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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of: WATER RIGHT HEARING REGARDING ADOPTION OF DRAFT CEASE AND DESIST ORDER AGAINST MARK AND VALLA DUNKEL, DRAFT ORDER WR 2009-OOXX-DWR	**MARK AND VALLA DUNKEL/SOUTH DELTA WATER AGENCY/CENTRAL DELTA WATER AGENCY JOINT CLOSING BRIEF**

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I. INTRODUCTION

The present hearing considers whether to issue Cease and Desist Orders against Mark and Valla Dunkel ("Dunkel"). This and the other concurrent hearings present a significant amount of information regarding the conditions of the Delta during the late 1800's and early 1900's. After nearly 100 years, finding the relevant and necessary information can be difficult.

Rather than examine the information, Intervenors (hereinafter "MSS parties") simply want to harass Delta farmers; the facts do not matter. Even after the evidence showed that Dunkel's property preserved its riparian water right, the MSS parties (and sadly the Prosecution Team ("PT") also) still insisted the proceeding go forward. Rather than address the causes of the decline of the Delta and expose their water rights to current and future obligations to superior rights and to the environment, they choose to try to destroy in-Delta water users. Exports kill fish, alter Delta inflow, radically change flow patterns, and suck channels dry. Upstream interests decrease downstream flow while ignoring obligations for downstream rights and fishery needs on the San Joaquin River and in the Delta. The policies of these parties? To destroy in-Delta interests so they need not acknowledge superior rights or the adverse effects of their own operations. The irony of it all is that if they are successful in putting Delta agriculture out of business, the area would revert to natural conditions and consume more water than is currently used (Mussi Exhibit 9, pages 5-6, 9E, 9G).

Unfortunately, the SWRCB has joined this illogical attack making an examination of Delta water rights one of its priorities while ignoring clear permit and water right violations of the Intervenors. How these decisions are made cannot be discerned, but the preferences and biases of the Board are clear; a shortage of water for exporters must be addressed even if it means taking water away from others. A worse plan for California's future could not be imagined.

A few comments about the Intervenors is appropriate. First, it appears that there can be no harm suffered by Modesto Irrigation District. MID has no downstream obligations for water quality objectives or other required water flow related criteria on the San Joaquin River. MID sometimes makes releases under the San Joaquin River Group Authorities' San Joaquin River Agreement which, in many years, provides water to meet the USBR obligation for Water Quality

Objectives for Fish and Wildlife Beneficial Uses. However, ***as specifically requested by MID*** and other SJRGA parties in the D-1641 hearings, ***the water provided by MID for these purposes is "abandoned" at Vernalis*** (see for example No.1 on page 166 of D-1641).

Once "abandoned," this water is available for many other uses and can be diverted by many other users. In fact, the water is "abandoned" so that DWR and USBR can export it if conditions and permit requirements allow. When export operations cannot take advantage of these "abandoned" flows, the water is counted as "lost exports" allowing for later recoupment. Under this scenario, it is difficult to determine what harm could occur by diversions to the Dunkel property.

As to San Luis Delta-Mendota Water Authority and the State Water Contractors, they allege that diversions by Dunkel limit their water supply and increase the projects burden to meet water quality objectives, which also decreases their water supply. No such injury has been alleged. Regardless of current rights, any diverter in the area should be able to get a supply contract from either DWR or USBR. Negotiations for just such a contract with DWR are ongoing, though DWR has not met with or proposed anything for over a year.

II. PROCEDURAL BACKGROUND

This process began when the SWRCB staff requested Dunkel provide them with evidence of a water right to support diversions onto their 40 acre parcel. The staff had failed to note that the property abutted the main Woods Irrigation Company ("WIC") supply canal. Once these facts were made clear, the staff tentatively agreed that a sufficient showing had been made, but reserved any final judgment until the facts regarding WIC were resolved in its CDO hearing. At the first day of the Dunkel hearing, MSS parties presented a court case[1] that they alleged "proved" WIC had no water rights, and thus Dunkel could not rely on WIC for water. However, since MSS parties' own evidence clearly showed Dunkel had retained a riparian water right, the hearing was re-opened. In that re-opened hearing, it was made clear that Dunkel's land had indeed maintained a

[1] That case is dealt with below. Not only did the case not state what MSS parties alleged, but it did not satisfy the requirements of collateral estoppel or issue preclusion.

riparian water right. Hence, as it turns out, the entire matter has been a colossal waste of time and effort.

III. THE SWRCB HAS NO AUTHORITY TO DETERMINE RIPARIAN OR PRE-1014 WATER RIGHTS OR TO ISSUE A CEASE AND DESIST ORDER AGAINST SUCH RIGHT HOLDERS.

The draft CDO alleges that a CDO may be issued pursuant to Water Code section 1831 due to the unauthorized diversion, collection and use of water in violation of section 1052 of the Water Code. Water Code sections 1831 and 1052 do not grant the Board the authority to issue CDOs against Dunkel for the exercise of riparian or pre-1914 water rights.

The Board's own literature states that the it "does not have the authority to determine the validity of vested rights other than appropriative rights initiated December 19, 1914 or later." Exhibit 1 to County's Request for Official Notice in the WIC hearing at p.7-8; *Natural Res. Def. Council v. Kempthorne* (2009) 621 F. Supp.2d 954, 963. Numerous Board water rights decisions and orders indicate that the Board has no power to adjudicate riparian and pre-1914 water rights and that the Board has no jurisdiction to validate riparian rights or pre-1914 appropriative rights; such a determination is only within the purview of a court of law. D 934 p. 3; D 1282 p. 7; D1290 p. 32; D1324 p. 3; D 1379 p. 8. Determinations regarding riparian and pre-1914 water rights can only be made by a court of law.

While the Board does have some measure of enforcement authority over riparian and pre-1914 water rights, that authority is limited to actions involving waste, unreasonable use or diversion, lack of a beneficial use, or protection of public trust resources (Wat. Code § 275), none of which are alleged in the pending CDO (Exhibit PT-1) and such enforcement authority is not necessarily exercised in the form of a CDO. Similarly the pending CDO is not the result of a petition for a statutory adjudication or a referral form a court.

The Board's authority to issue cease and desist orders is limited to the specific situations authorized and enumerated in Water Code section 1831. Subsection (e) of section 1831 specifically provides that this Article does not authorize the board to regulate in any manner the "diversion or use of water not otherwise subject to regulation of the Board under this part." ***A complete review of every section in Part 2 of Division 2 reveals no authority of the Board to***

regulate claimed riparian or pre-1914 water rights in the manner of a CDO. *People v. Shirokow* (1980) 26 Cal.3d 301, clearly indicates that riparian and pre-1914 water rights are not subject to compliance with the statutory appropriation procedures in Division 2 of the Water Code. Contrary to the CDO, both the Board and *Shirokow* acknowledge that riparian and pre-1914 water right holders cannot be found to have violated any of Division 2's statutory appropriation procedures because those procedures simply do not apply to the exercise of such rights.

The *Racanelli* case indicates that in carrying out its authority, the Board does indeed make some determinations related to riparian and pre-1914 water rights. However, these determinations are limited to particular administrative processes and do not affect riparian and pre-1914 water right holders. The Board plays only a "limited role" in "enforcing rights of water rights holders, a task mainly left to the courts." *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102.

As explained in *Racanelli*, where the Board lacks the authority to determine or affect riparian water rights and prior appropriative rights, including pre-1914 rights, when the Board is called upon to determine the availability of surplus water for purposes of issuing new appropriative rights; and when, in a statutory adjudication, the Board's determinations ***are merely recommendations*** that must be approved by a court, then it is evident that the Board cannot make such water rights determinations generally, such as in the present matter. The Board's attempt to do so in the pending CDO, which are not court adjudication proceedings, is outside the scope of the Board's authority, and as such, contrary to law.

