)

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

Petitions for reconsideration should be addressed to:

**Michael Buckman, Chief
Hearings Unit
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000
Email: mbuckman@waterboards.ca.gov**

Petitions for reconsideration may also be hand delivered to the following address:

**Records Unit
Attention: Michael Buckman
Division of Water Rights
State Water Resources Control Board
Cal/EPA Headquarters
1001 I Street, 2nd Floor
Sacramento, CA 95814-2828**

Couriers delivering petitions for reconsideration must check in with lobby security and have them contact the Division of Water Rights Records Unit, second floor. The Records Unit will receive and date stamp the petitions.

If you have any questions regarding this letter, please contact me at (916) 341-5359, or at emona@waterboards.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Ernest Mona". The signature is written in a cursive, flowing style.

Ernest Mona
Hearings and Special Programs Section

Enclosures:
e-Mail Service List
Order

MAILING SERVICE LIST

(March 8, 2010, updated: 09/19/12; 09/20/12; 10/10/12)

**IN THE MATTER OF THE ALLEGED UNAUTHORIZED DIVERSION OR USE OF
WATER BY MARK AND VALLA DUNKEL
(VIA ELECTRONIC MAIL)**

<p>MARK AND VALLA DUNKEL c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>DIVISION OF WATER RIGHTS PROSECUTION TEAM c/o David Rose, Esq. State Water Resources Control Board 1001 I. Street Sacramento, CA 95814 drose@waterboards.ca.gov</p>
<p>CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>	<p>SOUTH DELTA WATER AGENCY c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com</p> <p>c/o Dean Ruiz, Esq. 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com</p>
<p>SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT c/o DeeAnn M. Gillick, Esq. Neumiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 dgillick@neumiller.com mbrown@neumiller.com</p>	<p>STATE WATER CONTRACTORS c/o Stanley C. Powell, Esq. Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 spowell@kmtg.com</p>

<p>THE SAN LUIS & DELTA-MENDOTA WATER AUTHORITY c/o Jon D. Rubin, Counsel P.O. BOX 2157 Los Banos, CA. 93635 Jon.Rubin@SLDMWA.Org</p> <p>c/o Daniel J. O'Hanlon, Esq. Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 dohanlon@kmtg.com</p> <p>(Updated 09/19/12, 10/10/12)</p>	<p>MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin, Esq. O'Laughlin & Paris LLP PO. Box 9259 Chico, CA 92927 towater@olaughlinparis.com kpetruzzelli@olaughlinparis.com vkincaid@olaughlinparis.com</p>
<p>SAN JOAQUIN FARM BUREAU c/o Bruce Blodgett 3290 North Ad Art Road Stockton, CA 95215-2296 director@sjfb.org</p>	<p>CALIFORNIA DEPARTMENT OF WATER RESOURCES c/o James Mizell, Esq. 1416 Ninth Street, Room 1118 Sacramento, CA 95814 jmizell@water.ca.gov</p> <p>(Updated 09/20/12)</p>

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD**

ORDER WR 2012-0016

In the Matter of the Draft Cease and Desist Order Against
Unauthorized Diversion of Water by

Mark and Valla Dunkel

Source: Middle River

County: San Joaquin County

ORDER DECLINING TO ISSUE CEASE AND DESIST ORDER

BY THE BOARD:

1.0 INTRODUCTION

The Assistant Deputy Director for the State Water Resources Control Board's (State Water Board or Board) Division of Water Rights (Division) issued a draft cease and desist order (CDO) against Mark and Valla Dunkel (the Dunkels). At the Dunkels' request, the State Water Board conducted a public hearing to determine whether to adopt, with or without modification, the draft CDO. After consideration of the testimony and written evidence presented at the hearing and written closing statements, the State Water Board has determined not to issue a CDO, as the evidence does not indicate that there is an actual or threatened unlawful diversion of water on the Dunkel property.

