Tim O'Laughlin (SBN116807)
William C. Paris, III (SBN 168712)
O'Laughlin & Paris LLP
870 Manzanita Court, Suite B
Chico, California 95926
Telephone: 530/899-9755
Facsimile: 530/899-1367

Attorneys for Respondents-in-Intervention
SAN JOAQUIN RIVER GROUP AUTHORITY, et al.

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

HEARING TO DETERMINE WHETHER TO IMPOSE ADMINISTRATIVE CIVIL LIABILITY AGAINST LLOYD L. PHELPS, JR., JOEY P. RATTO, JR., AND RONALD D. CONN AND SILVA, ETAL.

Closing Brief of Participants San Joaquin River Group Authority, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

California Statutes & Regulations

Other

I. INTRODUCTION

The San Joaquin River Group Authority ("SJRGA") participated in this hearing for the purpose of exploring whether or not Lloyd Phelps, Jr., Joey P. Ratto, Jr., Ronald D. Conn and/or Ron Silva (collectively "Respondents") could demonstrate that they had riparian or pre-1914 appropriative water rights. It is clear that none of the oral testimony or written evidence submitted on behalf of the Respondents is sufficiently credible or specific to enable the State Water Resources Control Board ("SWRCB") to conclude that any of the Respondents' land on Upper Roberts Island is benefited by either riparian or pre-1914 appropriative rights. While it is possible that Respondents' land is so benefited, and that evidence substantiating such rights may come to light in the future, insufficient evidence was submitted during the hearing to support a finding of such rights.

While the SJRGA has no view on whether or not the Respondents were diverting during times when Term 91 was in effect, or whether the proposed penalties are appropriate, the SJRGA believes that the Respondents have failed to demonstrate that they have either riparian or pre-1914 water rights.

II. FACTS

Lloyd Phelps, Jr., Joey P. Ratto, Jr., Ronald D. Conn and Ron Silva are the owners of appropriative licenses, issued by the SWRCB, to divert water for the purpose of irrigating their properties on Upper Roberts Island. (Notice of Postponement of Public Hearing and Re-Notice of Public Hearing, December 13, 2002, p. 2). On July 2, 2002, the Chief of the Division of Water Rights issued Administrative Civil Liability complaints against Mr. Phelps, Mr. Ratto, Mr. Conn and Mr. Silva. (Id.). The complaints alleged that each diverted water in accordance with their licenses during periods when they had been notified not to divert. (Id.).

Each of the Respondents claimed that they were diverting water not in accordance with their licenses, but instead pursuant to an alternative water right, such as a riparian or pre-1914 appropriative right. (Id.). The Division of Water Rights asked the Respondents to provide evidence substantiating the claimed alternative water rights. South Delta Water Agency ("SDWA"), on behalf of all Respondents, submitted a written response, but the Division of Water Rights

concluded that the evidence submitted was insufficient to establish that Respondents had either a riparian or pre-1914 water right. (Id., p. 2-3). Thereafter, Respondents requested a hearing before the SWRCB. (Id.).

Prior to the hearing, the SWRCB identified the key issues to be addressed. For each of the Respondents, the hearing was to determine if (1) water was diverted during the period that Term 91 was in effect, (2) any of the Respondents had an alternative water right that enabled them to divert during the time that Term 91 was in effect, and (3) the penalty suggested in the complaints was appropriate. (Id., p. 3). The hearing took place on February 25 and February 26, 2003.

III. ARGUMENT

A. Respondents Failed to Provide Sufficient Evidence In Support of Alleged Riparian Right for Any of the Subject Properties.

1. It is Undisputed That None of the Subject Properties Are Contiguous to a Watercourse.

Riparian rights confer upon an owner of certain property the right to reasonably and beneficially use water on his property. (Lux v. Haggin (1886) 69 Cal. 255, 390-391; People v. Shirokow (1980) 26 Cal.3d 301, 307). This right of use is part and parcel of the land. (Lux, *supra*, 69 Cal. 255 at 391). As a general matter, in order to be considered riparian, a parcel of land must satisfy three criteria. First, the property must be contiguous to a watercourse. (Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 528). Second, it must be the smallest tract held under one chain of title. (Id. at 529). Thus, a portion of a riparian parcel that is severed, and then reunited under ownership with the original riparian parcel, will not regain riparian status. (Miller & Lux v. James (1919) 180 Cal. 38, 51-52; *see* Anaheim Union Water Co. v. Fuller (1907) 150 Cal. 327, 331)). Third, the property must be located within the watershed of the watercourse to which it is contiguous. (Rancho Santa Margarita, *supra*, 11 Cal.2d at 528-529).

There is no dispute that the Silva, Conn, Ratto and Phelps properties are not currently contiguous to either Middle River or the San Joaquin River. (Ex. WR 2-07, 2-08a, 2-08b; *see* RT[1] Vol. 2, p. 277, ln. 6-15). The undisputed evidence demonstrates that:

---

[1] RT refers to the two volume Record of Transcript taken during the hearing on February 25 and 26, 2003.

