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September 13, 2010

VIA EMAIL & HAND DELIVERY

Mr. Ernie Mona  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000

Re: Mark and Valla Dunkel CDO Hearing

Dear Mr. Mona:

On behalf of San Joaquin County and the San Joaquin County Flood Control and Water Conservation District, enclosed please find five copies of the following documents:

- Closing Brief in the matter of Mark and Valla Dunkel CDO hearing.
- Proof of Service.

If you have any questions please don't hesitate to contact me.

Very truly yours,

  
DeeAnne M. Gillick  
Attorney at Law

DMG/ect  
Enclosures

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5 Attorneys for County of San Joaquin and  
6 San Joaquin County Flood Control and Water  
Conservation District

7  
8 BEFORE THE CALIFORNIA  
9 STATE WATER RESOURCES CONTROL BOARD

10 Public Hearings to Determine Whether to Adopt)  
11 Cease and Desist Orders against: )  
12 Mark and Valla Dunkel, Middle River in San )  
13 Joaquin County )

**CLOSING BRIEF OF COUNTY OF SAN  
JOAQUIN AND SAN JOAQUIN COUNTY  
FLOOD CONTROL AND WATER  
CONSERVATION DISTRICT**

14  
15 **I. INTRODUCTION**

16 The County of San Joaquin and the San Joaquin County Flood Control and Water  
17 Conservation District (hereinafter collectively "County") hereby submit the Closing Brief in the  
18 above referenced matter before the State Water Resources Control Board ("Board"). The County  
19 submits that the Board does not have the authority to consider a cease and desist order ("CDO")  
20 against Dunkel who claims riparian and pre-1914 water rights. Additionally, substantial evidence  
21 was presented that supports Dunkel's valid riparian and pre-1914 water rights. The Board has no  
22 authority to issue a cease and desist order regarding these riparian and pre-1914 water rights.

23 **II. ARGUMENT**

24 **A. STATE WATER BOARD DOES NOT HAVE AUTHORITY TO ISSUE CEASE AND  
25 DESIST ORDERS AGAINST CLAIMED PRE-1914 AND RIPARIAN WATER RIGHTS.**

26 The pending cease and desist hearing by the Board is entirely improper to determine the  
27 nature, extent and validity of the pre-1914 or riparian water right held by Dunkel. The draft CDO is  
28 issued pursuant to *Water Code* sections 1831 and 1052. (See Exhibit PT-7, p.1.) These sections do

1 not grant the Board the authority to issue a cease and desist order against claimed pre-1914 and  
2 riparian water rights. The Board's authority to issue cease and desist orders is limited to that  
3 authority given to the Board by statute and does not include the authority for the Board to make  
4 determinations regarding the validity of riparian or pre-1914 water rights. It's jurisdictional. The  
5 Board simply does not have any jurisdiction or authority to determine pre-1914 and riparian water  
6 rights. Specifically, the Board's power pursuant to cease and desist orders authorized by *Water*  
7 *Code* 1831 and 1052 clearly does not extend to pre-1914 or riparian water rights—the Board's  
8 jurisdiction is limited to statutory, post-1914, appropriations. If the Board can determine whether or  
9 not these parties' riparian or pre-1914 water rights exist in this cease and desist proceeding, then the  
10 Board is determining the validity and nature of these riparian and pre-1914 water rights, which is  
11 outside of the Board's statutory authority and jurisdiction.

12 **1. The Board has recognized its limited jurisdiction over pre-1914 and riparian**  
13 **water rights.**

14 The Board's own literature states that the Board “does not have the authority to determine the  
15 validity of vested rights other than appropriative rights initiated December 19, 1914 or later.” Exhibit  
16 A to County's Motion for Official Notice at p.7-8. Also see Exhibit B to County's Motion for  
17 Official Notice at p. 8. and *Natural Res. Def. Council v. Kempthorne* (2009) 621 F. Supp.2d 954,  
18 963.

