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BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of Draft Cease and Desist Order No. 2009-00XX DWR Enforcement Action No. 75 Against Mark and Valla Dunkel	**CLOSING BRIEF**

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I. INTRODUCTION

On August 4, 2010, the California State Water Resources Control Board ("State Board") held a hearing pursuant to the Draft Cease and Desist Order ("CDO") issued by the State Board against Mark and Valla Dunkel (the "Dunkels"), which requested the Dunkels provide proof of their legal right to use water from the Middle River in San Joaquin County on Parcel 162-090-01. The Dunkels alleged they hold a riparian water right because their parcel maintained contact with a previously existing slough that was at one time connected to Middle River. The Dunkels' parcel, however, has not maintained a connection to Middle River such that a riparian right can be found to exist because this slough was dammed in 1875, and the physical connection between Middle River and the slough was not restored until 1898.

Additionally, the Dunkels alleged they hold a riparian water right, despite their parcel not being riparian to a natural water course, because at the time the parcel was severed from Middle River, the then-owners of the land (Wihoit and Douglass) intended to preserve the riparian right. The Dunkels point to two agreements executed in 1911 as evidence of that intent. The two agreements upon which the Dunkels rely consist of a September 29, 1911, Agreement between Jessie Lee Wilhoit and Mary L. Douglass and Woods Irrigation Company ("WIC"), in which Jessie Lee Wilhoit and Mary L. Douglass grant easements to WIC to construct and maintain irrigation and drainage canals across their property, and a September 29, 1911, Agreement from WIC to Jessie Lee Wilhoit and Mary L. Douglass in which WIC agrees to furnish water for irrigation upon payment (hereinafter collectively referred to as the "1911 Agreements"). Absolutely nothing contained in these two agreements, nor in any of the additional evidence submitted, including the 1909 Articles Incorporation, WIC's 1910 Bylaws, and WIC's post-formation documents, in any way support a finding of an intent to preserve a riparian right. The 1911 Agreements contain restrictions and descriptions that are so contrary to the value, purpose, and meaning of riparian rights such that it would be unreasonable to conclude that the 1911 Agreements were the intended vehicle to maintain a riparian right.

Therefore, because the 1911 Agreements do not manifest an intent to preserve a riparian right for the Dunkels' predecessors, and the Dunkels' did not parcel maintain a contiguous

connection to Middle River through a previously existing slough, the State Board should find that the Dunkels have not presented sufficient evidence to support the preservation of a riparian water right. The Modesto Irrigation District, the State Water Contractors, and the San Luis & Delta Mendota Water Authority ("MSS" or "MSS parties") respectfully request the State Board issue an order demanding the Dunkels cease and desist any and all diversions of water from Middle River for use on use parcel 162-090-01.

II. APPLICABLE LAW

A. Burden of Proof

The person or entity that alleges a water right has the burden to prove such right exists. (*California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d 715, 737.) This burden requires the trier of fact have a requisite belief that each element of the asserted water right has been established by evidence in the record. *(See Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1205.) In doing so, the party must prove each fact essential to establish the water right that it is asserting. (*Id.*)

In establishing a riparian right, the burden is on the party to prove: 1) that it owns real property contiguous to a watercourse; 2) that the real property it owns is the smallest parcel held under one title in the chain of title leading to that party as the current owners; and 3) that the real property the party owns is located within the watershed of the watercourse to which it is contiguous. (*See Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 528-529 ("*Rancho Santa Margarita*"); *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 116.) If a portion of a riparian parcel that is severed, is then reunited under ownership with the original riparian parcel, it will not regain riparian status. (*Miller & Lux v. James* (1919) 180 Cal. 38, 51-52 ("*Miller & Lux")*; *see Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 331 ("*Anaheim Union*").)

There is an exception to the general test for evaluating whether or not a parcel is considered riparian to a watercourse. If, at the time the non-contiguous parcel is severed from the riparian parcel, there is language in the conveyance document indicating an express intent to maintain the riparian right on the non-contiguous parcel, the non-contiguous parcel may retain its riparian status despite the lack of contiguity to a watercourse. (*Pleasant Valley Canal Co. v. Borror* (1998) 61

Cal.App.4th 742, 780 ("*Pleasant Valley*").) In addition to preserving riparian rights to a non-contiguous parcel through language in the conveyance document, the circumstances at the time of conveyance may also be construed as evidence of express intent to maintain the riparian rights on a non-contiguous parcel despite severance from the watercourse. (*Hudson v. Dailey* (1909) 156 Cal. 617, 624 -625.) Whether through language or circumstances, there must be demonstrated express intent to preserve a riparian right.[1] "When the grant is silent as to riparian rights obviously such rights have not been conveyed and remain with the grantor for the benefit of his retained lands and for the benefit of other riparians." (*Rancho Santa Margarita*, at 539.)

Additionally, a landowner contiguous to a slough may exercise its riparian right at a point on the main channel of the watercourse, however, such right is limited to the natural flow in the slough. (*Turner v James Canal Co.* (1909) 155 Cal 82, 90.) Further, the right is limited to the water in the slough that originated from the main channel; the riparian right does not extend to waters from other sources. (*Id.*, at 90-91.) Because a riparian right is limited to the natural flow that passes by riparian lands, if a slough no longer has natural flow or is severed, the riparian right no longer exists. (*Miller & Lux v. Enterprise Canal & Land Co.* (1915) 169 Cal. 415, 441 ("*Enterprise Canal*"); *Miller & Lux*, at 51-52; *see Anaheim Union*, at 331.)