2.0 BACKGROUND AND PROCEDURES

2.1 Strategic Workplan

On July 16, 2008, the State Water Board adopted a Strategic Workplan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Workplan), which emphasized the State Water Board's responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the San Francisco Bay/Sacramento-San Joaquin Delta (Delta). As described in the Workplan, the Division initiated an investigation of the basis of water rights of existing diverters within the Delta. (PT-1.)¹

¹ Citations to the hearing record are provided solely for ease of reference. There is often other supporting evidence in the record or other references to a legal argument that is not specifically cited in the decision. All transcripts and exhibits are available on the State Water Board's water right hearings web page, at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/.

Citations are indicated as follows:

- (1) Citations to the Reporter's Transcript are indicated by "R.T." followed by a Roman numeral for the volume of the transcript, followed by the beginning page and line number and the ending page and line number. Pages and line numbers are separated by a colon. (e.g., R.T.V. 997:4-998-17.)
- (2) Citations to Exhibits
 - a. All citations to exhibits in the evidentiary hearing record are designated by the name or

On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands within the Delta. Based on reviews of U.S. Geological Survey maps, aerial photography, and San Joaquin County Assessors maps, the Division sent letters to each property owner that was determined to have been irrigating in the last few years, and for whom the Division had no record of any basis of right for water diversion. The Division requested that each property owner either: (1) inform the Division within 60 days as to the basis of their right by filing a Statement of Water Diversion and Use with appropriate evidence; (2) define a contractual basis for diversion of water; or (3) cease diversion of water until a basis of right is secured. The letter also informed the contacted property owners that a failure to respond may result in enforcement action. (PT-7, p.2.)

According to the Prosecution Team's written testimony, the Division mailed the Dunkels a copy of the February 18, 2009 letter, as owners of Assessor Parcel 162-090-01 (Dunkels' property) located on Middle Roberts Island. (PT-1, p.2.) The Prosecution Team's written testimony also indicates that, on September 9, 2009, the Division mailed a second letter by Certified Mail to the Dunkels, but as of December 10, 2009, the Division had not received any response from the Dunkels supporting a basis of right for the diversion and use of water on the Dunkels' property. (*Ibid.*) The current action resulted from this series of information-seeking letters.

2.2 The Dunkels' Property and Water Use

The Dunkels' property (38 acres) is located within the Woods Irrigation Company's (Woods) service area. (PT-1; Dunkel-1; Dunkel-2.) The Woods service area is located on Middle Roberts Island in the southern Delta in San Joaquin County. (PT-4; Dunkel-1A; Dunkel-2; Dunkel-2A; MSS-1J; MSS-7D.) The Dunkels' property abuts one of the Woods's main irrigation canals, East Main Canal. (*Ibid.*)

During the period 2006 to 2010, the Dunkels received irrigation and drainage assessment invoices from Woods for irrigation and drainage of 32.7 acres. (PT-8A; PT-8B.) Irrigation farming has been conducted for several years on the Dunkels' property by tenant farmer, Mr. Gino Celli. (PT-1; Dunkel-1; Dunkel-2.) The Dunkels' crops are irrigated solely with water diverted from Middle River that is provided by Woods via the East Main Canal. (Dunkel-1.)

The evidence indicates that the Dunkels irrigate between 30.5 and 32.7 acres of land which

abbreviation for the party that submitted the exhibit, followed by the exhibit number, followed by the page number or other location of the cited information in the exhibit, if necessary. (e.g., Dunkel-2, p. 1.)

- b. Additionally, a number of the exhibits to this hearing were first submitted as exhibits in related hearings before the State Water Board heard in the same timeframe. Those exhibits also include the name or abbreviation for the party that originally submitted the exhibit after the name or abbreviation for the party that submitted the exhibit in this hearing, and those exhibits maintain the exhibit number from numeration in the original hearing. Where those exhibits were submitted as rebuttal testimony in the original hearing, that exhibit numeration includes an "R" before the rest of the exhibit number.
- c. The party abbreviations used herein are:
 - i. Prosecution Team: "PT"
 - ii. Joint submissions by the Modesto Irrigation District, the State Water Contractors and the San Luis & Delta-Mendota Water Authority: "MSS"
 - iii. Mark and Valla Dunkel: "Dunkel"
 - iv. Woods Irrigation Company: "WIC"
 - v. Rudy Mussi, Toni Mussi, and Lory C. Mussi, Investment LP: "MUSSI"

would amount to an estimated water use of 97.6 acre-feet per annum. (PT-1; PT-5; PT-6; MSS-4B.)