19 Numerous Board water rights decisions and orders indicate that the Board has no jurisdiction  
20 to validate riparian rights or pre-1914 appropriative rights -- such determinations are within the sole  
21 purview of a court of law. (See e.g., SWRCB Decisions D-1379, at p. 8; D-934, at p. 3; D-1282, at  
22 p. 7; D-1290, at p. 32; and D-1324 at p. 3.)

23 **2. The Board's Authority to Issue Cease and Desist Orders Is Limited to Specific**  
24 **Statutory Situations Not Present in the Current Proceeding.**

25 The Board does not have blanket authority to issue a cease and desist order for merely any  
26 matter in which the Board may otherwise be involved. The Board's authority to issue cease and  
27 desist orders is limited to the specific situations authorized and enumerated in *Water Code* section  
28 1831. This does not include determining the validity or extent of riparian or pre-1914 water rights.

1 Subsection (e) of *Water Code* section 1831 specifically provides that “This article shall not  
2 authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to  
3 regulation of the board under this part.” Pursuant to subsection (e) of section 1831 enforcement by  
4 the Board in the form of cease and desist orders is specifically restricted to the diversion and use of  
5 water regulated as specified in Part 2 of Division 2 of the Water Code regarding post-1914 statutory  
6 appropriations. There is no statutory authority vested in the Board to issue cease and desist orders  
7 with respect to riparian or pre-1914 water pursuant to Part 2 of Division 2 and therefore the Board  
8 lacks the authority to do so as a matter of law. The issuance of the draft CDO exceeds the Board's  
9 jurisdiction.

10 In response to the writ of prohibition filed in Sacramento Superior Court by Dunkel, the  
11 Attorney General argued on behalf of the Board that in 2002 the authority of the Board was  
12 expanded thus any prior Board Decisions “disclaiming” authority over riparian and pre-1914 water  
13 rights are not relevant. See p. 13, Fn. 7. of SWRCB Opposition to Petition for Writ of Prohibition.  
14 However, the 2002 legislation, AB 2261 (2001-2002 Reg. Sess.) clearly indicates that those 2002  
15 legislative changes did not expand the powers of the Board. The purpose of subsection (e) enacted  
16 in 2002 was to make that clear. Subsection (e) was added on the Senate Floor on August 12, 2002  
17 and that was the only amendment made to the bill on that date. See Exhibit C to County’s Motion  
18 for Official Notice. The Senate Rules Committee Bill Analyses dated August 19, 2002, clearly  
19 states that the 2002 amendments to the cease and desist order procedures do not expand the powers  
20 of the Board stating:

21 Senate Floor Amendments of 8/12/02 clarify that by streamlining the  
22 administrative process for issuing cease and desist orders the bill does not also  
23 expand the powers of the SWRCB.

24 Exhibit D to County’s Motion for Official Notice.

25 The Board’s powers prior to 2002 did not include the ability to determine riparian or pre-  
26 1914 water rights and the Board did not then gain such powers over such riparian and pre-1914  
27 water rights. In the pending proceeding the Board alleges its authority to issue a cease and desist  
28 order is based upon a violation of section 1052. Section 1052 was not amended by AB 2261 in

1 2002. See Exhibit E to County's Motion for Official Notice. In 2002, the Board's authority to  
2 regulate was specifically not expanded. As will be discussed below, in cease and desist proceedings  
3 the Board lacks authority over riparian and pre-1914 water rights, except in limited situations not at  
4 issue in the pending proceeding. Making any determinations regarding the existence or validity of  
5 pre-1914 and riparian water rights in this proceeding is beyond the Board's authority and not proper.