III. ARGUMENT

A. Respondents Failed to Provide Sufficient Evidence In Support of Alleged Riparian Right for The Dunkels' Parcel 162-090-01.

1. The Dunkels' Parcel Is Not Contiguous to a Watercourse.

(a) The Dunkels' Parcel is Not Contiguous to the Northeast Slough.

The Dunkels argue that because their property abutted an unnamed slough that joined Middle River at the location where WIC built its original headgate and delivery canal in 1898 ("the Northeast Slough"), the property has maintained a connection to Middle River since 1898 and thus retains a riparian right. (Exhibit Dunkel-3, at ¶ 23.) However, because the Northeast Slough was

[1] The rule here is that to preserve a riparian right there must be "express" intent. Therefore, any argument that the landowner surely intended to preserve the riparian right because he intended to farm the land is simply an argument of constructive intent – which is not express intent and is not sufficient to preserve the riparian right. (*Hudson v. Daily* (1909) 156 Cal. 617, 625; *Anaheim Union*, at 331.)

dammed in 1875, the physical connection between Middle River and the Northeast Slough was severed. Therefore, the Dunkel property did not maintain a natural connection to Middle River such that riparian rights can be found to exist despite the severance in 1911.

Riparian rights only attach to natural flow of a stream flowing in its natural course. (*Enterprise Canal*, at 441.) This rule applies to sloughs, which are attached to larger watercourses, and thus property adjacent to a slough is riparian to the larger watercourse, but is only entitled to take water during the time and to the extent that it is naturally found in the slough. (*Id.*) Riparian rights do not attach to an artificial channel like canals. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 147.) Indeed, where artificial channels are clearly used to convey water from a water source, riparian rights cannot attach. (*Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, 17.)

In this case, the Northeast Slough originally had a mouth that was 16.5 feet wide and 6 feet deep. (Exhibit MSS-R-14, at 7 (Stockton Daily Independent, April 15, 1875).) In 1875, a levee was completed along Middle River, which had the effect of damming the Northeast Slough and severing the surface water connection. (Exhibit MSS-R-14, at 22 .)

In 1898, a survey was commissioned which indicated that the interior lands of Roberts Island owned by the Woods Brothers were generally lower in the center than on the edges. (Exhibit MSS-R-14, at 22.) This survey suggested that if a headgate was constructed in the levee, and attached to a canal ½ mile long and 25 feet wide, water could be conveyed from Middle River to some, but clearly not all, of the interior lands owned by Woods Brothers. (Exhibit MSS-R-14, at 22, 34-35.) This headgate and canal were in fact constructed, and the canal intersected with the Northeast Slough. That is, the Northeast Slough was not connected to Middle River itself, but rather to the newly constructed canal. (Reporters Transcript ("RT"), at 1069; Exhibit WIC-6J.) Additionally, thereafter, the Northeast Slough was utilized by WIC to convey water to some undefined land within Roberts Island, at some undefined time. (Exhibit WIC-6K, Exhibit Dunkel-3, at ¶ 17-23.)

Having been dammed off in 1875, severed from Middle River until 1898, connected not to Middle River but instead to the Woods Brothers' canal, and used since 1898 as an artificial channel

for the purpose of conveying water diverted by Woods Brothers and then WIC, the Northeast Slough is not and has not been a natural water course to which riparian rights can attach or be maintained. Thus, the Northeast Slough lost all relationship to a natural watercourse, and became nothing more than an irrigation canal used by Woods Brothers and WIC to deliver water to some undefined land within Roberts Island at some undefined time.

(b) The Dunkels' Parcel Was Legally Severed From Middle River In 1911.

There is no dispute that the Dunkels' parcel is not currently contiguous to Middle River. (RT, at 988:24-25, 989:1-21; *see also*, Exhibit Dunkel-3, at 4.) The undisputed evidence demonstrates that the Dunkels' parcel was severed from a larger parcel that abutted Middle River by deed dated November 29, 1911. (RT, at 988:24-25, 989:1-21; *see also* Exhibit Dunkel-3, at 4; Exhibit Dunkel-3G.) The Dunkels' own witness, Mr. Landon Blake, testified that the deed transferring the Dunkels' parcel from E.L. Wilhoit, M.D. Eaton, and W.D. Buckley to W.B. Walters and M.F. Walters on November 29, 1911 "creates the separation to a direct surface connection to Middle River." (RT, at 989:2-12.) When pointing this out on a map in Exhibit Dunkel-3G, Mr. Blake stated, "the Dunkel parcel . . . no longer has that direct surface connection to the river . . . ." (RT, at 989:2-12.) The rule is clear that when a non-contiguous portion of an otherwise riparian parcel is separately conveyed, the non-contiguous parcel loses its riparian status. (*Pleasant Valley*, at 780-781.) As a result, the Dunkels' parcel property cannot be considered riparian under the traditional test, as it does not satisfy the requirement that a parcel must be contiguous to a watercourse.