IV. THE DUNKEL PROPERTY HAS RETAINED A RIPARIAN RIGHT.

This case closely mirrors that of Mr. Silva, one of the Term 91 parties who were the subject of a hearing culminating in WRO 2004-0004. In that hearing, four landowners whose licenses included Term 91 were alleged to have diverted water during times when Term 91 precluded such diversions without having any alternative source or right to water. Silva (whose property is very near Dunkels') showed that his land was part of a larger parcel which was connected to Middle River at the time a 1911 Agreement to furnish water was executed and recorded. That 1911 Agreement was between WIC and Jesse L. Wilhoit and Mary L. Douglass (herein after "Wilhoit

Douglass"), the successors in interest to J.N. Woods. The Wilhoit Douglass lands included what was to eventually be parceled off as the Silva parcel. [A similar agreement was executed at the same time between WIC and E.W.S. Woods, J.N. Woods' brother regarding E.W.S's "half" of the Woods lands.].

Because the Silva's land was riparian at the time of the 1911 Agreement, the SWRCB concluded that the 1911 Agreement was sufficient to show intent of the parties to preserver the riparian rights to the Silva land. That is to say, when a riparian parcel retains the ability to receive water via an agreement, that indicates that the owners intend to preserve the right to deliver water to all portions of the lands, and thus intended to preserve the riparian right. The SWRCB stated:

> A single landowner at one time owned the lands served by the Woods Irrigation District (sic) and during that time, the lands were connected to the Middle River. Although these lands were severed from the main channels by conveyances, they continued to have access to the Middle River through the Woods Irrigation District (sic) facilities, as evidenced by the agreements dated September 29, 1911. (Cite omitted) Both agreements predate the transfer that separated the Silva property from the Middle River, and demonstrate that there was an intention at the time of the severance to maintain a connection to the Middle River for irrigation. The deed, since it is conditioned upon the agreements to construct canals and to furnish water, is evidence of preservation of the riparian right. Additionally, the agreement shows that Woods Irrigation District (sic) had agreed before 1914 to serve water to the Silva property lands, raising the possibility that Woods Irrigation District (sic) may have been appropriating water under its own claim of right to deliver to others ...
>
> SJRGA argues that the agreements do not evidence a riparian right because the agreement to furnish water provides that "this contract is not intended to and does not create or convey any lien, estate, easement or servitude, legal or equitable, in any manner upon or in the canal or ditch of [Woods Irrigation Company], or in or to any water flowing therein or which may hereafter flow therein..." This language does not, however, preclude the preservation of a riparian right. In fact, it is silent as to the basis or ownership of any water right to the water. While it expressly does not "create or convey" (emphasis added) any right in the canal or in the water flowing in it, this language simply means that the agreement itself did not create a water right. Since water rights arise under the laws of California, the agreement could not have created a water right in any event, but that does not preclude the maintenance of an existing water right or its creation by other means. SJRGA also argues that since the agreement limits the water to be supplied to 32.86 cubic feet per second, this is inconsistent with a riparian right. This limit, however, is not expressed as a limit on any water right, but rather as a limit on the amount of water that would be delivered from the river. With the exception of the physical limits on the canal, there is nothing in the agreement that would prevent the use of more water. (Footnote omitted.) (State Water Resources Control Board Order WRO 2004-0004, pages 27 - 28.)

A. The Intent To Preserve a Riparian Right is Evidenced by the Dunkel Property Being Benefitted by a Contract To Furnish Water Which Predates any Severance From the Neighboring Channels.

As stated above, the Silva case mirrors the Dunkel situation. Both had a similar chain of title (State of California to Whitney; Whitney to Fisher; Fisher to Stewart et. al.; Stewart et. al. to the Woods Bros.; Woods Bros. to Wilhoit Douglass; see Dunkel Exhibit 3, pages 2-4). As of 1911, the Dunkel property was part of a larger parcel that was connected to Middle River. (Dunkel Exhibit 3, pages 1-9; Dunkel Exhibit 9 and 9I; MSS Exhibit 5). As per the last cited exhibit, the MSS parties agree with these facts. When reviewing the chain of title to the Woods Bros' lands in the WIC hearing to determine if any had retained a riparian status, the MSS parties' witness presented testimony which stated "[T]he only parcel which remained riparian through 1911 was the parcel on Middle River located at the extreme southern end of the WIC service area, marked A 74:289 (on the Exhibit attached thereto as 7A). See MSS WIC Exhibit MSS R-14. We see from comparing Dunkel Exhibit 1A and the MSS WIC Exhibit 7A that the parcel identified by the MSS parties as riparian contains the Dunkel property. There is no disagreement about this.

The previously mentioned 1911 Agreement between WIC and Wilhoit Douglass is Dunkel Exhibit 2B (but contained in numerous other exhibits in these hearings) and referenced in MSS Exhibit 1B. That Agreement committed WIC to furnish water to the lands owned by Wilhoit Douglass. Of note is the date of the Agreement; September 28, 1911. ***The day after*** that Agreement was executed and recorded, Wilhoit Douglass transferred a large parcel (containing the Dunkel property) to Wilhoit, Eaton and Buckley on September 30, 1911 (Dunkel Exhibit 3 and 3F). This parcel not only contained the Dunkel property, but was still contiguous with Middle River. ***It was not until November 29, 1911*** that Wilhoit, Eaton and Buckley transferred a portion of the larger parcel (including the Dunkel parcel) to Walters and Walters (Dunkel Exhibit 3 and 3G). It was only this last transfer that separated the Dunkel parcel from a surface connection to Middle River (MSS parties agree; see Mss Exhibit 5, page 2). It is obvious from the timing of these transactions, that the parties made sure that an agreement and system to provide water was first in place before they broke up the larger tracts of land for sale/subdivision. Such a timeline shows clear intent to preserve the riparian water right.

Just as in the Silva Term 91 case, it is clear that the parties intended to "maintain a connection to the Middle River for irrigation" and thus preserve the riparian character of the lands. Since there are no facts which contradict this intent, and since the facts are virtually the same as the Silva case, the SWRCB must conclude that the Dunkel property has maintained a riparian water right. Regardless of the Board's findings and decision on the WIC case, the Dunkel property has proven its riparian status.

B. The Dunkel Property Maintained a Riparian Right by Being Adjacent to an Interior Island Slough .

In addition to the 1911 Agreement providing evidence of intent to preserve a riparian right, the evidence also showed that the Dunkel parcel was actually abutting an interior island slough that came off Middle river. The testimony of Landon Blake (Dunkel Exhibit 3, pages 5-9) identifies an original interior island slough as of 1875 which corresponds to the location of the current WIC main diversion point and main canals. (Dunkel Exhibit 3, paragraph 14 (P15).[2] Mr. Blake next references the 1898 installation of a permanent "headgate" as part of the Woods Bros. efforts to irrigate their lands. (Dunkel Exhibit 3, (P16)). Again, this headgate corresponds to the current location of the WIC diversion point and main canals. Matching these references to the historic sloughs identified by Mr. Lajoie (see for example RT. Vol. I pages 134-136) and Mr. Moore, allows one to concluded that the historic sloughs were indeed used by the Woods Bros. when they irrigated and drained their properties on Middle Roberts Island (Dunkel Exhibit 3, (P16-17)). In addition, Mr. Nomellini showed that the MSS witness Jack Meyer had also identified soil types which corresponded to old sloughs. His evidence places just such soils/slough in this very same location (Dunkel Exhibit 9, page 7).