- the Silva property was severed from a larger parcel that abutted Middle River by deed dated December 28, 1911. (RT Vol. 1, p. 196, ln. 2-4; RT Vol. 1, p. 166, ln. 6-7; SDWA Ex. 3, p. 6; SDWA Ex. 3, Ex. M).

- the 120-acre L-shaped parcel of the Conn property was never contiguous to either Middle River or the San Joaquin River, and the 40-acre parcel was severed on April 26, 1887. (RT Vol. 1, p. 208, ln. 8-20; RT Vol. 2, p. 237, ln. 7-10; SDWA Ex. 3, p. 11; SJRGA Ex. 1, p. 3-4, Ex. 6, 13).

- the Ratto property was severed from Middle River by deed dated June 15, 1891. (RT Vol. 1, p. 166, ln. 20-22; RT Vol. 1, p. 210, ln. 23-25; RT Vol. 1, p. 211, ln. 1-3; SDWA Ex. 3, p. 7; SDWA Ex. 3, Ex. P, p. 3).

- the two eastern parcels of the Phelps property were never contiguous to either Middle River or the San Joaquin River. (RT Vol. 1, p. 215, ln. 9-15; RT Vol. 1, p. 217, ln. 5-13; SDWA Ex. 3, p. 11-12; SDWA Ex. 3, Ex. CC; SJRGA Ex. 1, p. 1-2, Ex. 10, 11). The western parcel of the Phelps property was severed in 1886 or 1887. (RT Vol. 1, p. 215-216).

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 Canal Co. v. Borror (1998) 61 Cal.App.4th 742, 780-781). Moreover, this rule is not new, but was well know to the landowners of the Delta during the time of its reclamation. (SJRGA Ex. 2, p. 301 ["Friction also developed over water distribution where subdividing resulted in separation of land from the river, and the attendant riparian water rights."]).[2] As a result, none of the properties at issue can be considered riparian under the traditional test, as they do not satisfy the requirement that a parcel must be contiguous to a watercourse to be considered riparian to that watercourse.

2. No Evidence Was Presented To Support a Finding that Any of the Deeds Expressly Retained Riparian Status of the Severed Parcels.

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 intention to maintain the riparian right on the non-contiguous parcel, the non-contiguous parcel can retain its riparian status despite the lack of contiguity to a watercourse. (Borror, *supra*, 61 Cal.App.4th at 780). In this case, although there is no dispute that the subject properties are no longer contiguous to any

[2] When asked if the document which contained this statement was valid, truthful and something to be relied upon, Mr. Neudeck answered "Absolutely." (RT Vol. 2, p. 235, ln. 8-18).

watercourse, Respondents argue that at the time each of the properties were severed from either Middle River or the San Joaquin River, there was an intent to maintain riparian status despite the severance. (RT Vol. 1, p. 127, ln. 12-16; RT Vol. 1, p. 150, ln. 20-24; RT Vol. 2, p. 275-276). However, no evidence was presented that shows that any such intention was contained within the instrument that resulted in the severance

None of the deeds or patents submitted by Respondents contained any indication that a riparian right was expressly reserved at the time of severance. (SDWA Ex. 3, Ex. M (Silva); SDWA Ex. 1, Ex. A (Conn), Ex. C (Ratto), Ex. D (Phelps)). Respondents' key witness, Mr. Neudeck, did not review any of the relevant deeds to determine whether or not the language of such deeds contained an express reservation of riparian rights at the time of severance. (RT Vol. 2, p. 236, ln. 9-16 ["I did not review {the deeds} from the standpoint of express language and reservations for riparian use."]; RT Vol. 2, p. 236-237, 241, 275-276). Finally, Respondents' counsel acknowledged that there was nothing in any of the relevant deeds that indicated that there was an express reservation of riparian rights at the time of severance. (RT Vol. 2, p. 277-278 ["The issue now is the evidence other than language in the deed because there is no language in the deed."]). As such, the exception to the general rule regarding physical severance of a property from a watercourse does not apply to any of the properties that were the subject of this proceeding.

3. No Evidence Was Presented That Demonstrated An Intent to Maintain Riparian Rights at the Time of Severance Based Upon Factors Outside of the Express Language of the Conveyance Causing the Severance.

Despite the fact that (1) the subject parcels are not contiguous to any watercourse and (2) there was no language in any of the deeds that resulted in the lack of contiguity expressly reserving riparian status to the non-contiguous parcels, Respondents argued that other factors demonstrated that at the time of severance, the parties intended to reserve riparian rights to the non-contiguous properties. This assertion is has no basis in law, and is not supported by the facts.

a. No Legal Basis for Looking At Factors Outside of the Relevant Deeds.

When construing a deed, the primary purpose is to determine the intent of the parties. (Civ. Code §§ 1636, 1066). Such intention must be ascertained from the writing alone, if possible, and

words cannot be added or subtracted to justify an intent that is not expressed. (Civ. Code § 1639; Safeco. Ins. Co. v. Robert S. (2001) 26 Cal.4th 758, 764). If the language of the deed is clear and unambiguous, the plain meaning of the language governs. (Civ. Code § 1638). A deed will only be considered ambiguous if its language is susceptible to more than one reasonable construction. (Palmer v. Truck Ins. Exchange (1999) 21 Cal.4th 1109, 1115).