2. The Dunkels Failed to Expressly Retain The Riparian Status Of The Severed Parcel.

In this case, the November 29, 1911 deed, which severed the Dunkels' parcel from Middle River, does not contain the word "riparian" and otherwise makes no reference to any rights to water. This silence is the antithesis of evidence of an intent to retain riparian rights. (*See, e.g*, *Carlsbad Mut. Wat. Co. v. San Luis Rey Development Co.* (1947) 78 Cal.App.2d 900, 904-905 [deed conveyed "all riparian rights to the waters of the San Luis Rey River."]; *Rianda v. Watsonville Wat.*

& Light Co. (1907) 152 Cal. 523, 524-525 [deed conveyed "all and singular water and riparian rights and privileges..."; *see also Murphy Slough v. Avila* (1972) 27 Cal.App. 3d 649, 653 ("*Murphy Slough*") [noting that 1917 deeds conveyed proportionate riparian rights to waters of Kings River].) Although the deed contains standard form language conveying "the tenements, hereditaments, and appurtenances . . ." (Exhibit Dunkel-3G at 2), such language is not sufficient to preserve a riparian water right within a deed severing the property from the watercourse when the deed is otherwise silent as to riparian rights. (*Murphy Slough*, at 655-656.) Thus, when the subject parcel was severed, the deed did not preserve its riparian rights.

3. The 1911 Agreements Do Not Evidence An Intent To Maintain Riparian Rights.

The Dunkels alleged their riparian right was preserved because, prior to losing contiguity with Middle River, the Dunkels' predecessors entered into the 1911 Agreements with WIC. (Exhibit Dunkel-2B; WIC Exhibit PT-5, at 40-49.) The Dunkels further assert that the State Board should rely on its previous conclusion from *In the Matter of Administrative Civil Liability Complaints for Violations of Licenses 13444 and 13274 of Lloyd L. Phelps, Jr.; License 13194 of Joey P. Ratto, Jr.; License 13315 of Ronald D. Conn and Ron Silva, et al.*("*Phelps*"), in which the State Board determined entering into the 1911 Agreements provided evidence of an intent to preserve riparian rights on the Ron Silva parcel, APN 162-090-03. (RT, at 1082:23-25, 1083:1-9; *see also* WRO 2004-0004, at 27-28.)

Although the deed to the Dunkel property is conditioned on the ***very same*** 1911 Agreements as the Silva deed, the State Board's decision in *Phelps* should not and cannot apply here. The evidence and legal arguments before the State Board in this matter differ from the evidence that was before the State Board in *Phelps*. The evidence and legal arguments make clear the 1911 Agreements cannot be read to manifest an intent to preserve the riparian rights of the Dunkels' parcel because the terms, provisions, conditions, factors and language contained in the 1911 Agreements are contrary to, incompatible with, and not synonymous with an intent to preserve the riparian rights.

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(a) Neither The 1911 Agreements, The 1909 Articles Of Incorporation Nor The 1910 Bylaws Reference Riparian Rights And Thus Say Nothing About Intent To Preserve A Riparian Water Right.

None of the documents submitted into evidence support an express intent to preserve a riparian right. Neither the November 29, 1911 deed that resulted in the severance of the Dunkel property, nor the 1911 Agreements make any reference to a reservation of a riparian right. In fact, the word "riparian" does not appear in the 1911 deed (Exhibit Dunkel-3G), the 1911 Agreements (Exhibit Dunkel-2B), the 1909 Articles of Incorporation (WIC Exhibit PT-5, at 28-37), the 1910 Bylaws of WIC (Exhibit WIC-11A), 1957 *Complaint to Quiet Title to Corporate Stock and for Declaratory Relief* (Exhibit WIC-4G), nor in any of the other documents submitted into evidence to support the intent. Instead, the 1911 Agreement to Furnish Water specifically refers to the Dunkels' predecessors as "consumers," which is legally defined as those who **buy** goods or services. (Exhibit Dunkel 2B, at 1; Black's Law Dictionary (8th ed. 2004).)

Most landowners at that time knew the hazards of dividing and subdividing property and the possibility that such divisions could result in the severance of riparian rights. (Exhibit Mussi-3J, at 319.) The fact that the parties here made absolutely no reference to riparian rights at all in any of the relevant documents, but instead established a contractual scheme, is in no way synonymous with an understanding of, or an intention to preserve, riparian rights.

(b) The Water Rate Is Quantified And Limited To 32.86 cfs.

The 1911 Agreement to Furnish Water limits the amount of water to be delivered to all of the subject lands to 32.86 cfs. (Exhibit Dunkel 2B, at 1.) Such express quantification does not support an intent to maintain riparian rights, because riparian rights are not expressed as mathematical certainties nor are they defined in fixed quantities. (*Prather v. Hoberg* (1944) 24 Cal.2d 549, 560 ("*Prather*"), citing *Pabst v. Finmand* (1922) 190 Cal. 124, 129 ("*Pabst*"); *Pleasant Valley*, at 776-777.)

In *Phelps,* the State Board attempted to avoid the plain application of the law by concluding that in limiting the water to 32.86 cfs, the 1911 Agreements did not reduce the landowners' water right to a mathematical certainty, but instead the 32.86 cfs was an expression of the physical

capacity of WIC's canal.[2] (WRO 2004-0004, at 28.) But, even the Dunkels disagree with that statement. Mr. Christopher Neudeck testified that the 32.86 cfs was not a limit to the size of WIC's facilities, but rather it was a specifically calculated number equal to one (1) cfs per 100 acres, a standard practice during that time for irrigation. (WIC RT, at 520, 525; Exhibit WIC-4, at 4.) By quantifying the amount of water, the landowners agreed to limit their water to one (1) cfs per 100 acres, regardless of the amount of water the property needs or the size of any aspect of the diversion and conveyance facilities.

Further, the State Board stated that at that time, with the exception of the physical capacity limits, there was nothing further in the Agreement that would otherwise limit the riparian right. This effort was improper in *Phelps* and must fail in this matter due to new information in the record. Thus, the 1911 Agreements are contrary to the spirit and definition of riparian rights and it would be unreasonable to conclude Agreements were as used a vehicle for express intent to maintain a riparian right.