[2] Mr. Blake numbered his paragraphs as "(P1)-(P28)." For easy reference, citations to his testimony henceforth will be to those paragraph numbers.

Further, Mr. Blake identifies a map[3] dated by him which shows an extensive system of irrigation and drainage canals on the Woods Bros. lands as of 1907-1908 (Dunkel Exhibit 3, (P18)), again corresponding to the historic sloughs previously identified and the earlier reference to the installation of a headgate for irrigation purposes. Mr Blake also references a 1914 map (drawn by Henderson and Billwiller, civil and hydraulic engineers) which also shows this extensive system of canals and ditches (this map was entered into evidence in the WIC hearing as WIC Exhibit 6K). A blow up of a portion of the map reveals that a portion of one of the interior island sloughs was still in existence as of 1914. This slough was being used as a part of the WIC irrigation system and it abutted the Dunkel property. (Dunkel Exhibit 3, (P19-23)). Mr. Nomellini idnetified and provided pictures of the still existing flood gate at the WIC main diversion point which corresponds to the connection of the old slough and Middle River, even dating the structure (brick) to same time that the "headgate was installed (Dunkel Exhibit 9, page 6, DJN 13).

Whether this slough had ever been leveed off from the River, it had been reconnected to that source as part of an irrigation system as early as 1898. This means that while the Dunkel property was part of a larger piece which was riparian to Middle River, the landowners connected it via an irrigation system well before the parcel was separated from a direct surface connection to the River. Creating an irrigation system with the canals/sloughs abutting the smaller parcel is clear intent to preserve the riparian right.

It is more likely that the slough was never disconnected from Middle River per the testimony of Dante Nomellini (Dunkel Exhibit 9, pages 3-4; RT. Vol. V, pages 1002-1003). This position is confirmed by Mr. Blake's reference to another source which states that prior to the "permanent headgate" being installed, the Woods Bros. lands were being irrigated with siphons (Dunkel Exhibit 3, (P16). Since the WIC irrigation system corresponds to the old sloughs and earlier irrigation was done through siphons, the logical conclusion is that the slough running by the Dunkel property was never separated from Middle River. Further, as admitted by the PT witness, a

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[3] Although the MSS parties witness speculates that this map should be dated later than was done by Mr. Blake, his dating of the instrument is clear and uncontroverted; see RT. Vol. V, pages 993-994)

body of water, like a slough, could itself confer riparian status on lands regardless of any direct surface connection to the main channels (WIC RT. Vol. I, pages 42-46). Mr. Nomellini echoed this conclusion (RT. Vol. I page 133).

Strangely, the PT's final brief claims that "there is no support for any conclusion that the Dunkel parcel has any legal right to water based on the bare claims that there was once a slough (bordering the property)." This statement blatantly ignores the large amounts of evidence in the record; not only that referenced above, but the similar and substantial evidence presented in the other concurrent hearings. Repeated references from various accounts, maps, soils, existing flood gates from the 1800's (where the old slough meets Middle River even today) and legal descriptions (RT Vol. V, page 987) all point to and confirm the old slough that abutted the Dunkel property; which slough became one of the main irrigation canals for WIC. To describe this as a "serious paucity of credible evidence" as the PT does borders on irrational, especially since the PT did not even try to rebut this evidence..

The draft CDO questions the right or rights under which Dunkels irrigated their land. Regardless of whether or not WIC might be providing Dunkel with water under a right held by WIC, Dunkel has now shown that their land is riparian to Middle River. Hence, there is no basis for any CDO to issue. Yet, surprisingly the PT still seeks a CDO to limit the Dunkel's riparian diversions to "... the natural flow of Middle River ..." This proceeding dealt with the existence of water rights, it did not deal with any current or future supply shortages for water right holders which might entail an examination of "natural flow." The PT now seeks to go beyond the limits of the hearing to make it one which addresses these future, potential conflicts between water right holders. If and when some water right holder believes a riparian diverter in the Delta is not entitled to divert from a channel, that issue will be addressed in the courts where the proper jurisdiction rests. It is inappropriate for the PT to try and assist the MSS parties in their future plans to destroy the Delta. It is relevant to note that the only testimony in the hearing which touched upon this is issue of supply is set forth in RT. Vol. V, pages 1043-1044. No matter what the flow in the tributaries to the Delta, the channels always have water in them to support riparian and pre-1914 rights.

C. A Riparian Landowner May Change His Point Of Diversion From A Slough To An Interconnected River, And Vice Versa.

It is well accepted that an individual exercising a water right may change his point of diversion to any point along a watercourse, so long as this change in the point of diversion does not cause injury to the rights of other water users (*Kidd v. Laird* (1860) 15 Cal. 161, 179, 181).

Sloughs that are interconnected with a watercourse, such as a river, and that are supplied with water from the watercourse, are considered part of that watercourse and lands contiguous to the slough have riparian rights in the waters of both the slough and the river to which the slough is connected during such times as the water of the river is present in the slough *(Turner v. The James Canal Company et al.* (1909) 155 Cal. 82, 82; see also *Miller & Lux v. Enterprise Canal & Land Co.* (1915) 169 Cal. 415, 420-421; Hutchins, The California Law of Water Rights (1956) p. 217-218).

Therefore, a landowner whose land is riparian to a slough may lawfully divert water from the main body of a river that is interconnected with, and supplies water to that slough, so long as water from the river would be naturally present in that slough. Likewise, a landowner whose land is riparian to a river may change his point of diversion to a point on an interconnected slough, so long as he causes no injury to others diverting from the slough.

The Delta is an estuarine, not tributary watershed. Tributary watersheds have definite directional flow, and can have rivers and tributaries that may seasonally, or in periods of drought, have diminished flow or completely run dry. Changing a point of diversion from one tributary, branch, or stream of a tributary watershed to a separate tributary, branch, or stream is generally impermissible under California case law, because to do so would constitute a change in the actual source of water diverted.

By contrast, the Delta's system of rivers, channels, and sloughs are all interconnected, and the tidal pressure from the ocean keeps the various inter-delta rivers, channels, and sloughs full of water, the level of which is more or less influenced solely by the high and low tides. As a result the Delta is more like a lake or common "pool" as opposed to a network of separate bodies of water.

Therefore, Delta landowners whose lands may have been riparian to a particular river or slough at the time of the issuance of a patent for Swamp and Overflowed Land were entitled to use the water of any interconnected Delta channel, slough, or river, and could lawfully change their point of diversion to any of the above without losing their riparian status and without having changed the source of water diverted under the changed point of diversion.

In this case, the Dunkel property was originally irrigated with either Middle River water, slough water containing Middle River and seepage, or slough water which was seepage.

D. A Landowner May Possess, And Simultaneously Exercise Both Riparian And Appropriative Rights On The Same Parcel Of Land.

"It is established in California that a person may be possessed of rights as to the use of the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator." (*Pleasant Valley Canal Co. v. Borror (1998) 61 Cal.App.4th 742, citing Rindge v. Crags Land Co.* (1922) 56 Cal. App. 247, 252).

"We know of no reason why a party may not acquire by appropriation a right to the use of the water of a stream to which his lands are riparian." (*Porters Bar Dredging, Co. v. Beaudry* (1911) 15 Cal. App. 751).

The State Board has also acknowledged that a riparian right and an appropriative right could exist simultaneously for the benefit of a parcel of property (State Water Rights Board Decision D 1282, p. 6, 10).

The establishment of an appropriative right on otherwise riparian land can occur either prior to the issuance of a patent, or after the issuance of the patent and vesting of the riparian right (*Rindge v. Crags Land Co.* (1922) 56 Cal. App. 247, 252; State Water Rights Board Decision D 1282).