Whether or not a deed is ambiguous is not solely determined by looking at the language. Extrinsic evidence may reveal a latent ambiguity. (Pacific Gas & Elec. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal.2d 33, 39-40). However, extrinsic evidence can only reveal a latent ambiguity if the language of the deed in question is reasonably susceptible to a meaning to which the extrinsic evidence is relevant. (Id. at 40-41).

The general rule regarding the decision to (1) admit extrinsic evidence to aid in the interpretation of a deed, and (2) use such extrinsic evidence in the interpretation of the deed, was set forth in Winet v. Price (1992) 4 Cal.App.4th 1159:

> "The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step-- interpreting the contract. [citation]." (Id. at 1165).

In this case, Respondents failed to make the case that the language of any of the deeds that resulted in a severance was susceptible to more than one reasonable interpretation. Such failure makes the consideration of the extrinsic evidence submitted by Respondents unnecessary and improper.

Although the relevant deeds to the subject properties have been submitted by Respondents (*See* SDWA Ex. 1, Ex. A-E), Respondents offered no argument or evidence indicating or suggesting that the language of the relevant deeds that resulted in severance were susceptible to more than one reasonable interpretation. To the contrary, the witnesses testifying for Respondents indicated that they had not really even read the relevant deeds, and if they had read them, were not prepared to discuss their content. For example, when discussing the testimony of Mr. Thurl

Pankey, who performed the title search on behalf of Respondents, counsel for Respondents stated "the only testimony Mr. Pankey is offering is his confirmation that he pulled those records and that they are accurate records." (RT Vol. 1, p. 134, ln. 12-14). During cross-examination, Mr. Pankey admitted that he was not offering any opinion or conclusion regarding whether or not any of the relevant deeds caused or resulted in a severance. (RT Vol. 1, p. 137, ln. 18-25). Similarly, as noted above, Mr. Neudeck testified that he did not review the language of any of the relevant deeds for any purpose related to the "express language." (RT Vol. 2, p. 236, ln. 9-16; RT Vol. 2, p. 236-237, 241, 275-276).

While Respondents submitted evidence in an effort to demonstrate that the relevant parties intended to maintain riparian rights at the time of severance, at no time did Respondents relate the evidence to the express language used in the relevant deed that resulted in severance. There was simply no effort by Respondents to show that the language of any of the relevant deeds was, as a result of the extrinsic evidence that they submitted, susceptible to more than one reasonable construction. Rather than follow the two-step process required by the relevant case law cited above, Respondents skipped the first step entirely - making the showing that the language of the relevant deeds was susceptible to more than one reasonable construction - and focused entirely on the second step - using extrinsic evidence in an effort to interpret the relevant deeds. This is improper.[3]

Under the two-step process established by the relevant case law, it was proper for the Board to "provisionally receive" the testimony and evidence submitted by Respondents that was extrinsic to the deeds that resulted in a severance. At this time, however, the Board should determine that the Respondents have failed to demonstrate that the language of the relevant deeds

[3] Respondents will likely rely heavily upon the case of Murphy Slough Assn. v. Avila (1972) 27 Cal.App.3d 649, in support of their attempt to use extrinsic evidence to interpret the various deeds that resulted in severance. That case is simply not relevant on the issue of whether or not the language of the deed in question is susceptible to more than one reasonable construction. In Avila, the appellate court accepted the decision of the trial court to consider extrinsic evidence to interpret the relevant deed. (Id. at 653). Having accepted the trial court's decision that the relevant language was susceptible to more than one reasonable construction, the appellate court focused exclusively on interpreting such language in light of the extrinsic evidence. (Id at 655-658). In other words, the only issue in the Avila case was the second step of the two-step process that must be followed concerning the used of evidence extrinsic to a deed.

is susceptible to more than one reasonable construction and therefore decide not to admit the extrinsic evidence submitted by Respondents.[4]

b. Even If Admitted, Extrinsic Evidence Not Sufficient to Demonstrate An Intention of the Parties to Maintain Riparian Rights at the Time of Severance.

As a general matter, Respondents argued that the intention to retain riparian rights at the time of severance is evidenced by the irrigated farming that allegedly took place on the properties thereafter.

> "Q. Is it your opinion that the intent of the parties, even though it is not stated in the deed documents was to retain the riparian status when the properties were, in fact, detached from the San Joaquin River?"
>
> "A. [Mr. Neudeck] Yes."
>
> "Q. That is based upon your understanding that there was an intent to farm these properties, is that correct?"
>
> A. [Mr. Neudeck] Absolutely." (RT Vol. 2, p. 275-276).

Despite the theory, Respondents failed to provide specific evidence of irrigated farming, or any other activity or circumstance, at the time of the severance, which suggested an intention to maintain a riparian right.

i. Silva Property

It is undisputed that the Silva property was severed by deed dated December 28, 1911. (RT Vol. 1, p. 196; SDWA Ex. 3, Ex. M). While the deed makes no reference to riparian rights, it is made subject to two pre-existing agreements with the Woods Irrigation Company, one for "canals, etc." and one to "furnish water." (SDWA Ex. 3, Ex. M). Although each of these agreements preceded the deed that severed the Silva property, neither can be construed as demonstrating an intention of the parties to maintain any riparian rights.