(c) The Landowners Have No Rights In The Water.

The 1911 Agreements state the landowners have no rights in the water, which is incompatible with the notion that WIC is delivering water pursuant to the parties' riparian rights. The language on page two of the 1911 Agreement to Furnish Water from WIC to Jessie Lee Wilhoit and Mary L. Douglass is contrary to preserving a riparian right because the holder of the water right and the water right being protected in the agreement is that allegedly held by WIC, not that of the landowners' riparian rights. This paragraph specifically states:

> "It is understood and agreed between the parties hereto 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 the water flowing therein or which may hereafter flow therein, nor does this contract create any equitable covenant encumbering the said canals, and disposition thereof by [Woods Irrigation Company]."

(Exhibit Dunkel-2B, at 2.) By signing this Agreement, the landowners acknowledged they obtain no lien, estate, easement, or servitude in or to the water flowing in WIC's canal. According to

[2] The limitation recognized by the State Board is not without consequence, but would require any finding of Dunkels' riparian right to be limited to 32.86 cfs.

Black's Law Dictionary, lien, easement, and servitude are all different forms of a legal right or interest that one party has in real property owned by another party. (Black's Law Dictionary (8th ed. 2004).) As the 1911 Agreement does not create or convey any lien, estate, easement, and servitude, the 1911 Agreement does not create or convey to one party a legal right or interest in the real property claimed by the other party.

This restrictive language is so contradictory to the substance and objective of riparian rights such that no riparian proprietor would have allowed his right to be described in this fashion nor would he have employed it as the vehicle for expressing his intention to maintain their riparian rights. If WIC was delivering riparian water to the landowners, there would be no need for this type of language as between the landowners and WIC.

Although in *Phelps*, the State Board felt this language did not preclude the preservation of a riparian right and that it was silent as to the basis or ownership of any water right to the water, the new evidence entered by WIC contradicts the State Board's prior determination. WIC has specifically alleged that it owns the canals, ditches and water therein. (Exhibit Dunkel-2B, at 2.) WIC has further alleged the language in the 1911 Agreements is not silent as to the basis of ownership, but rather, the 1911 Agreements clearly provide that WIC owns the canals and ditches, and the landowners do not and will not obtain a legal right or interest in the canals and ditches, nor in the water therein or the water which may flow therein.[3]

(d) <u>Both The 1911 Agreements And WIC Expire After 50 Years.</u>

Riparian rights are part and parcel with the land, not subject to prescription or abandonment and, so long as the parcel remains contiguous to a watercourse, is the smallest tract held under one chain of title, and is located within the watershed of the watercourse to which it is contiguous, (*Rancho Santa Margarita*, at 529) the riparian right is perpetual. (*Lux v. Haggin* (1886) 69 Cal. 255, 391 ("*Haggin*"); *Rancho Santa Margarita*, at 529; *Fresno Canal & Irrigation Co. v.People's Ditch (*1917) 174 Cal. 441, 450; *Mt. Shasta Power Corpn. v. McArthur* (1930) 109 Cal. App. 171,

[3] This is not to say that WIC has any rights. All that can be gleaned from this language of the 1911 Agreement is that the landowners themselves have no rights to the water delivered by WIC, and thus the water being delivered by WIC is not their riparian water.

192 ("*Mt. Shasta Power*").) The 1911 Agreement to furnish water, however, is not perpetual, nor is WIC. They end. Both expire on December 14, 1959, 50 years after the incorporation of WIC. (Exhibit Dunkel-2B, at 2; WIC Exhibit PT-5, at 29.)

At the time the Dunkels' predecessors entered into the 1911 Agreements, they knew the corporation was temporary and would cease to exist after 50 years because in 1909, two years before the 1911 Agreements were signed, they signed the Articles of Incorporation for WIC, which certified: "the term for which said Corporation is to exist is fifty years from and after the date of its incorporation." (WIC Exhibit PT-5, at 29.) Additionally, the 1911 Agreement expressly states that "[t]he said water shall be so furnished by the first party to the second party from the 29th day of September, 1911, until the 14th day of December, 1959, and thereafter in perpetuity." (Exhibit Dunkel-2B, at 2.) While the last clause states "thereafter in perpetuity," this promise is illusory and is so insubstantial as to impose no obligation because, pursuant to WIC's terms, WIC expires exactly 50 years after its incorporation. (WIC Exhibit PT-5, at 29.) In fact, discretionary, intervening action was required to extend the existence of the corporation. (WIC Exhibit PT-5, at 34-37.)

Furthermore, the 1911 Agreements contain no reservation of rights by the landowners for legal access to Middle River to exercise individual riparian rights in the event that WIC expired as contemplated. Neither the 1911 Agreements nor WIC were expected to furnish water after December 14, 1959 – absent some intervening discretionary action in which the existence of the corporation was extended. It is unreasonable to think that a party intending to maintain its riparian rights would have used an agreement that expired as the vehicle for expressing its intention. The very idea of expiration is so contrary to the value, meaning and purpose of riparian rights that no reasonable person would have permitted the possibility of expiration to be a part of any effort to maintain riparian rights at the time of severance. The fact that WIC and the parties to the 1911 Agreements expressly contemplated their expiration in the absence of discretionary, future action demonstrates that the parties did not intend the 1911 Agreements to be a vehicle for expressing the intention to maintain the riparian rights of the Dunkels' predecessors.