In these proceedings, the MSS parties often tried to assert that there could be no such overlap of water rights and that a party was obligated to separate and clarify the water rights being used at any time. That is of course incorrect. It would only be a proceeding between competing users that the use of any particular right would need to be determined as the source of a diversion.

E. Certificates Of Purchase Cannot Be Relied Upon To Demonstrate Severance Of Riparian Rights.

The MSS parties through their witnesses Mr. Wee continually asserted that certificates of purchases were relevant in determining riparian rights. As provided below, that is a gross misstatement of the law.

Certificates of Purchase, alone, did not designate a legal parcel. California's statute relating to the sale of public lands and the issuance of patents states quite clearly:

> . . .[p]atents may be issued to the original holder of the certificate of purchase, or his legal representatives, heirs, or assigns, as the case may be, and *such patent may be for any amount of land* the party applying may be the owner of, *whether it be for a greater, or less, amount than the original certificate of purchase calls for.* (Emphasis added). (Cal Stats. of 1861, Ch 251, Section 1 (Approved April 29, 1861)).

Riparian rights do not attach to property, nor vest in a landowner, until the land at issue passes into private ownership through issuance of a patent from the State or Federal government, and any diversion of water occurring on public land prior to issuance of a patent was appropriative in nature, regardless of whether the land abutted a watercourse: "As to land held by the government, it is not considered that a riparian right has attached until that land has been transmitted to private ownership. . ." (*Rindge v. Crags Land Company* (1922) 56 Cal. App. 247, 252).

During possession of the land, but before the claimant obtained fee title by means of a patent, claimant could, of course, divert water for domestic, agricultural or other purposes. Under California case law, this diversion constituted an *appropriative right*, not a riparian right (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal. App. 4th 742, 774; *Rindge v. Crags Land Co.* (1922) 56 Cal. App. 247, 252).

The only relevance certificates of purchase have with respect to riparian rights is in determining the date of a riparian claimant's lawful entry and possession of land for the purposes of establishing its priority, or lack thereof, over a competing appropriative right.

In *Lux v. Haggin* (1886) 69 Cal. 255, 430) , the court stated that the Certificates of Purchase should have been deemed admissible in a "limited sense" as evidence to show when equitable title to public land was obtained, and that should a patent have been issued for those Certificates of Purchase, the patent would operate by *relation back* to the date of those Certificates of Purchase for

the purpose of proving a date of lawful entry and possession of the land (*Lux v. Haggin.*) Establishing the date of priority relative to riparian and appropriative rights was necessary due to the fact that prior appropriative rights were acknowledged and protected under an Act of Congress approved July 26, 1866 *(39 Cong. Ch. 263, July 26, 1866, 14 Stat. 253, §9*) and landowners obtaining title to land by issuance of a patent would obtain a riparian right *subject* to any pre-existing appropriative rights.

V. DUNKEL PROVIDED SUFFICIENT EVIDENCE TO SUPPORT PRE-1914 RIGHTS.

A. Proof Of A Pre-1914 Right Requires Only That Water Be Put To Use, And Such Right Can Develop Over Time.

1. Elements Necessary To Establish A Pre-1914 Water Right

Appropriate rights prior to the 1914 enactment of the Water Commission Act are commonly referred to as "pre-1914 rights." *People v. Murison* (2002) 101 Cal.App.4th 349, 359, f.n. 6. Such pre-1914 rights were available by simply diverting water and putting it to a beneficial use *(Id* at page 361). With regard to the quantity of water secured by a pre-1914 water right holder,

> "An appropriator, as against subsequent appropriators, is entitled to the continued flow to the head of his ditch of the amount of water that he, in the past, whenever that quantity was present, has diverted for beneficial purposes, plus a reasonable conveyance lost, subject to a limitation that the amount be not more than is reasonably necessary, under reasonable methods of diversion, to supply the area of land theretofore served by his ditch." *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 546-547.

It is further understood that the maximum quantity of water secured by an appropriative right is measured by the maximum amount of water devoted to a beneficial use at some time within the period by which a right would otherwise be barred for non-use. *Erickson v. Queen Valley Ranch* (1971) 22 Cal.App.3rd 578, 584.

Prior to 1914, an appropriate right for the diversion and use of water could be obtained two ways. First, one could acquire a non-statutory (common law) appropriative right by simply diverting water and putting it to beneficial use. *Haight v. Costanich* (1920) 194 P.26, 184 Cal.426. Second, after 1872, a statutory appropriative right could be acquired by complying with Civil Code Section 1410 et seq. (*Id.*) Under the Civil Code, a person wishing to appropriate water was

required to post a written notice at the point of intended diversion and record a copy of the notice with the county recorder's office which stated the following: The amount of water appropriated, the purchase for which the appropriated water would be used, the place of use, and the means by which the water could be diverted (Cal. Civil Code Sections 1410 through 1422, now partially repealed and partially reenacted in the Water Code; *Wells A. Hutchins, the California Law of Water Rights* (1956) at 89).

Generally, the measure of an appropriative right is the amount of water that is put to reasonable beneficial use, plus an allowance for reasonable conveyance lost. *Felsemthal v. Warring* (1919) 40 Cal.App.119, 133.

B. Once A Prima Facie Case For A Pre-1914 Right Is Shown, The Burden Shifts To Other Parties Alleging Loss Or Abandonment.

In establishing the nature and extent of a pre-1914 right, the board must apply the "preponderance of the evidence" standard. This standard requires a showing that respondent's version of the facts is "more likely than not" or, stated another way, "that the existence of a particular fact is more probable than its non-existence." *Beck Development Company, Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160-1205.

Once the claimant of a pre-1914 water right puts on prima facie evidence of the existence of a pre-1914 right, the burden shifts to the petitioner, or Board (or MSS parties) in this case, to show that the pre-1914 right was lost or abandoned. (See e.g., *(Lema v. Ferrari* (1938) 27 Cal. App.2d 65, 72-73; *Erickson v. Queen Valley Ranch Company* (1971) 22 Cal.App.3d 578, 582.)

C. SWRCB Requires Evidence Of A Pre-1914 Water Right Be Interpreted In The Light Most Favorable To Dunkel.

Dunkel is faced with the task of presenting evidence to substantiate a pre-1914 water right which was perfected nearly 100 years ago. The Board has previously and properly recognized the difficulty associated with locating and presenting such evidence and has determined that ***evidence introduced in support of a pre-1914 water right must be considered in the light most favorable to the claimant.*** Specifically, in Order No. WR95-10 California-American Water Company, ("Cal-Am"), the Board provided as follows:

> For purposes of this order in evaluating Cal-Am's claims, the evidence in the hearing record is considered in the light most favorable to Cal-Am due to the difficulty, at this date, of obtaining evidence that specific pre-1914 appropriative claims of right were actually perfected and have been preserved by continuous use. Order No. WR95-10, page 17.

An additional 15 years have passed since the Cal-Am Order making Dunkel's challenge in locating and producing evidence to substantiate its pre-1914 Water Right that much more difficult. The evidence addressed in the Dunkel hearing must be viewed in the light most favorable to Dunkel.