6 **3. Riparian and Pre-1914 Water Rights Are Not Subject to Division 2 of the Water**  
7 **Code Referenced in Section 1052 for Issuance of a Cease and Desist Order**  
8 **Pursuant to Section 1831.**

9 The draft CDO specifies that it is issued pursuant to section 1831 due to a prohibition set  
10 forth in section 1052. Exhibit PT-7 at p. 1. Subsection (d)(1) of section 1831 provides that the  
11 Board may issue a cease and desist order for a violation or threatened violation of "[t]he prohibition  
12 set forth in Section 1052 against the unauthorized diversion or use of water subject to this division."  
13 Subsection (a) of Section 1052 provides that "The diversion or use of water subject to this division  
14 other than as authorized in this division is a trespass." Division 2 of the *Water Code* includes  
15 sections 1000 through section 5976 and riparian and pre-1914 rights are not regulated by the Board  
16 by any provision in sections 1000 through 5976. Therefore, there can be no "trespass" by riparian  
17 and pre-1914 water right holders and thus no grounds for the Board to issue the pending CDO.

18 In order for the Board to have authority to issue a cease and desist order, there must be a  
19 violation of something that is subject to regulation by the Board, as authorized by sections 1000  
20 through 5976. The diversion of water by Dunkel who claims a diversion of riparian and pre-1914  
21 water rights is not subject to regulation pursuant to these sections within Division 2. Therefore, the  
22 use and diversion of water under a claim of riparian and/or pre-1914 water rights cannot be the  
23 subject of a cease and desist order issued pursuant to section 1831 due to an alleged violation of  
24 section 1052. Such action by the Board is in excess of its authority and jurisdiction.

25 **a. The Board Itself States Riparian and Pre-1914 Water Rights Are Not**  
26 **Subject to Division 2's Statutory Appropriation Procedures.**

27 The Board itself has stated that riparian and appropriative rights perfected prior to December  
28 19, 1914 do not have to comply with the statutory appropriation procedures set forth in Division 2 of  
the Water Code. See Water Rights Order, WR 2001-22, at page 14.

1  
2                   **b.       *Shirokow* Confirms That Division 2’s Statutory Appropriation  
3                   Procedures Do Not Apply to Riparian and Pre-1914 Water Rights.**

4                   In *People v. Shirokow* (1980) 26 Cal.3d 301 the California Supreme Court specifically  
5 addressed the circumstances under which the Board could obtain an injunction pursuant to *Water*  
6 *Code* section 1052. In so doing, *Shirokow* evaluated the language of section 1052 and what types of  
7 water diversions or use are subject to regulation by section 1052 as specified in Division 2. The  
8 Court concluded that the application of Division 2 of the Water Code is as follows:

9                   *The rights not subject to the statutory appropriation procedures* are narrowly  
10 circumscribed by the exception clause of the statute and *include only riparian rights*  
11 *and those which have been otherwise appropriated prior to December 19, 1914*, the  
12 effective date of the statute. [Fn. omitted.] Any use other than those excepted is, in  
13 our view, conditioned upon compliance with the appropriation procedures of division  
14 2.

15 (*Ibid.*, emphasis added; see also *Modesto Properties Co. v. State Water Rights Bd.* (1960) 179  
16 Cal.App.2d 856, 860 [appropriation includes any taking of water for other than riparian or overlying  
17 uses]; *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925 [term “appropriation” means  
18 any taking of water for other than riparian or overlying uses].) *Shirokow* clearly indicates that  
19 riparian and pre-1914 water rights are not subject to compliance with the statutory appropriation  
20 procedures in Division 2 of the Water Code; thus they cannot be subject to a cease and desist order  
21 by the Board.

22                   **c.       Dunkel Claims Riparian and Pre-1914 Water Rights Which Are Not Subject to  
23                   Division 2 of the Water Code and Which Are Not Subject to the Board’s  
24                   Authority to Issue Cease and Desist Orders.**