(e) WIC's Shareholders Must Pay For Water.

WIC's shareholders are required to pay for the water received from WIC, which is contrary to the exercise of riparian rights. Riparian rights, which are part and parcel of the soil itself, are "are separate and distinct from . . . contractual rights to water." (*Mt. Shasta Power*, at 191, citing *San Bernardino v. Riverside* (1921) 186 Cal. 7, 13.) The 1911 Agreement to Furnish Water, however, clearly states water must be paid for:

> "**For the water** herein agreed to be furnished, the consumer in consideration of the promises, hereby promised, promises and covenants to pay in gold coin of the United States to the Company or its agents as may hereafter be provided at its or their office as follows[.]

(Exhibit Dunkel-2B, at 3 (emphasis added).) In addition to being required to pay for water, the parties to the 1911 Agreements are subject to cessations in delivery in the event that they fail to pay for water. (WIC Exhibit MSS-5, at 2.) If the shareholders truly possessed riparian rights, paying for water would be unnecessary, and deliveries would not cease upon failure to pay the water bill. (*Mt. Shasta Power*, at 191.)

This payment of gold coin for water furnished pursuant to the 1911 Agreements is in addition to, and separate from, the total costs for maintenance and replacement of the canal and structures, the delivery of water, to remove seepage waters, of the operation of the Company's affairs, of litigation, and of all other expenses incidental to the operation of the canal system. (Exhibit Dunkel-2B, at 3.) While it is reasonable to expect riparian landowners to pay for the costs associated with the existence, operation, and maintenance of the delivery system, it is not reasonable to expect them to pay for the water itself, as that water is theirs by nature of the riparian characteristic of their property.

The provisions of the 1911 Agreements requiring landowners to pay for water are contrary to the essence of a riparian right. No landowner intending to create a document memorializing his intention to retain riparian rights would have chosen to include a restriction to pay for water which he already owns.

(f) The Shareholders Are Restricted By Purpose Of Use, Time Of Use, Method Of Use And Are Restricted To An Amount Of Water.

The 1911 Agreements cannot be construed as manifesting an intent to preserve the landowners' riparian rights at the time of severance because the purpose of use, time of use (seasonal), method of use and quantity of water used are not only limited, but are also controlled by WIC, and no landowner that intended to preserve his riparian rights at the time of severance would have willingly consented to such excessive restrictions. Riparian rights are only limited to reasonable beneficial use, and the amount of water available. (*Pabst*, at 129.) So long as water is available and being put to a reasonable beneficial use, riparian proprietors may divert water without being restricted by the purpose of use, time of use (seasonal), method of use or quantity of water used. (*Haggin*, at 390-391; *People v. Shirokow* (1980) 26 Cal.3d 301, 307 ("*Shirokow*").)

First, riparian owners are not limited by purpose of use so long as it is beneficial. (*Pabst*, at 129.) Riparian proprietors are only limited to reasonable beneficial uses and may apply water for any of the following: domestic use, irrigation, municipal use, industrial use, preservation and enhancement of fish and wildlife, recreational use, mining and power purposes, and any uses specified to be protected in any relevant water quality control plan. (Cal. Water Code, § 1257.) The 1911 Agreement to Furnish Water, however, specifically limits the shareholders' beneficial use of the water to irrigation only. The shareholders do not have the option of exercising a right to apply water pursuant to any other beneficial use.

Next, riparian owners' use is not limited by the season or time of year. Riparian proprietors may use riparian water year round, so long as water is flowing past their lands. (*See Enterprise Canal*, at 441.) According to the WIC's rules and regulations, however, Rule 11 limits the shareholders seasonal deliveries of "four irrigations per season." (WIC Exhibit MSS-5, at 3-4.)

Additionally, riparian proprietors are not limited by any particular method or means of use. Riparian owners may take their share of the waters of the stream by any means available, so long as they do not injure other riparian users. (*Haggin*, at 391.) The 1911 Agreements, however, do not permit the shareholders to take water by any means available, but in fact restrict them to receiving water in rotation if WIC so elects. (Exhibit Dunkel-2B, at 4.) Additionally, WIC has the right to

determine whether the use of water is neglectful and if it finds a shareholder's use to be so, WIC can direct that shareholder's method of irrigation. Such determination of whether a riparian proprietor's use of water is reasonable is a question for the trier of facts in the courts of law. (*Prather*, at 560.)

Finally, riparian proprietors are not limited to a specific quantity of water. (*Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California* (1930) 209 Cal. 206, 220.) As riparian owners do not have a specific mathematical amount to water, but instead have a "common ownership with other riparians on the stream [to] a correlative share of the natural flow," (*Rancho Santa Margarita*, at 560-562; *see also People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743; *Pabst*, at 129), fixing a riparian proprietor's share is contrary to the nature of a riparian right. The 1911 Agreement, however, gives WIC the power to fix the amount of water a shareholders receives if WIC feels the shareholder's use of water is neglectful. (Exhibit Dunkel-2B, at 4.)

Thus, none of the restrictions above are consistent with the nature and practice of riparian rights. Riparian rights may be exercised as needed so long as put to a reasonable and beneficial use. (*Pabst*, at 129; *Haggin*, at 390-391; *Shirokow*, at 307.) Riparian rights are not restricted by the purpose of use, method of use, method of delivery, amount of water, nor by the cost of water. Including such limitations in the 1911 Agreements is contrary to any intent to preserve the riparian rights of the landowners.