D. The Doctrine of Progressive Use And Development Allows Dunkel's Pre-1914 Water Right To Increase Over Time.

The quantity of water to which an appropriator is entitled is not necessarily limited to the amount actually used at the time of the original diversion. Under the doctrine of progressive use and development, pre-1914 appropriations may be enlarged beyond the original appropriation (*Haight* at 194; *Hutchins* at 118). Under the progressive use and development doctrine, the quantity of water to which an appropriator is entitled is a fact specific inquiry. According to the ruling in *Haight*, the right to take an additional amount of water reasonably necessary to meet increasing needs is not unrestricted. The additional water or use must have been within the scope of the original intent, and additional water must be taken and put to a beneficial use in keeping with the original intent, and within a reasonable time by the use of reasonable diligence. *Haight* at page 194. As such, the progressive use and development doctrine allows an appropriator to increase the amount of water diverted under pre-1914 right, provided: a) the increased diversion is in accordance with a plan of development; and b) the plan is carried out within a reasonable time by the use of reasonable diligence. See Cal-Am at page 15, *Senior v. Anderson* (1896) 115 Cal.496, 503-504; 47 P.454; *Trimble v. Heller* (1913) 23 Cal.App.436, 443-444, 138 P.376; see Cal-Am at page 16.

The evidence (as set forth below) clearly shows that WIC and its predecessors diverted and put water to use, thus establishing a pre-1914 water right.

E. Dunkel Presented Substantial Evidence That Water Was Put To Use Prior To 1914 Thus Establishing a Pre-1914 Water Right.

Given the clear preservation of riparian rights, Dunkel did not stress any pre-1914 rights, though claimed such. However, the record indicates that such rights were created. In the declaration of Dante Nomellini, attached to his testimony (Dunkel Exhibit 9, 9I) he describes how the Dunkel property abutted one of the main irrigation canals of WIC. That canal was/is part of the larger system used first by the Woods Bros. for irrigation, then later by WIC. Mr. Nomellini is able to date that system as far back as 1907-1908 (Dunkel Exhibit 9, page 4-5) per a map which was also described and dated by Mr. Blake (see Dunkel Exhibit 3 (p18)).

In rebuttal testimony, Mr. Nomellini and Rudy Mussi stated that the WIC system, including the canal/old slough abutting the Dunkel property can and was originally gravity fed (RT Vol. I pages 138-140). This means that not only was the Dunkel property adjacent to an irrigation canal as of 1908 (at the latest) but that it could have been supplied with water through gravity alone. In the WIC hearing, there was extensive evidence presented regarding the practices, facilities, and crops grown prior to and immediately after 1911. From all this, the only reasonable conclusion is that the owners of the Dunkel property took advantage of the availability of water and did irrigate their lands; thus establishing a pre-1914 right. Any needed specificity regarding the amount could be determined through the process covered in the WIC hearing; that being a calculation estimating use per acre of either 1 cfs per 80 acres, or 1 cfs per 100 acres.

F. MSS' Argument That The Case Of Woods Irrigation Company v. The Department Of Employment Estopps Dunkel From Receiving Water Under The WIC Right Is Legally And Factually Incorrect.

The MSS parties claim that a court case had determined WIC had no water rights. This turns out to be a false assertion on their part. The MSS parties referenced the California Supreme Court Case of *Woods Irrigation Company v. Department of Employment* (1958) 50 Cal.2d. 174 , and provide a portion of the Reporter's Transcript from the Appellate Court (MSS-5). Although the Supreme Court's recitation of the facts mentions that WIC has no water rights of its own, that fact was not at issue in the case. MSS parties try to argue that this case bars WIC from asserting its pre-1914 water right. That argument falls apart on review.

1. WIC's Pre-1914 Rights Are Not Precluded By Collateral Estoppel Because The Required Elements For Collateral Estoppel Are Not Present.

The elements required to apply the doctrine of collateral estoppel/issue preclusion are well settled. As set forth in the California supreme court in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, and its progeny, the doctrine applies only if several threshold requirements are fulfilled. First, the issue sought to be precluded from re-litigation must be *identical* to that decided in the former proceeding. Second, this issue *must have been actually litigated* in the former proceeding. Third, the issue must have been *necessarily* decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. The party asserting collateral estoppel bears the burden of establishing these requirements. *Id. at 341.* Even assuming all the threshold requirements are satisfied, the court must look to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting. *Id. at 342 - 343.*

The existence of water rights were not at issue and, therefore, were not litigated in *WIC v. The Department of Employment* (1958) 50 Cal.2d 174. Rather, the issue before the court was whether WIC's employees were agricultural laborers and, thus, whether WIC was exempt from having to make unemployment insurance contributions on their behalf. The existence of WIC's water rights or those of its shareholders, was not challenged or at risk. MSS incorrectly asserts that, based on statements in the Reporter's Transcript on Appeal, WIC's attorney, Gilbert Jones, stated that WID had no water rights . The actual testimony from The Reporter's Transcript On Appeal (MSS-1E), page 140 lines 21-23 is:

Q: I see. And does it own any water rights?

A: No water rights whatever are transferred by the owners of this land to this company.

Hence, a review of the testimony relied upon by MSS parties reveals that WIC's attorney at the time did not answer a question directly. Instead of answering whether water rights were held or owned, Mr. Jones offered a non-responsive statement regarding the lack of any transfer of water rights. As will be touched on below, a reading of the complete documents indicates that at this part of the testimony, and at all other parts therein, the discussion and testimony pertained to riparian water rights with no discussion or position given on any pre-1914 rights.

An actual determination of whether WIC held its own water rights, independent of its shareholders, was not a part, nor was deciding it necessary for the court's ultimate determination that WIC employees were exempt agricultural laborers. Consequently, the issues litigated in *WIC v. Dept. of Employment* are very different than those at issue in the CDO proceeding. Based on the obvious differences between the two cases, it is clear that the first three elements necessary to support a finding of collateral estoppel/issue preclusion are not satisfied and that the doctrine does not apply in this instance. The issue of WIC's water rights was not decided in the former proceeding. And, it was not necessarily decided in the former proceeding. Furthermore the former proceeding was not a water right adjudication nor was it a quiet title action. The *WIC v. Department of Employment* proceeding clearly did not involve a legal action to determine any water rights held by WIC.

In addition to failing to satisfy the first three elements of collateral estoppel/issue preclusion, the issues in dispute in the WIC CDO proceedings are important from a statewide public policy perspective. This is another factor preventing the SWRCB from determining that WIC is estopped from asserting, and further establishing, its water rights in the CDO proceeding.

As referenced above, it is quite obvious that the testimony in the *WIC v. Dept. of Employment* was focused on the fact that WIC was delivering the riparian right water of those being served through common facilities. The fact that such delivery also establishes a pre-1914 right does not appear to have been at issue in the case.[4]

2. WIC's Pre-1914 Water Right Cannot Be Barred By Res Judicata/Claim Preclusion.

Res judicata, or claim preclusion, prevents the re-litigation of a claim previously tried and decided. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal. 4th 888, 896-897. The claim in *WIC v. Department of Employment* specifically addressed WIC's claim that its employees were agricultural laborers thereby exempting WIC from having to make unemployment insurance

[4] The ability to hold multiple water rights is addressed in Section IV G. 2 herein below.

contributions on their behalf. Any discussion of WIC's water rights, or the status of same, was not related to the claims at issue. Thus, the doctrine of res judicata is not applicable.

3. WIC's Pre-1914 Water Right Cannot Be Barred By The Doctrine Of Judicial Estoppel.

Any contention that WIC is judicially estopped from asserting pre-1914 and riparian water rights in the subject CDO proceedings is misplaced. In *WIC v. Department of Employment* , the issues before the court clearly did not pertain to WIC's water rights. The evidence in the matter included superfluous, limited testimony related to water rights which was unclear and non-responsive. Moreover, there is no indication whatsoever that even the limited and incomplete discussion pertaining to water, involved or contemplated pre-1914 appropriate rights.