The contract for "canals, etc." expressly provides that the Woods Irrigation Company shall have the right, but not the obligation, to build, own, operate and maintain a canal for the purpose

---

[4] Intervenors objected to the admission of the testimony of Mr. Neudeck since Respondents failed to demonstrate that the language of any of the relevant deeds was susceptible to more than one reasonable interpretation. (RT Vol. 2, p. 336, ln. 6-19).

of irrigating certain lands. (SDWA Ex. 3, Ex. L, p. 1-2). Further, if the Woods Irrigation Company exercises the right it obtains by the contract, it will be the owner of the canals constructed, and will operate and maintain them, if at all, as it sees fit. (Id.).

The contract "to furnish water" expressly provides that Woods Irrigation Company will supply irrigation water to the Silva property, subject to certain conditions. First, the owners of the Silva property were required to pay $10.00 in gold coin, plus additional amounts of money at a later time. (Id., p. 4). Second, the amount of water to be delivered to the Silva property is limited to 32.86 cubic-feet per second ("cfs"). (Id.). Third, the contract expressly provides that its terms do not grant the owners of the Silva property any right, title or interest in any water that may be found in the Woods Irrigation Company's canal. (Id., p. 5 ["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..."]).

The provisions of these contracts, to which the deed severing the Silva property were specifically made subject, cannot be construed as supporting an intention to maintain riparian rights at the time of severance. The contract to furnish water specifically limits the amount of water to be furnished to 32.86 cfs. Such a fixed limitation is simply not synonymous with riparian rights, which have no fixed limits, but are limited only by (1) reasonable use and (2) the amount of water available. As was explained by the court in Borror, the holder of a riparian right

> "has no right to any mathematical or specific amount of the water of a stream as against other like owners. He has only a right in common with the owners to take a proportional share from the stream -- a correlative right that he shares reciprocally with the other riparian owners. No mathematical rule has been formulated to determine such a right, for what is a reasonable amount varies not only with the circumstances of each case but also varies year to year and season-to-season. [citation][¶] Consequently, 'the moment a right in a natural stream is specifically defined in a concrete and inflexible amount, at that moment the right becomes one of priority and not riparian.' [citation]." (Id. at 776).

Applying these rules in this case, it is clear that the establishment of a fixed amount of water to be delivered in the contract to furnish water cannot be construed as maintaining riparian rights, since

riparian rights are simply not subject to such fixed limitations. Had the parties truly intended the contract to furnish water to maintain the riparian rights of the Silva property, it would not have limited the amount of water available to a fixed amount.[5]

The fact that the documents represent contractual obligations only further demonstrate that the parties did not intend for the Silva property to retain its riparian rights at the time of severance. A contract is merely a document that evidences an agreement between two or more parties to perform, or refrain from performing, particular tasks. (*Black's Law Dictionary* (6th Ed 1990), p. 322). A contract is, therefore, by definition, not synonymous with riparian rights. A riparian right is part and parcel of land and its existence or exercise does not depend upon the agreement of another. (Lux, *supra*, 69 Cal. at 391). The contracts affecting the Silva property simply do not create a perpetual obligation upon the part of Woods Irrigation Company to deliver water to the Silva property in compliance with the riparian right associated with the Silva property. Rather, the owners of the Silva property will only receive water from the Woods Irrigation Company if they perform certain obligations, including the payment of money. (SDWA Ex. 3, Ex. L, pp. 4, 6). Indeed, the contracts make it clear that the water delivered belongs to the Woods Irrigation Company, and that the owners of the Silva property have no right, title or interest in such water unless and until they perform their obligations under the contract. (Id., p. 5).

Finally, there is no requirement that the Woods Irrigation Company must build, own, operate and maintain any canal, or deliver any water. This suggests that the Woods Irrigation Company can, at its discretion, decide to fill-in and abandon its facilities. Such an act by Woods Irrigation Company would result in the inability of the Silva property to receive water.

Respondents offered no testimony or evidence to rebut these facts. Indeed, when specifically asked, "Why would a contract to obtain water from the Woods Irrigation District show intent to maintain a riparian right from the Middle River," Mr. Neudeck responded, "I don't have an answer to that right now." (RT Vol. 1, p. 205).

[5] The Borror court further explained that a riparian right could not be quantified since it extends to future reasonable uses on the riparian property. (Id. at 776-777).