(g) Water Is Prorated Per Acre In The Event Of Shortage.

According to the 1911 Agreements, in the event of a shortage of water, the water will be prorated among the landowners in WIC's service area on a per acre basis. (Exhibit Dunkel-2B, at 5.) This provision is incompatible with riparian rights because in times of shortage, riparian water is adjusted according to the landowners' needs based upon their reasonable beneficial use of the water (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 695; *Pabst*, at 129), and not divided equally based upon acreage. Again, no landowner intending to create a document to preserve his riparian right at the time of severance would permit the document to include a provision dividing the riparian rights upon acreage, and not upon reasonable and beneficial use.

(h) The Landowners Cannot Convey Their Water Right.

Riparian rights may be severed by grant, condemnation or prescription from the land to which they are part and parcel. (*Gould v. Stafford* (1891) 91 Cal. 146, 155; *Haggin*, at 392; *Forest Lakes Mut. Water Co. v. Santa Cruz Land Title Co.* (1929) 98 Cal.App. 489, 495.) The 1911 Agreement to Furnish Water, however directly contradicts this riparian provision because it states that "[t]he Consumer shall not sell or dispose of any of the water, furnished under this contract, to any other land or person or allow the water to flow off his land upon the land of others." No landowner intending to create a document to preserve his riparian right at the time of severance would permit the document to include a provision preventing his ability to convey such riparian right, yet this is what Dunkels are asking the State Board to conclude.

4. Post 1911 Actions Suggest The 1911 Agreements Are Not Intended To Retain Riparian Rights.

After the 1911 Agreements were executed, WIC added parties to and released parties from the 1911 Agreements. The evidence shows that approximately 370 acres were released in 1913 (RT , at 801:11-19; 805:5-13; 806:21-23; 807:1-25; 808:1; WIC-6S), and an additional approximately 200 acres were released in 1940. (WIC Exhibit MSS-5, at 1.) Moreover, WIC passed a resolution to add approximately 197 acres in 1940, and made such lands subject to the "same obligations" and "the same rights as if originally included in the Contract between Woods Irrigation Company and E.W.S. Woods, dated the 29th of September, 1911." (*Id.*, at 2.) Such proposed additions and reductions from the 1911 Agreements are not consistent with the notion that the 1911 Agreements express an intent to maintain the parties' riparian rights for two reasons.[4]

First, if the 1911 Agreements were intended to preserve riparian rights, the lands that WIC approved to be added to the 1911 Agreements cannot gain rights to riparian water by joining WIC and being included in its service area. Since such lands were intended to be added to the 1911 Agreements as if they had been original parties back in 1911, unless those new lands were riparian and the owners had specifically granted their rights to WIC to hold and deliver in trust – two events

[4] Neither are such additions and subtractions consistent with pre-1914 water rights of WIC or landowners within the WIC service area.

for which there is no supporting evidence - the new lands could not receive water pursuant to the 1911 Agreements.[5]

Second, the lands released from the 1911 Agreements that had been severed from a watercourse would no longer be riparian unless there was a demonstration that the landowner could continue to exercise his right. There is no evidence that such a provision was made. Given how the Dunkels have argued that riparian rights were so important that all agreements must have included their preservation, it is hard to see how letting properties out of the 1911 Agreements without some other method of protecting the riparian right supports the notion that the 1911 Agreements were a vehicle for maintaining riparian rights at the time of severance.

By proposing to add lands to and releasing lands from the 1911 Agreements – and not just WIC's service area – without regard to riparian rights, the actions of WIC and those parties subject to the 1911 Agreements demonstrate that the original parties did not intend the 1911 Agreements as a vehicle for expressing their intention to maintain their riparian rights at the time of severance in 1911.

5. **WIC Is Not a Mutual Water Company Holding Dunkels' Riparian Rights In Trust.**

The State Board should not find that the 1911 Agreements manifest an intent to preserve the riparian right for the Dunkels' parcel because WIC is not a mutual water company holding the landowners' riparian rights in trust. In order for the riparian rights of landowners to be held in trust on their behalf by a mutual water company, thus retaining their riparian status regardless of whether their parcels have been severed from a watercourse, the following steps are required. First, before the land is subdivided, it must be riparian. (*Rancho Santa Margarita*, at 529.) Next, the landowners of those riparian lands must convey their riparian water rights to the mutual water company and simultaneously receive certificates of stock in the mutual water company declaring that the holder of each share is entitled to a proportional part of the water right. (*Copeland v. Fairview Land & Water Co.* (1913) 165 Cal. 148, 161 ("*Copeland*"); *see also Quist v. Empire*

[5] The minutes from WIC's Special Meeting of the Board of Directors Held on January 25, 1940 make no mention of preserving any riparian rights of the 197 acres upon its addition to WIC.

Water Co. (1928) 204 Cal. 646, 648-649 ("*Quist*").) Finally, upon subdivision, each parcel must be sold together with its proportional number of shares of stock, which are appurtenant to the land. (*Id.*)

In this case, however, no evidence was presented to show that Dunkels' predecessors or any other landowners conveyed their riparian rights to WIC in exchange for stock in the company. Nor was any evidence presented to demonstrate that the shares of corporate stock issued by WIC to its shareholders represented a proportionate share of the stockholder's riparian rights and that WIC was to furnish water pursuant to those rights. Absent any conveyance of the water rights to the mutual water company, in exchange for shares of corporate stock representing the water rights of the shareholders, the mutual water company cannot be considered a trustee holding the riparian rights on behalf of its stockholders. (*Copeland*, at 161; *see also Quist*, at 648 -649.)