25                   Dunkel claims riparian and pre-1914 water rights. (See Dunkel Exhibit 2, Dunkel Exhibit 3,  
26 Para. 1, 3. Dunkel Exhibit 9, p.6, 7.) The Prosecution Team was presented with evidence prior to the  
27 hearing in which the parties asserted these riparian and pre-1914 water rights. (See PT-1 at p. 3.)  
28 The parties submitted evidence at the hearings of their claimed riparian and pre-1914 water rights.  
(Dunkel Exhibit 2, Dunkel Exhibit 3, Dunkel Exhibit 9, p. 6, 7.) The Board lacks the authority to  
make a factual determination of the existence or non-existence of these rights as a matter of law.  
Such determinations are outside of the authority of section 1052 and are thus not proper bases for  
cease and desist orders issued pursuant to section 1831. Such a determination of the extent, nature

1 and validity of claimed riparian and pre-1914 water rights must be determined by a court of law.  
2 The Board is exceeding its authority by pursuing the pending cease and desist order against Dunkel  
3 who claims and has provided evidence of riparian and pre-1914 water rights.

4 **C. THE BOARD DOES HAVE SOME AUTHORITY WITHIN DIVISION 2 TO**  
5 **DETERMINE RIPARIAN AND PRE-1914 WATER RIGHTS WHICH IS LIMITED**  
6 **TO SPECIFIC CIRCUMSTANCES NOT AT TISSUE AND REMEDIES NOT**  
7 **INVOLVING CEASE AND DESIST ORDERS.**

8 **1. In Determining Whether Surplus Water Is Available for Appropriation and in**  
9 **Issuing Appropriative Permits, the Board Does Not Affect Riparian or Pre-1914**  
10 **Water Rights.**

11 The Board does indeed make some determinations related to riparian and pre-1914 water  
12 rights; however, these determinations are limited to particular administrative processes and do not  
13 affect riparian and pre-1914 water right holders actual rights to water. (*United States v. State Water*  
14 *Resources Control Board* (1986) 182 Cal.App.3d 82 [*Racanelli*].) The Board plays only a “limited  
15 role” in “enforcing rights of water rights holders, a task mainly left to the courts.” (*Id.*, p. 102.)  
16 *Racanelli* explains the Board's role in determining the surplus water supply available for  
17 appropriation, and the limitations on the Board's authority over riparian and senior appropriators as  
18 follows:

19 Section 1375 declares the basic principle that: “As a prerequisite to the  
20 issuance of a permit to appropriate water ... [t]here must be unappropriated water  
21 available to supply the applicant.” (Subd. (d).) Accordingly, in reviewing the  
22 permit application, the Board must first determine whether surplus water is  
23 available, a decision requiring an examination of prior riparian and appropriative  
24 rights. (*Temescal Water Co. v. Dept. Public Works* (1955) 44 Cal.2d 90.) In  
25 exercising its permit power, the Board's first concern is recognition and protection  
26 of prior rights to beneficial use of the water stream. (*Meridian, Ltd. v. San*  
27 *Francisco* [1939] 13 Cal.2d 424, 450.) Yet, the Board's estimate of available  
28 surplus water is in no way an adjudication of the rights of other water right  
holders (*Temescal [supra]*, at p. 103); the **rights of the riparians and senior**  
**appropriators remain unaffected by the issuance of an appropriation permit.**  
(*Duckworth v. Watsonville Water etc. Co.* (1915) 170 Cal. 425, 431.)

(*Id.*, p. 102-103, emphasis added.) The Court recognizes that the Board may consider riparian and  
senior appropriative rights in making a determination of available, unappropriated water, but that  
such a determination does not in any way alter these pre-existing water rights.

The Board does have some authority to evaluate pre-1914 water rights during a water right  
permit process but “the Board’s role in examining existing water rights to estimate the amount of  
surplus water available for appropriation does *not* involve adjudication of such rights” and the

1 “rights of riparian’s and senior appropriators remain unaffected by the issuance of an appropriative  
2 permit.” *Id.*, p. 102-103, 104. Thus, in a water right permit proceeding the Board might necessarily  
3 make conclusions regarding pre-1914 or riparian water rights, but in no way is such an  
4 “adjudication” or “determination” of those water rights nor is such a determination for purposes of  
5 enforcement subject to a cease and desist order.