2.3 Notice of Draft CDO

On December 14, 2009, the Assistant Deputy Director for Water Rights issued a proposed CDO to the Dunkels for the alleged violation and threatened violation of the prohibition against the unauthorized diversion or use of water. (PT-1; PT-7.) If imposed, the draft CDO would have imposed the following provisions:

- (1) The Dunkels shall submit to the Division sufficient evidence establishing a valid basis of right or an existing water supply contract to serve the property. No diversions shall be made to this parcel until the Dunkels receive approval from the Assistant Deputy Director for Water Rights to exercise the water right or contract.
- (2) Within 90 days of the date of this Order, if no basis of rights can be established, the Dunkels shall submit a plan showing how and when they will permanently remove the diversion works serving parcel 162-090-01. Upon approval of the plan by the Assistant Deputy Director for Water Rights, the Dunkels shall diligently take the actions identified in the approved plan.

(PT-7.)

2.4 Evidentiary Hearing

On December 30, 2009, the Dunkels timely requested a hearing. On February 18, 2010, the State Water Board issued a notice of public hearing for the Dunkels and for landowners of several nearby parcels who received draft CDOs the same day.² The hearing notice identified the following key hearing issues:

- (1) Should the State Water Board adopt the draft CDOs issued on December 14, 2009?
- (2) If the draft CDOs should be adopted, should any modifications be made to the measures in the draft CDOs, and what is the basis for any such modifications?

The joint hearings were held on May 5, June 9, July 9 and July 15 of 2010. On August 4, 2010 the State Water Board continued the Dunkel hearing for the limited purpose of reopening the administrative hearing record to receive additional evidence relevant to the Dunkels' claim to hold riparian water rights after additional evidence relevant to the Dunkels' riparian claim was identified in a separate hearing addressing a proposed CDO against Woods.

Adjudicative proceedings before the State Water Board are governed by California Code of Regulations, title 23, sections 648.8, 649.6, and 760, and the statutes specified in the regulations, including applicable provisions of chapter 4.5 of the Administrative Procedure Act (commencing with Government Code section 11400). The State Water Board has separated its adjudicative function from its investigative and prosecutorial functions in this proceeding.

² The other parties in the joint notice were: Rudy Mussi, Toni Mussi, and Lory C. Mussi, Investment LP; Yong Pak and Sun Young; and Gallo Vineyards, Inc. Gallo Vineyards, Inc. settled with the prosecution team before the hearing. (Order WR 2010-0026-EXEC.) The proceedings for the remaining parties moved forward jointly. However, because the Dunkels' defense revealed distinct factual and legal issues that allow it to be decided on narrow grounds, the State Water Board is issuing a separate order in this case.

At the hearing, the Dunkels, the State Water Board's Prosecution Team³, and joint participants Modesto Irrigation District, State Water Contractors and San Luis & Delta-Mendota Water Authority (collectively, MSS) appeared and presented cases-in-chief. Central Delta Water Agency, South Delta Water Agency, San Joaquin County and the San Joaquin County Flood Control & Water Conservation District appeared only to participate by cross-examination or rebuttal and to present non-evidentiary policy statements. The San Joaquin Farm Bureau and California Department of Water Resources appeared to present non-evidentiary policy statements only.