The 1911 Agreements provide no evidence that a mutual water company was formed. Instead of the landowners conveying their riparian water rights to the company in exchange for stock, WIC landowners conveyed $10.00 gold coin. (Exhibit Dunkel-2B, at 1.) Even the 1909 Articles of Incorporation fail to state as one of its purposes that WIC will hold in trust the riparian rights of its stockholders and provide the stockholders with water pursuant to those rights. While not required, the 1911 Agreements do not even consider WIC will hold the rights in trust; yet the Articles of Incorporation contain quite an assortment other purposes, such as "[t]o buy, sell and deal in merchandise of all kinds, and to borrow and lend money, and to charter, construct, own, lease and operate steam and other craft and vessels." (WIC Exhibit PT-5, at 29.) Moreover, there is no evidence in the 1909 Articles of Incorporation that the stockholders conveyed their riparian rights to the company in exchange for corporate stock as evidence of their water rights to run with the land. In fact, the stock, which was originally issued not based on acreage (7,686 acres) but rather based upon capital ($10,000)[6] was divided equally among the shareholders, not divided based upon the number of acres each shareholder owned, as would be the procedure for establishing a mutual water

[6] Contrast this with the 1957 effort by WIC to re-issue stock based upon one (1) share per acre, resulting in a re-issuance of approximately 6,300 shares. (1957 Complaint to Quiet Title to Corporate Stock and for Declaratory Relief (Exhibit WIC-4G).)

company. (WIC Exhibit PT-5, at 29-30.) Finally, nothing states that stock is given in exchange for riparian water rights. Without more, there is no evidence that the 1911 Agreements or 1909 Articles of Incorporation in any way support a preservation of riparian rights for the shareholders.

B. The Dunkels Have Not Demonstrated Valid Pre-1914 Appropriative Water Rights.

To the extent the Dunkels' allege a pre-1914 appropriative water right, the Dunkels are required to prove (1) an intent, prior to 1914, to apply water to some existing or contemplated beneficial use; (2) some appropriation of water prior to 1914 from the natural channel by some mode sufficient for the purpose; and (3) appropriation and beneficial use of water to the full extent asserted under the water right within a reasonable time. (*Simons v. Inyo Cerro Gordo Min. & Power Co.* (1920) 48 Cal.App. 524, 537; *Thompson v. Lee* (1857) 8 Cal. 275, 280; *see also Haight v. Constanich* (1920) 184 Cal. 426, 433.) There is no evidence in the record, however, to establish that the Dunkels' predecessors diverted water from the Northeastern Slough or Middle River prior to 1914 and no evidence that prove the specific elements of a pre-1914 appropriative water right.

C. The Delta Pool Theory.

The Dunkels also attempted to establish riparian rights based upon the theory that they have riparian water rights because the groundwater their property overlies is connected to the surface waters from which they are diverting, also known as the "Delta Pool" theory. The State Board rejected this theory in its *Phelps* Order (WRO 2004-0004), which was upheld on judicial review. (*See* Phelps et. al. v. SWRCB (Super. Ct. Sacramento County, 2006, No. 04CS00368); *Phelps v. SWRCB* (2007) 157 Cal. App.4th 89.) In the pending enforcement proceeding against WIC, the State Board again rejected this theory. The hearing officers disposing of an evidentiary objection wrote:

> The portions of Mr. Neudeck's testimony that MID objects to in the current proceeding are copies of Mr. Neudeck's testimony in a prior enforcement hearing regarding Robert's Island properties, State Water Board Order WR 2004-0004 (hereinafter "Phelps"). This evidence is presented solely to support the theory that lands in the area have riparian water rights because the groundwater they overlie is connected to the surface waters from which they are diverting, also known as the "Delta Pool" theory. This theory was rejected in State Water Board's Phelps Order, which was upheld on judicial review.

> (See *Phelps et al. v. SWRCB* (Super. Ct. Sacramento County, 2006, No. 04CS00368); *Phelps v. SWRCB* (2007) 157 Cal.App.4th 89.) Because a riparian water right cannot attach through groundwater, this evidence is not relevant to the proceeding, and the motion to strike is granted on that ground.

(July 19, 2010 Hearing Officer's Ruling on the evidentiary objections and motions raised concerning the submission of exhibits by Woods Irrigation Company, and Modesto Irrigation District, at 3.) Since the State Board determined that the issue of the "Delta Pool" was irrelevant, and permitted no evidence to be submitted in support of this theory, the State Board should find that the Dunkels are not riparian to Middle River or any other watercourse based upon the "Delta Pool" theory.

IV. CONCLUSION

The Dunkels argue that the 1911 Agreements are evidence of the intent of the Dunkels' predecessor to maintain the riparian nature of the property at the time of severance in 1911. Yet, a detailed review of the provisions of the 1911 Agreements shows that the documents are replete with conditions, limitations and descriptions that are not synonymous with riparian rights. No landowner, intending to draft a document for the purpose of demonstrating to the world for time immemorial that he intended to maintain the riparian characteristic of his land, would ever have included the conditions, limitations and descriptions that are contained in the 1911 Agreements. The restrictions on the purpose of use, time of use, method of use, combined with the requirement to pay for the water itself, the acceptance of a fixed quantity of water based upon acreage, the restriction on conveyance, and the limitation on distribution in times of shortage are so contrary to the nature, value and purpose of riparian rights as to be evidence that the 1911 Agreements were not intended to be a vehicle by which the landowners retained their riparian rights at the time of severance.