6 *Racanelli* indicates that the Board has only a limited role with respect to disputes and the  
7 enforcement of water rights, and that such matters are properly resolved by *judicial* action:

8 Yet notwithstanding its power to protect the public interest, **the Board plays**  
9 **a limited role in resolving disputes and enforcing rights of water rights holders, a**  
10 **task mainly left to the courts.** Because water rights possess indicia of property  
11 e.g., actions for quiet title, nuisance, wrongful diversion or inverse condemnation.  
12 [Citations.] **It bears reemphasis that the Board's role in examining existing water**  
13 **rights to estimate the amount of surplus water available for appropriation does**  
14 **not involve adjudication of such rights.** [Citations.]

15 (*Id.*, p. 104, bold emphasis added, italics in original.) *Racanelli* unequivocally recognizes that it is  
16 the courts, not the Board, which has the authority to resolve water rights disputes and enforce the  
17 rights of water right holders regarding riparian and/or pre-1914 water rights. The opinion recognizes  
18 that riparian and pre-1914 water rights possess “indicia of property rights” that must be afforded  
19 judicial protection. This differs from a statutory appropriation of water, which is based on a permit,  
20 which is granted, administered and reviewed by the Board. No such authority of the Board exists for  
21 riparian and pre-1914 water rights, which are not based on a permit from the Board.

22 The Board's past decisions regarding water rights reflect its understanding and  
23 acknowledgment of the Board's limitation against determining the existence of riparian water rights.  
24 See SWRCB Decision 1282, p. 6; SWRCB Water Rights Order, WR 65-25. In issuing new  
25 appropriative rights, Decision 1282 stated quite clearly that the Board's practice was to not  
26 adjudicate any existing claimed riparian, or pre-1914, water rights: “The Board has no power to  
27 adjudicate this or any other claimed riparian right.” SWRCB Decision 1282, p. 7. The Board  
28 acknowledged it lacked the authority to determine such rights and properly indicated that such  
determination is dependent on a “judicial determination.”



1 In the present matter, the Board is now attempting to adjudicate the validity of riparian and  
2 pre-1914 water rights. This is a determination that the Board expressly declined to make in Decision  
3 1282 due to its lack of power to do so, even in the context of new appropriative water rights which  
4 are squarely within the Board's jurisdiction. Just as the Board lacked the authority to determine or  
5 adjudicate riparian or pre-1914 rights in Decision 1282, it lacks the authority to do so now regarding  
6 Dunkel in this cease and desist order proceeding.

7 **2. This Cease and Desist Proceeding is Not a Statutory Adjudication and Any**  
8 **Determination Regarding Riparian and Pre-1914 Water Rights is Not Proper.**

9 The Board may act upon a petition for a “statutory adjudication” of any stream system or act  
10 as a referee or investigate matters referred to it by a court of competent jurisdiction ( §§ 2000, 2075,  
11 2500), which may involve examination of riparian and pre-1914 rights as part of the process.  
12 Footnote 3 in *Racanelli*, which follows the statement: “It bears reemphasis that the Board's role in  
13 examining existing water rights to estimate the amount of surplus water available for appropriation  
14 does *not* involve adjudication of such rights” acknowledges that even in statutory adjudications the  
15 Board's role is limited and the Board does not determine or adjudicate water rights. Footnote 3 reads  
16 as follows:

17 In two instances the Board performs a limited adjunct function in the  
18 process of adjudication of water rights: One, as a special master or referee upon  
19 reference from the court ( ' 2000 et seq.), a function advisory in nature [citations];  
20 another, as a hearing body to conduct a “statutory adjudication,” upon petition of  
21 any water rights holder, determining all the water rights in a “stream system”  
22 (§ 2500 et seq.; [citation]). The statutory hearing is contingent upon the Board's  
23 finding that the public interest will be served by such determination. (§ 2525.) But  
24 again, the Board's determination is tentative in nature and must be filed in the  
25 superior court for hearing and final adjudication. (§§ 2750, 2768, 2769; [citation];  
26 see *In re Waters of Soquel Creek Stream System* (1978) 79 Cal.App.3d 682 [],  
27 disapproved on other grounds in *In re Waters of Long Valley Creek Stream*  
28 *System, supra*, 25 Cal.3d 339 [] [trial court properly rejected and remanded  
Board's determination of water rights]; [citation].]