The December 28, 1911 deed that resulted in the severance of the Silva property and the contracts to which it is made subject to make no reference to a reservation of riparian rights. As noted earlier, most landowners knew the hazards of dividing property and the possibility that such divisions could result in the severance of riparian rights. (SJRGA Ex. 2, p. 301). The fact that the parties here made absolutely no reference to riparian rights at all, and established a contractual scheme that is in no way synonymous with an understanding of, or an intention to preserve, riparian rights, demonstrates unequivocally that the SWRCB cannot conclude, based upon the existence and language of the deed and the contracts, that any riparian rights that the Silva property had before December 28, 1911 were not lost when that property was severed from Middle River.

ii. Conn Property

The Conn property consists of two parcels. The first, a 41-acre parcel, was severed by deed dated August 10, 1889 (RT Vol. 1, p. 208, ln. 17-20)[6] or April 26, 1887. (RT Vol. 2, p. 237, ln. 4-9). Although Mr. Neudeck's written testimony indicates that the 40-acrel parcel is still connected to Middle River (SDWA Ex. 3, p. 9), on cross-examination Mr. Neudeck explained that this statement refers to the time before severance occurred, and does not refer to current conditions. (RT Vol. 1, p. 209, ln. 6-17). The second, an L-shaped parcel of 120 acres, was never contiguous to Middle River. (RT Vol. 1, p. 208, ln. 14-16; RT Vol. 2, p. 237, ln. 4-9; SJRGA Ex. 1, p. 3-4, Ex. 6, 13).

Neither the 1887 nor the 1889 deed specifically mentions riparian rights, although the April 26, 1887 deed does specifically reserve one-half of the crop that is growing on the property. (*See* SDWA Ex. 3, Ex. Z). Such reservation is significant, as it demonstrates some sophistication on the part of the parties when conducting transactions involving real property, and suggests that the parties knew how to reserve rights, including riparian rights, at the time of a property conveyance. The fact that none of the deeds contains such a reservation suggests that the parties did not intend to reserve riparian rights at the time of severance.

---

[6] Mr. Neudeck testified that the date of severance was August 10, 1989. Mr. Neudeck obviously misspoke, as page 4 of his Exhibit X, and the deed submitted attached to Mr. Pankey's testimony, both show that the referenced deed is dated August 10, 1889.

Respondents argue that while these two parcels were either never attached to, or were severed from, the main stem of the San Joaquin and/or Middle Rivers, they continued to receive water by way of their contiguity to old sloughs. Specifically, Mr. Neudeck testified that the L-shaped parcel was "likely" attached to the San Joaquin River *via* a slough, and that the smaller 40-acre parcel was "likely" attached by slough to the San Joaquin River and/or Middle River. (SDWA Ex. 3, p. 10; RT Vol. 1, p. 167-168). In addition to the lack of direct evidence demonstrating that either of these parcels was, in fact, connected to either the San Joaquin or Middle River *via* slough, there are several problems with the reliance upon such old sloughs to establish riparian rights.

The old sloughs that allegedly connected these two parcels to the San Joaquin River and/or Middle River are now gone (RT Vol. 1, p. 161-162; RT Vol. 1, p. 183-184; RT Vol. 2, p. 240, ln. 7-22), as they were filled by the owners during reclamation. (RT Vol. 1, p. 161-162). It is hornbook law that riparian rights can be lost through avulsion, which is commonly defined as a sudden change in the course of a stream. (*Black's Law Dictionary* (6th Ed 1990) p. 137). (McKissick Cattle Co. v. Alsaga (1919) 41 Cal.App. 380, 388-390; Littleworth & Garner, *California Water* (Solano Press 1995), p. 35). Avulsion can be caused by both natural and man-made causes, including "human placement of artificial fill." (Alexander Hamilton Life Ins. Co. of Am. v. Governor of Virgin Islands, 757 F.2d 534, 538 (3d Cir. 1985); *see* Louisiana v. Mississippi, 466 U.S. 96, 100 (1984) ["the cut-off, being man-made and effectuating a channel change, obviously was avulvise..."]; *see also* State of Calif. ex rel. State Lands Com. v. Superior Court (1995) 11 Cal.4th 50, 79 [local dumping, human structures or dredging may cause avulsion]). It therefore seems clear that, even assuming either or both of the Conn parcels were at one time contiguous to a slough, the fact that such slough was intentionally filled in means that the owner intentionally severed his own riparian rights through avulsion.[7]

When avulsion occurs, the owner has the opportunity to "ditch the water back to its original channel" if it is done in a reasonable period of time, and without disturbing the rights of others. (McKissick, *supra*, 41 Cal.App. at 388-389). There is no evidence that this was the case here. In

[7] Possible riparian rights to old, no longer existing sloughs are of no legal consequence. The California Supreme Court has declared "riparian rights are determined not by past geologic formations but from the present natural topography." (Rancho Santa Margarita, *supra*, 11 Cal.2d at 557).

fact, the evidence is to the contrary, as the original channels - the old sloughs - have been filled in, and the Conn parcels now receive water by way of other conveyances. (SDWA Ex. 3, Ex. BB).

Intervenors are not aware of any legal authority that would permit a party to intentionally deprive his property of connectivity to a watercourse through avulsion, yet retain the property's riparian rights by way of agreements with surrounding parties for a new point of diversion and conveyance. As noted above, avulsion - even if done intentionally - severs the riparian right itself from a parcel. Nonetheless, assuming that such riparian status could be maintained despite the intentional avulsion, there is no evidence that indicates that such rights were maintained. Without knowing when the sloughs were filled in, it is impossible to know whether or not any of the other arrangements, such the easement for the current diversion in 1941, the terra cotta pipe discussed by Mr. Ohm, or some other conveyance were made at the time of the avulsion, and with the intention and purpose of maintaining the riparian character of the property.