Hearing officers Art Baggett⁴ and Charles Hoppin presided over the hearing. The State Water Board was assisted by a staff Hearing Team.⁵

3.0 LEGAL BACKGROUND

3.1 Cease and Desist Authority for Water Right Violations

The State Water Board may issue a CDO in response to a violation or threatened violation of: (1) the prohibition against the unauthorized diversion or use of water; (2) a term or condition of a water right permit, license, certification, or registration; or (3) a State Water Board order or decision issued pursuant to specified provisions of the Water Code. (Wat. Code, § 1831, subds. (a) & (d)(1-3).) The State Water Board may require compliance immediately or the State Water Board may set a time schedule for compliance. (§ 1831, subd. (b).)

Before issuing a CDO, the Board must provide notice and an opportunity for hearing to the person allegedly engaged in the violation. (Wat. Code, §§ 1831, subd. (c), 1834, subd. (a).) The notice must contain "a statement of facts and information that would tend to show" the alleged violation. (§ 1834, subd. (a).)

Water Code section 1845, subdivision (b), provides that any person who does not comply with a CDO may be liable for an amount not to exceed one thousand dollars for each day in which the violation occurred. In addition to imposing administrative civil liability pursuant to this provision, the State Water Board may request the Attorney General to petition the superior court for injunctive relief. (§ 1845, subd. (a).)

3.2 Riparian Water Rights

California law recognizes two principal types of surface water rights: riparian rights and appropriative rights. Generally, riparian rights authorize the diversion and use of water from a stream on land that is contiguous to the stream and located within the watershed of the stream. (*Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 774-775.) Riparian rights are limited to the natural flow of the stream, and do not authorize the diversion of "foreign water" that would not be present in the stream under natural conditions. (*Bloss v. Rahilly* (1940) 16 Cal.2d 70, 75-76.) In addition, water may not be seasonally stored under a riparian right. (*City of Lodi v. East Bay Mun. Utility Dist.* (1937) 7 Cal.2d 316, 335.) A riparian right attaches only to

³ The Prosecution Team included Water Resource Control Engineer, Brian Coats; Senior Water Resource Control Engineer, Mark Stretars; and Staff Counsel, David Rose.

⁴ Art Baggett is no longer a member of the State Water Board.

⁵ The Hearing Team included Water Resource Control Engineer, Ernest Mona; Senior Water Resource Control Engineer, Charles Lindsay; Environmental Scientist, Jane Farwell; and Senior Staff Counsel, Dana Heinrich. Senior Environmental Scientist Michael Buckman and Attorney Marianna Aue joined the Hearing Team after the close of the hearings, but before consideration of this Order.

the smallest parcel held under one title in the chain of title leading to the present owner. (*Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at pp. 774-775.) When a riparian parcel is subdivided, such that a parcel is no longer contiguous to the stream, the riparian right formerly attached to the noncontiguous parcel is lost, absent proof of intent to retain the riparian right. (*Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 331; *Hudson v. Dailey* (1909) 156 Cal. 617, 624-25.) Once it has been lost, the riparian right cannot be regained by reuniting the noncontiguous and contiguous parcels under common ownership. (*Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. at p. 33.)

Relative to other riparian rights, riparian rights are correlative. When the natural flow of a stream is insufficient to satisfy all the riparian rights to use the waters of the stream, the riparian right holders must reduce their diversions proportionately. (*Prather v. Hoberg* (1994) 24 Cal.2d 549, 560.) Relative to an appropriative right, a riparian right has a priority date based on when the riparian parcel was patented. (*Pleasant Valley Canal Co. v. Borrer*, *supra*, 61 Cal.App.4th at p. 774.)

3.3 Appropriative Water Rights

Appropriative rights are acquired by diverting water from a stream and applying it to beneficial use. Appropriative rights are not dependent on land ownership, and may authorize the use of water outside the watershed. (*Crandell v. Woods* (1857) 8 Cal. 136, 142; *Miller v. Bay Cities Water Co.* (1910) 157 Cal. 256, 280-281.) Unlike riparian rights, appropriative rights are not necessarily limited to the natural flow of the stream, and water may be seasonally stored under an appropriative right. (*Bloss v. Rahilly*, *supra*, 16 Cal.2d at pp. 75-76; *City of Lodi v. East Bay Mun. Utility Dist.*, *supra*, 7 Cal.2d at p. 335.) The point of diversion, place of use, or purpose of use of an appropriative right may be changed, provided that the change does not amount to the initiation of a new water right, or result in injury to any other legal user of water. (Wat. Code, §§ 1701, 1702, 1706; *Senior v. Anderson* (1896) 115 Cal. 496, 501-504.) The maxim “first in time, first in right,” governs the relative priority of appropriative rights. (*City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 926.)