The doctrine of judicial estoppel seeks to preclude a party from gaining a litigation advantage by espousing one position and then seeking a second advantage by taking an incompatible position. *Jhaveri v. Teitelbaum*, (2009) 176 Cal. App.4th, 740. The dual purpose of the doctrine are to maintain the integrity of the judicial system and protect parties from unfair strategies of their opponents. *Id.* WIC's water rights were not at issue in *WIC v. Department of Employment* , and pre-1914 rights were not discussed. WIC has gains no unfair advantage against its opponents or unfairly surprises them in this matter by asserting its own pre-1914 rights and the riparian rights of its member shareholders. WIC did not initiate this proceeding other than to request a hearing to prevent the Draft CDO from being adopted without opposition. WIC's opponents in this proceeding have always known WIC claims to have valid water rights both on its own accord and through its member shareholders. WIC has been in existence diverting water onto Roberts Island since at least 1911. MSS parties, and WIC's other opponents in this proceeding cannot seriously claim they have been unfairly surprised or disadvantaged because WIC continues to assert its right to legally divert water from the Delta. MSS parties' claim that the doctrine of judicial estoppel applies in this context has no merit.

4. Any Assertion That WIC Cannot Assert Its Pre-1914 Water Rights Before The SWRCB Because The California Supreme Allegedly Has Exclusive Jurisdiction Is Incorrect.

MSS parties' position regarding alleged exclusive jurisdiction defies logic. MSS parties asks the SWRCB to find that it has no jurisdiction to determine WIC's water rights yet MSS parties took an opposite position in opposing a recent writ of prohibition filed by the Mussi et., al petitioners challenging SWRCB's authority to conduct the subject CDO proceedings. Moreover, MSS parties is asking the SWRCB to find that WIC is forever barred from defending or proving its water rights because of a decision in an unemployment insurance case in which water rights were not at issue. Clearly, MSS parties' assertions must be rejected, and Dunkel can receive water under the WIC pre-1914 right.

VI. MSS PARTIES WITNESS MR. WEE'S TESTIMONY IS UNRELIABLE BASED ON THE PRESENTATION OF INACCURATE INFORMATION AND A FAILURE TO EXPLAIN THE SAME.

In support of their theories Intervenors present basically one "expert" witness who does title work for water rights disputes. This "expert" interpreted every bit of evidence to support his theory of no Delta rights; the same expert whose report alleged a near complete lack of riparian rights in the Delta based solely on a review of Assessor maps; the same expert who could not bring himself to admit that an agreement to provide water was not intent of the landowner to preserve a riparian right (RT. Vol. V pages 1077-1081). As we shall see, this "expert" should not be given any credence given his "mistaken" assertions on the record and his inability to explain such mistakes.

In this hearing, Mr. Wee (Dunkel MSS 1) first claimed that a deed dated December 28, 1909 resulted in a severance of the property at issue therein (Dunkel MSS Exhibit 1H). However, even his own exhibit attached to his testimony showed that the subject deed resulted in a parcel which abutted Middle River, and thus maintained a riparian right (Dunkel MSS 1G). In the cross examination of the witness, he started his explanation of his mistake by expressing his belief that Certificates of Purchase ("CP's") can result in a severance of a riparian right. Mr. Wee's belief is of course incorrect. A CP confers an ability to purchase property from the State, it is not a transfer of ownership. Thus with no transfer, there can be no severance. In fact, a riparian water right does not exist on property while the State owns it, but comes into existence after the State transfers the

property to a party. Hence, Mr. Wee's theory of CP's "severing" riparian rights is both backwards and wrong.

Mr. Wee next tried to explain his incorrect statement about severance by alleging that a simple mapping error of CP's (which included and bordered the Dunkel parcel) was the reason for the incorrect conclusion. On cross-examination and in fact under simple analysis his explanation does not hold up.

First, Mr. Wee did not ever allege that any original CP caused a severance of the Dunkel property. Neither did he allege that the Patent, or any deed in the chain (before the 1909 deed) caused a severance. The CP mapping error did not lead him to some deed which did cause a severance; he mapped the correct deeds in the chain. Thus, an incorrect mapping of a CP did not lead to a mistaken deed being examined.

Second, when determining whether a deed severs property from a connection to a waterway, the mapping of the CP has no bearing on whether the deeded property abuts a waterway or not. One does not "look back" in time to the CP to interpret a later deed unless one already alleges the CP caused a severance; something Mr. Wee specifically did not do. In fact, if the CP caused the severance, the later deed would be irrelevant.

Third, in the WIC hearing, Mr. Wee asserted that a larger parcel (including Dunkel's) remained riparian to Middle River as of 1911; testimony presented after the Dunkel hearing was completed. Yet, Mr. Wee claimed he did not notice that his two testimonies were in conflict until after he saw the Motion to Re-Open Dunkel. His statements simply cannot be believed; the connections to waterways is central to both hearings and he must have known that when he asserted the land was riparian it was contrary to his recent assertion it was not.

Mr. Wee's positions, statements and explanations defy logic and cannot be accepted as true. If the error was simple one, Mr. Wee could have simply said he made a mistake and made a statement which was not supported by his research. Instead, he developed a nonsensical explanation about CP's and mapping. The Board can make its own conclusions about why and what, but it is clear that Mr. Wee's testimony in these hearings must be considered suspect and should not be given any weight given his failure to explain his submittal of incorrect information.

VII. THE LANGUAGE IN THE RELEVANT DEEDS PRESERVED A RIPARIAN RIGHT FOR DUNKEL.

The original deeds transferring the relevant lands subsequent to the Patent, were J.P Whitney to M.C. Fisher, then M.C. Fisher to Stewart et .al. These deeds are found in Dunkel Exhibit 3, (P6)-(P8); 3A-3C. Each of these contains a provision transferring "tenements, hereditaments and appurtenances." Though this should be sufficient for purposes of the evaluation below, subsequent deeds in the chains also included this language.

A. The Riparian Water Rights For Dunkel Lands Were Retained In The Parcels That Were No Longer Contiguous To A Water Course Due To The Language In The Deeds In All Alleged Severances.

The 1907 case of *Anaheim v. Fuller* (1907) 150 Cal. 327 at page 331[5] is cited for the "well settlement rule that where the owner of a riparian tract conveys away a noncontiguous portion of the tract by a deed that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status." *Santa Margarita v. Vail* (1938) 11 Ca.2d 501, 538. "If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary." "Land thus conveyed and severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership." *Anaheim v. Fuller* (1907) 150 Cal. 327, 331. Dunkel is not contending that any riparian water rights are regained due to a later merger of the ownership of a prior severed parcel with any predecessor in interest, rather Dunkel is contending that the language in the deeds did in fact retain the riparian water rights of those parcels that were separated from the watercourse.

1. Hereditaments Language Within Deeds Conveyed Riparian Rights To Parcels Separated From The Watercourse.

A riparian water right is considered a hereditament. In 1886 the Supreme Court in *Lux v. Haggin* repeatedly described the right of the riparian proprietor to the use of the water as an

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[5] It is important to note that later cases clarified that "intent" of the parties is controlling and not just language in the deed.

"incorporeal hereditament appertaining to the land." *Lux v. Haggin* (1886) 69 Cal. 255, 300, 391, 392, 430. It was quite clear at the time of *Lux v. Haggin* that a riparian water right was considered a hereditament stating, "The supreme court of California has not been silent with respect to the subject. 'The right to running water is defined to be a corporeal right or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes. *Sacket* v. *Wheaton*, 17 Pick. 105; 1 Cruise, Dig. 39; Ang. 3.' *Hill* v. *Newman*, 5 Cal. 445." *Lux v. Haggin* (1886) 69 Cal. 255, 392.