Compounding this problem is the fact that no firm date can be placed upon the date, location or purpose of the terra cotta pipe. While Mr. Ohm previously submitted a declaration stating that the terra cotta pipe did serve the Conn parcels, no other evidence corroborating this statement was offered, and due to Mr. Ohm's death, no cross-examination of his declaration took place. Moreover, even accepting as true Mr. Ohm's statement that the pipe did serve the Conn parcels, neither Mr. Ohm nor Mr. Neudeck can accurately date the pipe. Neither man relied upon his personal knowledge to date the pipe, but rather cited the pipe's material to bolster their claim that it was used before 1914, and possibly before 1900. (SDWA Ex. 3, Ex. Y; SDWA Ex. 3, p. 10). Since Mr. Neudeck himself admitted that he had no direct evidence that farming ever took place on either of the Conn parcels prior to 1900, his own testimony casts doubt upon the allegation that the terra cotta pipe was constructed and in use prior to 1900. (RT Vol. 2, p. 270, ln. 4-20).

Even assuming that the riparian rights to the old sloughs still somehow existed, such rights would not necessarily extend to the main stem of either the San Joaquin or Middle Rivers. Riparian rights are limited to such water that reaches riparian land by way of its natural flow. (Anaheim Union Water Co. v. Fuller, *supra*, 150 Cal. at 332). While a riparian right holder may

divert water not from his own land, but from the land of an upstream owner provided no other rights are impaired, the SWRCB has previously found that a riparian cannot do so if "the natural flow of the stream is not sufficient to reach the riparian's property under natural conditions." (WR 95-17 (1995), p. 18, citing Drake v. Tucker (1919) 43 Cal.App.53, 58-59). In this case, there was no evidence presented that shows that the water diverted from Middle River during the time that the alleged violation of Term 91 occurred would have been found at the Conn parcels in its natural condition had the sloughs still existed.[8]

The only known facts demonstrate that the two Conn parcels were severed from the main stem of the San Joaquin and Middle Rivers before 1890, and that the relevant deeds made no reference to an intention to preserving riparian status. While it is possible that the parcels were at one time riparian to various sloughs, those sloughs are now gone, and there is simply not enough evidence upon which the SWRCB can determine the time that such sloughs were filled in, how they were filled in, who filled them in, why they were filled in, and what, if any action, was taken at the time that such sloughs were filled in to preserve the riparian rights of the parcels that abutted those sloughs. Even assuming that all of these evidentiary problems could be overcome, enabling the SWRCB to determine that the Conn parcels had retained their riparian rights to the old sloughs, there was no evidence presented that would enable the SWRCB to conclude that riparian water would have been available for diversion in those sloughs at the time the violations of Term 91 allegedly occurred. The SWRCB should conclude that Respondents failed to present sufficient evidence to demonstrate that a riparian right exists at either of the Conn parcels.

iii. Ratto Property

It is undisputed that the Ratto property is not currently contiguous to any watercourse, and was severed from Middle River by deed dated June 15, 1891. (RT Vol. 1, p. 210-211). Although the specific deed resulting in severance makes no mention of a reservation of riparian rights (SDWA Ex. 1, Ex. C), Respondents nonetheless argue that the it was the intention of the parties at the time of severance to maintain riparian rights to Middle River. (RT Vol. 1, p. 167, ln. 7-11).

[8] State's witness Mr. Wilcox discussed the issue at length during rebuttal testimony. (RT Vol. 2, p. 386-391).

The basis for this assertion regarding the intention of the parties seems to be based upon the allegation that irrigated farming was allegedly taking place on the Ratto property before and after the severance occurred. (SDWA Ex. 3, p. 9 ["the land has been continuously supplied with water from Middle River or Old River since the mid-1850's through the present for irrigated farming."]; RT Vol. 1, p. 167, ln. 2-6). However, there was simply no evidence submitted that demonstrates that, at the time of severance, irrigated farming on the Ratto property was taking place using water taken from Middle River under a riparian right, and that the parties intended to maintain that riparian status despite the severance.

Respondents' evidence of irrigated farming on the Ratto property is based exclusively on two grounds. First, Respondents argue that an artist's rendering of what is believed to be the Ratto property in 1879 shows that farming was taking place on the property. (SDWA Ex. 3, Ex. Q; RT Vol. 2, p. 270, ln. 12-16; RT Vol. 2, p. 271, ln. 20-21). However, there is no indication of any irrigation facilities such as canals or pumps. (SDWA Ex. 3, p. 8 [acknowledges failure of drawing to "show any irrigation improvements"]).[9] Since this rendering fails to show the existence of any irrigation facilities, and is not contemporaneous with the severance (drawing dated 1879, severance occurred in 1891), it is of dubious value at best of what the parties in 1891 intended at the time of the severance.