Before December 19, 1914, the effective date of the Water Commission Act, an appropriative right could be obtained by diverting water and applying it to beneficial use. (See *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 311-312.) Since that date, obtaining a water right permit from the State Water Board (or its predecessor agency) pursuant to division 2 (commencing with section 1000) of the Water Code has been the exclusive means to acquire an appropriative water right. (Wat. Code, § 1225; *People v. Shirokow* (1980) 26 Cal.3d 301, 308-309.) Both pre-1914 and post-1914 appropriative rights are perfected by applying water to reasonable, beneficial use. The measure of the right is the amount of water actually applied to reasonable, beneficial use, not the amount of water listed in a notice of appropriation, the capacity of an appropriator’s diversion works, the amount of water actually diverted, or the amount of water authorized to be diverted in a water right permit. (*Haight v. Costanich* (1920) 184 Cal. 426, 431; *Trimble v. Heller* (1913) 23 Cal.App. 436, 443-444; *Akin v. Spencer* (1937) 21 Cal.App.2d 325, 328; Wat. Code, §§ 1240, 1390, 1610.)

4.0 DISCUSSION

4.1 The State Water Board Has the Authority to Hear and Decide This Case

The Dunkels, San Joaquin County, San Joaquin County Flood Control & Water Conservation District, Central Delta Water Agency and South Delta Water Agency all argue that the State Water Board lacked the authority to hear the present case or to issue a CDO against the

Dunkels because of limits to the State Water Board's authority to regulate riparian and pre-1914 appropriative water right holders. This legal argument is addressed in State Water Board [Order WR 2011-0005](#), at pp. 9-18, State Water Board [Order WR 2012-0001](#), at pp. 2-6, and State Water Board [Order WR 2012-0012](#), at pp. 4-5.^{6 7} The parties do not raise any legal arguments not considered in the previous orders, or provide any other convincing reason why the State Water Board should disapprove or distinguish those orders. The State Water Board has authority to consider issuance of a CDO in response to the unauthorized diversion or use of water. The mere assertion of a claim of riparian or pre-1914 right does not deprive the State Water Board of the authority to determine whether a CDO should be issued, including the authority to determine whether the allegedly unauthorized diversion or use is in fact authorized under a valid riparian or pre-1914 right.

4.2 Riparian Rights Retained for the Dunkels' Property

As described under Section 2.2, crops farmed on the Dunkels' property are irrigated with Middle River water, diverted by Woods through its East Main Canal. While at one time the Dunkels' property was part of a larger parcel that abutted Middle River, it is no longer contiguous to Middle River. As described below, however, the evidence indicates that the property retained riparian rights even after severance, and there is no indication that the Dunkels are using water contrary to this right.

Uncontested evidence in the record indicates that prior to the subdivision and conveyance of lands on November 29, 1911, what is now the Dunkels' property was part of larger tracts of land that abutted Middle River and that the property lost its physical connection to Middle River as the result of a November 29, 1911 conveyance. (Dunkel-3G; Dunkel-3A to 3F; Dunkel-WIC-7A; MSS-7E; MSS-8A to 8E.) The conveyance itself did not directly address the transfer or relinquishment of riparian rights to the property but the conveyance instrument was "made subject to that certain agreement for canals, etc., dated September 29, 1911" described below. (Dunkel-3G.)