Moreover, the post-1911 actions of WIC and the original parties to the 1911 Agreements of letting parties in and out of the 1911 Agreements themselves, without addressing the riparian rights of the released parties, the newly added parties, or those already parties, further refutes the notion that the 1911 Agreements were drafted for the express purpose of memorializing an intention to maintain riparian rights at the time of severance.

///

For these reasons, the State Water Board should draw the following conclusions:

1. The Dunkels' parcel does not have a riparian right to Middle River.
2. The Dunkels' parcel does not have a riparian right to the Northeast Slough.
3. The Dunkels do not have a pre-1914 appropriative water right.
4. The Dunkels' parcel is not riparian to the "Delta Pool."

V. PROPOSED FINDINGS AND ORDER

The evidence presented at the hearing supports the following findings of fact, upon which an order should be based: (1) the Dunkels' parcel 162-090-01 is not contiguous to Middle River; (2) the Dunkels' parcel was severed from Middle River on November 29, 1911 and the deed did not reserve riparian rights; (3) the 1911 Agreements do not support a finding that riparian rights were reserved at the time of severance; (4) the Northeast Slough was dammed in 1875 and no natural flow has been in it since; and (5) the Dunkels have not submitted any evidence supporting a pre-1914 appropriative water right to Middle River. Based on these findings, the order should read as follows:

IT IS HEREBY ORDERED THAT:

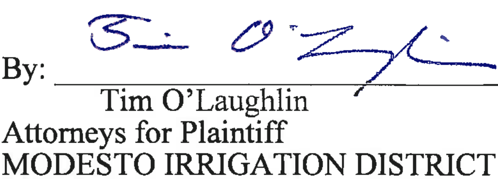
1. Without producing further evidence, the Dunkels must cease and desist diverting water pursuant to any claim that they have either a riparian water right or a pre-1914 appropriative water right.

2. The Dunkels may divert water consistent with any right they may acquire.

3. The Dunkels may receive water from WIC pursuant to any valid right held by WIC.

Dated: September 13, 2010

O'LAUGHLIN & PARIS LLP

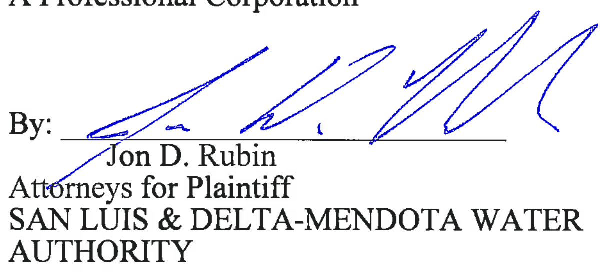
By: 

Tim O'Laughlin
Attorneys for Plaintiff
MODESTO IRRIGATION DISTRICT

(signatures continue)

Dated: September 13, 2010

DIEPENBROCK HARRISON
A Professional Corporation



By: ______________________
Jon D. Rubin
Attorneys for Plaintiff
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

Dated: September 13, 2010

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
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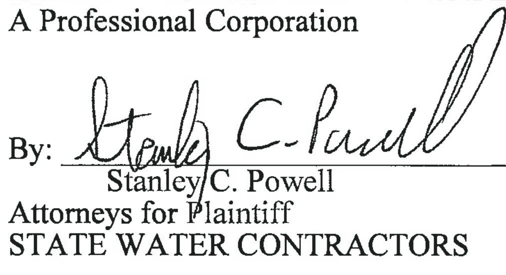

By: ______________________
Stanley C. Powell
Attorneys for Plaintiff
STATE WATER CONTRACTORS

1 **PROOF OF SERVICE**

2 I, Jolanthe V. Onishi, declare as follows:

3 I am over 18 years of age and not a party to the within action; my business address is 400
4 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

5 On September 13, 2010, I served a copy of the foregoing document entitled: **CLOSING**
6 **BRIEF** on the following interested parties in the above-referenced case number to the following:

7 See attached Service List

8 [X] **BY MAIL**
9 By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United States Postal Service where it would be deposited for
10 first class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business as indicated above.
11

[X] **ELECTRONIC MAIL**
12 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Diepenbrock Harrison, originating from the undersigned at 400 Capitol
13 Mall, Suite 1800, Sacramento, California, to the e-mail address(es) indicated above."

14
[ ] **BY FACSIMILE** at ________a.m./p.m. to the fax number(s) listed above.
15 The facsimile machine I used complied with California Rules of Court, rule 2003 and no error was reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I caused the
16 machine to print a transmission record of the transmission, a copy of which is attached to this declaration.
17 [ ] A true and correct copy was also forwarded by regular U.S. Mail by following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United
18 States Postal Service where it would be deposited for first-class delivery, postage fully prepaid, in the United States Postal Service that same day in the ordinary course of business.
19

[ ] **BY OVERNIGHT DELIVERY**
20 [ ] Federal Express [ ] Golden State Overnight
21 Depositing copies of the above documents in a box or other facility regularly maintained by Federal Express, or Golden State Overnight, in an envelope or package designated by Federal
22 Express or Golden State Overnight with delivery fees paid or provided for.

23 [ ] **PERSONAL SERVICE** [ ] via process server [ ] via hand by

24

25 I certify under penalty of perjury under the laws of the State of California that the foregoing
26 is true and correct and that this declaration was executed on September 13, 2010at Sacramento,
27 California.

28 Jolanthe V. Onishi

SERVICE LIST
(VIA ELECTRONIC MAIL)

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