The second basis for Respondents' assertion that irrigated farming took place on the Ratto property (and all other properties that are the subject of this proceeding) is the assertion that irrigated farming was taking place generally on Upper Roberts Island before 1900. The reason for this reliance on general information that is not specific to the subject parcels is the lack of information obtained by Respondents that relates to whether or not farming took place on the subject properties, the type of farming that took place, the number of acres farmed, the crops

---

[9] Respondents' argue that irrigation at that time took place *via* the Willow Slough. (SDWA Ex. 3, p. 8). However, what is depicted as Willow Slough on Exhibit Q of SDWA Ex. 3 is an east-west feature. Other evidence, including a map from the same book as Exhibit Q of SDWA Ex. 3 and State's Exhibits WR 2-16 and 2-17 show Willow Slough as being a north-south feature, or at least a northeast-southwest feature. As the State's witness stated, "All three sources seem to conflict, so I honestly don't know where Willow Slough really ran." (RT Vol. 2, p. 357, ln. 1-5). As depicted on the official State map (State's Ex. WR 2-17), Willow Slough does not abut the Ratto parcel. (RT Vol. 2, p. 356, ln. 9-18). As stated by the State's witness, the official map is probably more reliable than an artist's depiction (RT Vol. 2, p. 357, ln. 3-5) that Respondents' witness even recognized demonstrated that the artist had only "a general but not perfect sense of the geography of the area." (SDWA Ex. 3, p. 8)

grown or anything else. Indeed, when asked if there was specific evidence that irrigated farming took place on any of the subject properties, including the Ratto property, Mr. Neudeck testified

> "I think the preponderance of the evidence I provided to date shows what information that I have that indicates that farming was ongoing in the mid to late 1800s on Upper Roberts. *Specifically I do not have direct reference to each and every parcel. Records don't show that.*" (RT Vol. 2, p. 271, ln. 15-20)(emphasis added).

Despite Respondents' efforts to rely on general information to support their contention that irrigated farming was taking place on the Ratto and other properties, the evidence submitted demonstrates unequivocally that it was more likely than not that at the time of severance of the Ratto and other properties, irrigated farming was **not** taking place generally on Upper Roberts Island.

By 1909, "less than half of the reclaimed land [in the Delta] was irrigable." (SJRGA Ex. 2, p. 312, fn. 8). In 1924, 61% of Upper Roberts Island was not irrigated. In 1925, 80% of Upper Roberts Island was not irrigated. In 1926, 75% of Upper Roberts Island was not irrigated. In 1927, 68% of Upper Roberts Island was not irrigated. (State's Ex. WR 2-22, p. 1; RT Vol. 2, p. 349-350). Since almost 2/3 of the property on Upper Roberts Island was not being irrigated almost 40 years after the Ratto property was severed, there is simply no basis to credibly conclude that the Ratto property was one of the small minority of properties being irrigated at the time of severance.

At best, the general evidence relied upon by Respondents could be used to indicate that the Ratto and other properties were being farmed at the time of severance. However, the fact that farming was taking place does not demonstrate that irrigated farming was occurring. To the contrary, the evidence submitted shows that wheat and barley were the dominant crop grown in the Delta from the late 1800s through the early 1900s. (SDWA Ex. 3, Ex. B; RT Vol. 2, p. 324-348; SJRGA Ex. 2, p. 375-376). These crops were not grown with the aid of irrigation, but were grown by what is known as dry farming. (SJRGA Ex. 2, p. 379 ["In the Delta, barley and wheat are not irrigated..."]; Id. p. 378 ["Barley and wheat yields in the delta average...higher than on dry-farmed soils of the sandier valley plains."]; Id. p. 376 ["As a rule, wheat and barley have been planted in December and January and harvested in June and July."]; RT Vol. 2, p. 374-375). Therefore, simply because one could possibly conclude that farming was taking place on the Ratto (or any of

the subject properties) before, at the time of, or after severance, does not mean that such farming was done with the assistance of irrigation.

Respondents' have failed to submit any credible, specific evidence that demonstrates that, at the time the Ratto property was severed in 1891, (a) the property was being irrigated through the exercise of riparian rights, and (b) there was an intention of the parties to maintain the riparian right despite the physical severance. At best, the circumstantial evidence suggests that farming may have been done on Upper Roberts Island generally, but even that farming was almost exclusively dry farming as irrigation was not the norm until sometime after 1927. The SWRCB has no alternative but to conclude that insufficient evidence has been submitted justifying the finding that the Ratto property is benefited by riparian rights.

iv. Phelps Property

The Phelps property consists of three parcels, two of which were never connected to the main stem of any river, stream or watercourse. (RT Vol. 1, p. 215, ln. 4-15; SJRGA Ex. 1, p. 1-2, Ex. 10, 11). The third parcel was contiguous to the San Joaquin River until severed by deed in 1886 or 1887. (RT Vol. 1, p. 215-216; SDWA Ex. 3, p. 12). Respondents assert that despite the fact that the parcels were either severed from the main stem or never contiguous to it, they had and retain riparian rights since they were (1) contiguous to an old slough (easternmost two parcels) and/or "could have" received water from an old pipe allegedly built in the 1890s. (SDWA Ex. 3, p. 12; RT Vol. 1, p. 216-218).