On September 29, 1911 prior to physical severance of the property from Middle River, Woods entered into contract with the owners of the tract of land encompassing the Dunkels' property. (Dunkel-2B.) The agreement provided for construction and maintenance of canals and other conveyance facilities, delivery of water, and provision of drainage services, all for irrigation of an area of land that included the Dunkels' property. (*Ibid.*) The contract specified that, "in the case of subdivision of a tract and the sale of a part thereof, *the grantor shall provide means for the supplying of irrigating waters and the drainage of the tract so subdivided.*" (*Id.*, at p. 5 [emphasis added].) Because it specified the irrigation of specific lands and extended to lands after subdivision, the agreement was intended as a lien upon all the lands after subdivision. (Dunkel-2B.)

Thus, the November 29, 1911 deed of conveyance was specifically conditioned upon the agreements with Woods to build canals and furnish water, including the provision that the grantor ensure access to the Middle River water Woods delivered. (Dunkel-3G; Dunkel-2B.)

⁶ State Water Board orders may be found on the State Water Board's website at:

http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/index.shtml.

⁷ Challenges to the decisions regarding the State Water Board's authority in State Water Board Orders WR 2011-0005 and 2012-0001 are currently pending in *Young v. State Water Resources Control Board* (CO68559) and *Millview County Water District v. State Water Resources Control Board* (Mendocino County Superior Court, Case No. SCIK-CVPT-12-59715), respectively.

As noted under Section 3.2 above, when a riparian parcel is subdivided, such that a parcel is no longer contiguous to the stream, the riparian right formerly attached to the noncontiguous parcel is lost, absent proof of intent to retain the riparian right. (*Hudson v. Dailey* (1909) 156 Cal. 617, 624-25.) In describing why the court could not determine whether the particular parcel at issue in the proceeding retained its riparian rights after subdivision and loss of contiguity to the stream, the California Supreme Court explained:

If the tract conveyed [without specific provision for retention of riparian rights] 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 the 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 a part of [a larger parcel] 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. 624-25.) This passage provides examples of evidence that can be used to prove the intent to retain a riparian right.

Regarding the issue of intent, the Dunkel matter is analogous to the situation described in State Water Board [Order WR 2004-0004](#), hereinafter “Phelps Order.”⁸ In the Phelps Order, a September 29, 1911 water supply agreement between Woods and the owners of a larger tract of land was specifically referenced in a later deed that separated a property from contiguity with Middle River. (*Id.*, at p. 27.) The deed and agreement evidenced the intention of the parties to the conveyance to maintain a riparian right to Middle River water. (*Ibid.*) Similarly here, the existence of the September 1911 water delivery contract requiring water deliveries to subdivided lands, and the specific mention thereof in the deed of conveyance evidences an intent to maintain riparian rights on the severed property.

MSS parties argue that the Dunkels’ property did not maintain riparian rights because neither the September 1911 agreement’s terms nor the post-1911 behavior evidences an intent to retain riparian rights.⁹ (MSS parties’ brief, at pp. 6–15.) The MSS parties present several arguments as to why the September 1911 agreement should not be interpreted as retaining riparian rights: (1) the agreement and the conveyance do not mention riparian rights;¹⁰ (2) the contracts contain certain restrictions on water use and deliveries that riparian water rights do not in and of themselves contain; (3) the contract does not convey any rights to water in the Woods canals; and (4) the boundaries of Woods’ service area changed post-agreement. (See MSS parties’ brief, at pp. 6-14.)

The contract provided for water delivery and drainage services, and was crafted to ensure that all subdivided lands would get the same water access as lands prior to subdivision. The fact that the agreement does not reference any particular type of water right does not indicate that it is somehow contrary to retaining existing riparian rights. The intent to continue Middle River water deliveries after subdivision suffices. (See *Hudson v. Dailey, supra*, 156 Cal. at pp. 624-25 [citing capacity and history of water conveyance as evidence of the intent to retain a riparian

⁸ The MSS Parties suggest that the legal arguments and relevant evidence are different in this hearing than they were in the Phelps Order. However, the MSS parties do not point to evidence submitted in this hearing that provides any reason to differ from the Phelps decision. The material facts are analogous.

⁹ The MSS parties’ brief also contains other arguments concerning loss of riparian rights that are unnecessary to the resolution of this issue and are therefore not addressed.