24 (*United States v. State Water Res. Control Bd., supra*, 182 Cal. App. 3d 82, 152.)

25 There are numerous California cases related to the adjudication of water rights which  
26 reference the Board's authority over riparian and pre-1914 water rights in the context of a statutory  
27 adjudication. This line of cases cannot be interpreted to extend to the Board any authority over  
28 riparian and pre-1914 water rights outside of an adjudicatory proceeding.

1           Where the Board lacks the authority to determine or affect riparian water rights and prior  
2 appropriative rights, including pre-1914 rights, when the Board is called upon to determine the  
3 availability of surplus water for purposes of issuing new appropriative rights, and when in a statutory  
4 adjudication the Board's determinations are merely *recommendations* that must be approved by a  
5 court, then it is evident that the Board cannot make such water rights determinations generally, such  
6 as in the present matter. The Board's attempt to do so against Dunkel in the form of a cease and  
7 desist order is outside the scope of the Board's authority, and as such, contrary to law.

8           **3.       The Board Has Power to Investigate, but this Does Not Confer Authority to  
9           Issue CDOs.**

10           Section 1051 provides the Board with investigative powers, but this does not authorize the  
11 issuance of the pending CDO. Such investigation can include taking testimony, and the Board may  
12 "ascertain whether or not" the water is "appropriated under the laws of the State." However, there is  
13 no authority granted for the Board to issue any enforcement orders such as the pending CDO.

14           **4.       The CDOs Do Not Involve a Violation or Threatened Violation of a Prior Board  
15           Order Which Might Authorize the Issuance of a Cease and Desist Order  
16           Pursuant to Section 1831.**

17           Subsection (3) of subsection (d) of section 1831 provides that the Board may issue a cease  
18 and desist order for a violation or threatened violation of "[a]ny decision or order of the board issued  
19 under this part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division  
20 7 [regarding use of potable water in certain circumstances], in which decision or order the person to  
21 whom the cease and desist order will be issued, or a predecessor in interest to that person, was  
22 named as a party directly affected by the decision or order." Thus, a cease and desist order may be  
23 issued for a violation of a previously issued Board order. No former Board order exists against  
24 Dunkel; therefore, subsection (3) of subsection (d) of section 1831 does not apply. In addition the  
25 pending CDO does not allege that Dunkel engaged in any "waste, unreasonable use, unreasonable  
26 method of use, or unreasonable method of diversion of water" that would come under the purview of  
27 section 275. Exhibits PT-7. No such allegations occurred during the hearing. The CDO against  
28 Dunkel cannot be based upon any authority of the Board derived from sections 1831(d) (3) or 275.

1 **B. SUBSTANTIAL EVIDENCE SUPPORTS DUNKEL’S RIPARIAN AND PRE-1914**  
2 **WATER RIGHTS.**

3 Dunkel claims riparian and pre-1914 water rights. (See Dunkel Exhibit 2, Dunkel Exhibit 3,  
4 Para. 1, 3. Dunkel Exhibit 9, p. 6, 7.) Substantial evidence supports these riparian and pre-1914  
5 water rights. The Dunkel Property benefits from the 1911 Agreement with the Woods Irrigation  
6 Company (“WIC”) to furnish water to the Dunkel property. (Exhibit MSS 1K and 1L.) The  
7 November 29, 1911 deed which separates the Dunkel property from a direct surface connection to  
8 Middle River specifically makes the deed subject to the September 29, 1911 agreements for canals  
9 (MSS 1K) and contract to furnish water (MSS 1L) by the WIC. Dunkel Exhibit 3 and 3G. In  
10 addition, the property is located along a natural slough which existed in 1911. (Dunkel Exhibit 3, p.  
11 5-8.) The Dunkel property continues to be served water by deliveries from the WIC pursuant to the  
12 1911 recorded agreement. Dunkel Exhibit 1. This evidence supports a valid riparian and pre-1914  
13 right.  
14