Again in 1890 riparian water rights were clearly described by the California Supreme Court as a corporeal hereditament stating: "To the extent that it existed, it was an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or by condemnation, or extinguished by prescription, but could not be defeated by simple appropriation." *Alta Land & Water Co. v. Hancock* (1890) 85 Cal. 219, 223 Clearly it was a very reasonable interpretation in 1890 that a reverence in a deed granting the "tenements, hereditaments and appurtenances" granted to the conveyed land the riparian water rights in which the conveyed land had previously enjoyed prior to the conveyance. At the time there was no law to the contrary, and WIC contends that even today there is no law to the contrary.

Although severance of the riparian water right is alleged, it is quite clear from the face of the deeds that each deed conveyed the existing riparian water rights to those parcels which were no longer contiguous to a watercourse.

2. Reference To Hereditaments Language In The 1972 Case *Murphy Slough* Is Distinguishable.

In 1972 the Fifth District Court of Appeal in *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, held that a prior transfer of a 100 foot strip of land to a reclamation district along a watercourse that allegedly severed the grantor's remaining land from the watercourse did not extinguish the grantor's riparian water rights to the remaining land no longer contiguous to the watercourse. First, the situation at issue is reversed from the examination of intent of the conveyance in *Murphy Slough Assn.* In *Murphy Slough Assn.* the grantor retained the resulting noncontiguous parcel and the Court evaluated whether the deed language of hereditaments granted

such grantor's riparian water rights to grantee. In this factual situation the presumption is that riparian water rights pass by a grant of land to the grantee even though the instrument is silent concerning the riparian right. *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 656. This is not the presumption at issue in this hearing.

3. Intent Of Parties Prevails, Derived From Extrinsic Evidence And The Deed Itself.

"We conclude that the overriding principle in determining the consequence of a conveyance of land insofar as riparian rights are concerned is the intention of the parties to the conveyance." *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 657. It is not necessary that the conveyance specifically specify that riparian water rights are transferred; rather the intent of the grantor is evaluated. "The extrinsic evidence and the deed itself establish status of riparian water rights." *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 658 Use of water from the watercourse, ditches serving the parcel or other conditions can indicate an intent to continue to have the riparian right notwithstanding the lack of contiguity with the watercourse. *Hudson v. Dailey* (1909) 156 Cal. 617, 624-625.

The *Murphy Slough* Court found that a riparian water right was retained in the noncontiguous parcel by, in part, the actions of the parties after the alleged severance. The Court concluded that the later deeds of the grantors conveyed 9 and 18 years after the alleged severance indicated the parties belief that the early deed had retained the riparian rights of the noncontiguous parcel. *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 657-658. In addition the Court relied on the fact that "the evidence is uncontradicted that respondents have been taking water from the Murphy Slough continuously for the past 30 years and appellant at no time has sought to intervene to prevent such taking" to conclude that the intent of the parties was to retain the riparian water right to the non contiguous parcel (*Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 658

Similar conclusions can be made in the case before the State Water Board. The Dunkel property was reclaimed for purposes of cultivation. Great expense and effort was taken to reclaim the land and put it to cultivation and the Woods brothers originally acquired the property on

Roberts Island for the purpose of farming. These facts together with the deed language conveying all "hereditaments" which clearly include riparian water rights supports the conclusion that the intent of the grantors was to convey the riparian water rights to the parcels which were allegedly no longer contiguous to watercourses.

B. Once Riparian Rights Have Been Retained To Lands Separated From The Waterways The Riparian Rights Do Not Need To Be Mentioned Or Retained In Future Deeds.

Once riparian rights have been retained they remain and do not need to be mentioned or retained in future deeds. Once preserved, the riparian rights of non-contiguous land remains throughout the chain of title. *Rancho Santa Margarita v. Vail* (1938) 11 Cal 2d 501, 538; *Miller & Lux v J. G. James Co.*, (1919) 179 Cal 689, 690-691; *Strong v Baldwin* (1908) 154 Cal 150, 156-157. Once the riparian rights are preserved at the time the land is separated from the various waterways, then that land forever retains riparian rights as it can never lose them through future separations from waterways since there cannot be any future separations from waterways, the land has already been separated from the waterways. "If the grant deed conveys the riparian rights to the noncontiguous parcel, that parcel retains its riparian status." (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 539.) Riparian right is a "vested right inherent in and a part of the land [citations] and passes by a grant of land to the grantee even though the instrument is silent concerning the riparian right [citations]." (*Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 655-656.) Thus, once a riparian right is retained in a parcel separated from the watercourse, the riparian right passes by grant of the land in future conveyances even though the future conveyance is silent concerning the retained riparian right. Therefore it is not necessary for any deeds subsequent to the conveyances retaining the riparian water rights in the noncontiguous parcels to mention, retain or transfer such retained riparian water rights within WIC.

C. The Amount Of Water In A Stream Has No Bearing On Determining If The Tract Is Riparian.

"The amount of water in the stream has no bearing whatever in determining whether a particular tract is riparian." *Rancho Santa Margarita v. Vail* (1938) 11 Cal. 2d 501, 534. "In determining the riparian status of land the same rules of law apply regardless of the size of the

tract, the extent of the watershed or the amount of the run off." The quantity of water available does not impact the status of the land as riparian.

Thus the amount of water within the old slough abutting the Dunkel property (see above) has no bearing on whether the land along the slough is riparian or not. The mere location adjacent to the slough, which has some water, is sufficient evidence to support a riparian water right.

D. Partition Does Not Sever The Riparian Lands.

"Upon the partition of riparian lands, the decree being silent as to the division of riparian rights, each parcel retains its water right." *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 540.

VIII. THE DUNKEL PROPERTY IS RIPARIAN TO THE DELTA POOL.

The Delta Pool is like a lake rising and falling with the tides and with river flow is simply a widened portion of the river system comprised of Swamp and Overflowed Lands.

The Dunkel parcel was patented into private ownership as Swamp and Overflowed Land (Dunkel 3A) and is and always was contiguous to the Delta Pool. (See Dunkel 3I.) A watercourse does not lose its character by reason that it is artificially controlled by levees nor from the fact that water has been for periods (no matter how long) dammed from the watercourse. See *Smith v. City of Los Angeles* (1944) 66 Cal.App.2d 562, 569 and *Lindblom v. Round Val. Water Co.* (1918) 178 Cal. 450. Artificial modifications to watercourses do not change their character. See *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, 17, *Turner v. James Canal Co.* (1909) 155 Cal. 82 and *Miller and Lux v. James* (1919) 180 Cal. 38.

Riparian rights clearly attach to reclaimed swamp and overflowed lands. See *Hutchins, The California Law of Water Rights* (1956), pages 203 and 204. Delta lands at the lower end of a river system or even abutting the ocean enjoy riparian rights. See *Hutchins*, op cit supra, page 203; *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 548; *Smith v. Wheeler* (1951) 107 Cal.App.2d 451, 455; and *Half Moon Bay Land Co. v. Cowell* (1916) 173 Cal. 543, 547-548.

The court in the *Half Moon Bay* case at page 547 and 548 explained:

> "In delta land situated at the lower end of the stream, the water in the bed of the stream is often higher than the adjacent land, and that was the situation in the case at bar. This occurs to land properly within the watershed and from natural causes. The torrential flow from the steeper grades carries the debris down to the

flat land, where it is deposited, raising the bed above the level of the land adjoining."

The periodic or even continuous inundation of the land absent reclamation does not preclude riparian rights.

In *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, the Supreme Court rejected the contention that lands which are part of the bed of a stream cannot be riparian and further in distinguishing the case of *Diedrich v. North Western Union Ry. Co.*, 42 Wis. 264 stated at page 329:

> There is nothing in that opinion to indicate that the owner of land which was under the bed of an ordinary stream might not, by virtue of the position of his land, have such benefit from the water as he could get from it.