¹⁰ MSS parties also mention certain documents not in the record in this matter.

right after loss of physical connectivity].) The intent case law exists to address situations where riparian rights are not specifically mentioned. (*ibid.*)

The restrictions on water use in the Woods contract that the MSS parties point to as inconsistent with a riparian right do not prevent the contract from being a means to retain a riparian right after severance. No legal rule prevents a riparian right holder from agreeing to water delivery terms more restrictive than those of the right itself. Such an agreement does not necessarily reflect the actual terms of a water right: it only sets out the terms that the owner and the water agency agree to regarding water delivery. (See Phelps Order, at p. 28.) To the extent the predecessor in interest to the Dunkels' property had a right to more or different water than Woods agreed to deliver, Woods is not obligated to deliver that water under the 1911 contract. (See *ibid.*) While MSS parties assert that "no riparian water right holder" would agree to certain terms, the State Water Board finds it could be reasonable to do so. The amounts and circumstances of delivery that a water right holder may be legally entitled to and what a water supply company may be willing to contract for delivery are not necessarily the same thing. The water supplier may not want to take on responsibilities for delivery, and the water right holder may not want to incur the costs to pay for that delivery capability, beyond the limitations agreed to in the contract. Furthermore, it is clear that a riparian water right holder did agree to the exact terms of the September 1911 agreement. (MSS-7; MSS-6A, pp. 4-5; Dunkel-2B.)

Similarly, the fact that the contracts do not "create or convey" water rights "does not preclude the maintenance of an existing water right or its creation by other means." (Phelps Order, at p. 28.) The fact that the boundaries of Woods' service area changed after the September 1911 agreement is also not inconsistent with some of the lands within Woods maintaining riparian rights. Since the September 1911 agreement, some property in Woods has had riparian rights to Middle River, while other property did not. (Dunkel-WIC-7A; see also State Water Board Order 2011-0005, pp. 19-22, 34-37 [discussing how an irrigation company may serve users under both riparian and appropriative rights].) A change in area under which some lands continue to have riparian rights while others do not is not contrary to maintaining riparian water rights to lands that have them.

Moreover, it is the intent of the parties to the conveyance, not the meaning of the contract itself, that is the central question here. The pre-conveyance presence of an irrigation ditch from the water source from which a property was riparian before severance may indicate an intent to retain a riparian right. (*Hudson v. Dailey, supra*, at pp. 624-25.) The ability to deliver water from the source is sufficient, even though a ditch does not specifically reference a water right, it contains certain restrictions (e.g. capacity) on its use that do not in and of themselves limit a riparian right, and it does not in and of itself convey ownership to the water in the ditch. Similarly, a commitment to deliver water to a property from a water source from which the property was riparian before severance may indicate such an intent, regardless of whether the water delivery agreement centers on water right questions. (See Phelps Order, at p. 27.)

4.3 It is Unnecessary to Address Other Water Right Arguments

Because the evidence indicates that the Dunkels' property maintained riparian rights to Middle River after physical separation from the stream, there is no need to address the additional theories presented regarding water diversion and use on the Dunkels' property.

5.0 CONCLUSION

The September 29, 1911 water supply agreements were intended as a lien upon all the lands after subdivision, and the deed severing the Dunkels' parcel from contiguity with Middle River specifically referenced these agreements. These documents provide sufficient intent to find that the Dunkels' property has maintained riparian rights to Middle River. There is no allegation that the Dunkels are exceeding a riparian right on their property.

Therefore, the State Water Board declines to issue a CDO against the Dunkels.

ORDER

THEREFORE, IT IS HEREBY ORDERED THAT, based upon the foregoing findings:

1. A CDO against Mark and Valla Dunkel shall not be issued at this time.
2. Nothing in this order limits the authority of the State Water Board or the Division to impose future penalties for violation of any provisions of the Water Code including, but not limited to, violations of section 1052.

CERTIFICATION


The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Board held on October 16, 2012.

AYE: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Felicia Marcus

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board