15 The Prosecution Team acknowledged that the Dunkel property receives water from the WIC  
16 which claims a pre-1914 water right. (Exhibit PT-1, p.3.) The Prosecution Team recognizes that  
17 WIC has a valid pre-1914 water right up to 77.7 cfs (see Woods CDO Exhibit PT-1, p. 4.) Based on  
18 this recognized right there is no factual basis to support any unauthorized or threatened unauthorized  
19 diversion by Dunkel. This proceeding is entirely without merit and frivolous.  
20

21 **III. CONCLUSION**

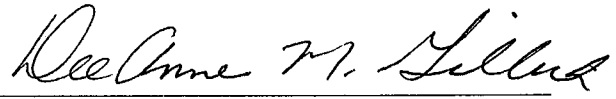
22 Dunkel claims riparian and pre-1914 water rights. This was asserted prior to the hearing, and  
23 substantial evidence was presented during the hearing to support the existence of those rights. The  
24 Board is precluded from making any determinations regarding the validity, nature or extent of those  
25 rights within the instant cease and desist proceedings. The Board has not been granted authority by  
26 the Legislature to determine the validity, nature or extent of the alleged riparian and pre-1914 water  
27 rights, and therefore, the Board cannot, as a matter of law, make such determinations.  
28

1           “Because water rights possess indicia of property rights, water rights holders are entitled to  
2 judicial protection against infringement, e.g., actions for quiet title, nuisance, wrongful diversion or  
3 inverse condemnation.” (*United States v. State Water Res. Control Bd.*, *supra*, 182 Cal. App. 3d 82,  
4 104.) Any dispute regarding Dunkel’s water rights and the use and enjoyment of these claimed  
5 property rights - that is, their riparian and/or pre-1914 water rights - must be determined in a court of  
6 law, not by the Board. Any issuance of a cease and desist order to Dunkel by the Board is a  
7 violation of the Board’s statutory authority and the due process and property rights of Dunkel.

8           In the event the Board evaluates the validity of Dunkel’s riparian and pre-1914 water rights,  
9 the County submits that substantial evidence exists to establish their valid water rights and a cease  
10 and desist order shall not be issued by the Board.

11 Dated: September 13, 2010

NEUMILLER & BEARDSLEE  
A PROFESSIONAL CORPORATION

12  
13 By: 

DEEANNE M. GILLICK  
Attorneys for  
County of San Joaquin and  
San Joaquin County Flood Control and  
Water Conservation District

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**PROOF OF SERVICE**  
**CCP 1013a**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 509 W. Weber Avenue, Stockton, California 95203. On September 13, 2010, I served the within documents:

**CLOSING BRIEF OF COUNTY OF SAN JOAQUIN AND SAN JOAQUIN COUNTY  
FLOOD CONTROL AND WATER CONSERVATION DISTRICT**

- (BY U.S. MAIL)** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.
- (BY PERSONAL SERVICE)** I delivered such envelope by hand to the address(es) shown below.
- (BY ELECTRONIC MAIL)** I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Neumiller & Beardslee, originating from the undersigned at 509 W. Weber Avenue, 5th Floor, Stockton, California, to the email address(es) indicated in the attached Service List of Participants.
- (BY OVERNIGHT DELIVERY)** I enclosed the documents in an envelope or package designated by an overnight delivery carrier and addressed to the persons at the addresses stated below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier, or with a courier or driver authorized by the overnight delivery carrier to receive documents.

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

Executed this 13th day of September 2010, at Stockton, California.

  
\_\_\_\_\_  
ELVIA C. TRUJILLO

**SERVICE LIST  
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