IX. EQUITABLE ESTOPPEL FORECLOSES ANY OPPORTUNITY FOR THE SWRCB TO CONTEST THE RIGHTS OF OWNERS OF RECLAIMED SWAMP AND OVERFLOWED LANDS TO WATER.

As stated, the reclamation was not only contemplated by the State and Federal government - it was expressly intended and encouraged by multiple acts of the legislature over a long period of time. This was done for what then were, and what remain, a number of benefits, including commerce, agriculture, transportation, navigation, health, and development. It was well known what reclamation efforts were expected to be accomplished, as was the substantial undertaking and expense necessary to accomplish the reclamation. Furthermore, it was known or should have been known that a permanent change would be brought about in the way the reclaimed lands were watered and dewatered. Since the initial reclamation efforts and improvements, great expense has been incurred and is continuing to be incurred in maintaining and improving those reclamation works. The methodology and deployment of practices for watering and dewatering the reclaimed lands has been well known, and is and was open and notorious - for the world, including the State of California, to see. Over the years there has been a continued reliance by private parties, and acquiescence by the State, in the diversion and application of water by Delta water users. Further, the subject lands have always been regarded as having the reputation of being possessed of riparian rights. Moreover, there has been great public and private reliance and expectation upon the continued validity and enjoyment of Delta water rights, and the continued maintenance and

improvement of the reclamation works. Indeed, it is a matter of common knowledge that without the continued maintenance of these reclamation works, the water quality and supply of many outside the Delta would be impaired. Again, all of this has been not only with the knowledge of, but the actual encouragement of, the State of California. Good conscience and fair dealing does not allow the State of California to literally renounce the water rights enjoyed in the Delta based on the very reclamation the State of California encouraged. See *City of Long Beach v. Mansell* (1970) 3 Cal.3d. 462, 487-501.

X. THE HYDROLOGIC CONNECTION BETWEEN THE SHALLOW GROUNDWATER AND THE SURFACE STREAMS AFFORDS DUNKEL RIPARIAN AND/OR OVERLYING RIGHTS TO DIVERT DIRECTLY FROM THOSE STREAMS.

Respondents submit that *Hudson v. Dailey* (1909) 156 Cal. 617 (*Hudson*) confirms that, on account of the undisputed hydrologic connection ("immediate" or otherwise) between the shallow groundwater underlying the Dunkel's property and the surface streams, it is within the scope of Dunkel's riparian and/or overlying rights to divert its fair share of that common supply directly from the surface streams to the extent it can do so without injuring others with coequal and correlative rights to that supply. (For evidence attesting to said connection and its immediacy, see e.g., Mussi Exhibit 3V, pp. 4-5; Dunkel Exhibit 9; and Mussi Exhibits 9E, 9F, 9G & 9H.)

However, to the extent the SWRCB determines *Hudson* does not confirm the forgoing, Respondents respectfully request that SWRCB confirm that such is indeed the case. Such a confirmation would be entirely consistent with, and in furtherance of, *Hudson*, *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, *Turner v. James Canal Co.* (1909) 155 Cal. 82, and the well-established "no-injury rules" set forth in case law and statutory law with regard to changing points of diversion from a common supply.

XI. WHEN WHITNEY SEPARATED ITS LANDS FROM THE BANKS OF VARIOUS WATERWAYS WHITNEY RETAINED THE DUNKEL PARCEL'S RIPARIAN RIGHTS TO THOSE WATERWAYS.

Dunkel Exhibit 3A contains a copy of the patent from the State of California to J. P. Whitney ("Whitney"), dated November 24, 1876. Dunkel's parcel at issue herein was part of the lands conveyed in that patent, and at the time of the patent, abutted the banks of numerous

waterways including, but not limited to, the San Joaquin River, Burns Cut-Off, Duck Slough, Middle River, Trapper Slough, Whiskey Slough, Black Slough, etc. As Whitney subdivided and sold parts of this patented land, the land which Whitney retained after such sales began to lose its surface connections to the banks of various waterways.

Via Whitney's December 12, 1876, conveyance to M. C. Fisher, Whitney separated his lands to the east of Duck Slough (which included the Dunkel parcel) from the banks of the San Joaquin River, Trapper Slough, Whiskey Slough and Black Slough. (See Mussi Exhibit R-37; see also the certified copy of said conveyance deed included as an Exhibit to Dunkel's Request for Official Notice being submitted concurrently herewith.) (Thereafter, on January 15, 1877, Whitney transferred all or most of its lands to the east of Duck Slough [including the Dunkel parcel] to M. C. Fisher [see Dunkel Exhibit 3B].)

Because the December 12, 1876, conveyance to M. C. Fisher contains no expression whatsoever that Whitney intended to eliminate his riparian rights to divert from the banks of the San Joaquin River, Trapper Slough, Whiskey Slough and Black Slough, all of Whitney's retained lands to the east of Duck Slough, including the Dunkel parcel, retained and preserved their riparian rights to divert from those banks at the time those lands were separated from those banks. (See *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d. 649, 657-658.) Accordingly, from the time of that conveyance forward, those rights remained "part and parcel" of those lands and could not be severed via any further subdivisions of those lands. (See *id.*, at pp. 655-658; see also *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 539; *Strong v. Baldwin* (1908) 154 Cal. 150, 157.)

XII. CONCLUSION

The evidence presented clearly shows that Dunkel property maintained its riparian status because the owners created through agreement the means to receive irrigation water prior to any surface severance. In addition, the record is also clear that the property abutted an interior island slough which was actually connected to Middle River prior to and after the parcel was subdivided and no longer had a surface connection to the River. Further, it is also clear that the property was

irrigated and farmed since before 1914, thus creating a pre-1914 right. For these and the legal reasons given above, no CDO can or should issue by the SWRCB

Dated: September 13, 2010

By: _____
John Herrick, Esq.

PROOF OF PERSONAL SERVICE

STATE OF CALIFORNIA)
) ss.
County of San Joaquin)

I am a citizen of the United States and a resident of the County of San Joaquin. My business name is Service First, and my business address is Post Office Box 2257, Stockton, California, 95212. I am over the age of eighteen years and not a party to the within entitled action.

On September 13, 2010, I hand delivered the original and four copies of **MARK AND VALLA DUNKEL/SOUTH DELTA WATER AGENCY/CENTRAL DELTA WATER AGENCY JOINT CLOSING BRIEF** to the State Water Resources Control Board, by hand delivering true copies thereof to the person at the front desk of the SWRCB for delivery on the SWRCB at approximately 4:00 p.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on September 13, 2010, at Stockton, California.

Patrick Burnett

PROOF OF SERVICE BY E-MAIL

I declare as follows:

I am over eighteen years or age and not a party to the within entitled action. My business address is the Law Office of John Herrick, 4255 Pacific Avenue, Suite 2, Stockton, California, 95207. I am employed in San Joaquin County, California. Based on an agreement of the parties to accept service by e-mail or electronic transmission, on September 13, 2010, at approximately 2:35 p.m., I sent the **MARK AND VALLA DUNKEL/SOUTH DELTA WATER AGENCY/CENTRAL DELTA WATER AGENCY JOINT CLOSING BRIEF** and Proofs of Service by e-mail to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SWRCB	wrhearing@waterboards.ca.gov
Dean Ruiz	dean@hpllp.com
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Clifford Schulz	cschulz@kmtg.com
Erick Soderlund	esoderlu@water.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on September 13, 2010, at Stockton, California.

Dayle Daniels