The discussion of the legal and factual issues regarding old sloughs that have long since been intentionally filled in, set forth above in reference to the Conn parcels, including the conclusion that there is not enough information about the old sloughs upon which the SWRCB can conclude that riparian rights did or do exist, are equally applicable here and shall not be repeated. As for the relevance of the brick pipe, the alleged date of its construction - 1890 - comes *after* the parcels were severed. Therefore, whether or not it ever did connect any of the Phelps' parcels to the San Joaquin River, there is no evidence that the parties intended, at the time of severance, to

maintain existing riparian rights.[10]

Respondents argue that the Phelps' properties were "continuously supplied with water from the San Joaquin River since the mid 1870's through the present for irrigated farming." (SDWA Ex. 3, p. 12). However, on cross-examination, Mr. Neudeck admitted that he did not have any direct information supporting this claim.

> "Q. Other than the Ratto parcel, do you have any other direct evidence of farming prior to 1900 on any of these parcels?
>
> A. No." (RT Vol. 2, p. 270, ln. 17-20).

As discussed above in reference to the Ratto property, Mr. Neudeck relied not upon specific evidence regarding the farming and irrigation practices on the subject properties to support his claims, but instead upon general information regarding farming (and not irrigation) that was taking place on Upper Roberts Island. It is worth repeating that Mr. Neudeck admitted, "I do not have direct reference to each and every parcel. Records don't show that." (RT Vol. 2, p. 271, ln. 18-20). This general, indirect and non-specific evidence is simply not sufficient bases upon which the Board can conclude that the Phelps' parcels are benefited by riparian rights.

B. Respondents Failed to Submit Credible, Specific Evidence That Supports Their Alleged Pre-1914 Water Rights.

In 1914, the Legislature established the current system for acquiring appropriative water rights. (*See* Wat. Code §§ 1200 et seq.). Once adopted, those procedures represented the exclusive method by which appropriative rights could be obtained, although appropriative rights acquired before 1914 were unaffected and still valid. (Shirokow, *supra*, 26 Cal.3d at 308-309).

Between 1872 and 1914, the Legislature codified procedures for establishing appropriative rights that had evolved through various court decisions. (former Civ. Code §§ 1410-1422). The procedures provided that a person intending to acquire an appropriative right were to post a written notice at the intended place of diversion, and record a copy of the notice with the office of the

---

[10] Mr. Neudeck was specifically asked how the construction of a pipe in the 1890s could be relevant to the alleged intent to maintain riparian rights at the time of severance in the years prior to the pipe's construction. (RT Vol. 1, p. 218). Mr. Neudeck testified that that he was not testifying as to the severance from the San Joaquin River, and that *he could not* testify as to when the internal sloughs were filled in. (Id.). This inability to identify when the sloughs were filled in (1860? 1960?) demonstrates the lack of evidence upon which the SWRCB can conclude that riparian rights existed and/or were intended to be preserved despite severance or avulsion.

county recorder in the county in which the notice was posted. (Civ. Code §§ 1415, 1421 (1872)). The notice that was posted and filed was to identify the purpose of use of water, the place of use of the water, the intended means of diversion, and the amount of water to be diverted. (Id.).

Compliance with these procedures was not required in terms of establishing an appropriative right. (Civ. Code § 1418; *see* Lower Tule etc. Co. v. Angiola etc. Co. (1906) 149 Cal. 496, 499; *see also* Borror, *supra*, 61 Cal.App.4th at 752). Rather, compliance with these procedures was necessary for purposes of establishing priority in relation to subsequent claimants that did not comply with the procedures. (Duckworth v. Watsonville Water & Light Co. (1915) 158 Cal. 206, 211). One could still establish an appropriative right between 1872 and 1914 by diverting water and putting it to reasonable use. (Lower Tule, *supra*, 149 Cal. at 499; Borror, *supra*, 61 Cal.App.4th at 752).

In this case, Respondents submitted no evidence upon which the SWRCB can conclude that the parcels in question are benefited by pre-1914 appropriative rights. There was no specific, credible evidence that water was diverted and used on any of the subject properties before 1914, nor was there any indication that the owners of the parcels had posted notices and otherwise complied with the provisions of the Civil Code that was in effect between 1872 and 1914.

The record is devoid of any evidence at all as to the amount of water diverted and used before 1914 on any of the subject parcels, the season of use, the place of diversion or the method of diversion. While Respondents argue generally that the purpose of use was "irrigated farming" (SDWA Ex. 3, p. 7 (Silva), p. 9 (Ratto), p. 11 (Conn) and p. 12 (Phelps), there is no specific evidence regarding irrigated agriculture on any of these parcels in any particular year before 1914, including any evidence as to the type of crop grown.

When specifically asked for specific evidence regarding the alleged pre-1914 appropriative rights, Respondents were unable to provide it. In regards to the Phelps' property, the following exchange took place:

> "Q. Mr. Phelps' property, was any notice filed of the place of diversion at the county recorder of a pre-1914 right?
>
> "A. [Mr. Neudeck] I'm not aware of any.

"Q. Can you tell me in any particularity what year water was diverted onto this property prior to 1914?

"A. [Mr. Neudeck] I think prior to 1914 my exhibit [SDWA Ex. 3, Ex. D] speaks for itself. I'm assuming that prior to -- 1912 is the condition. So prior to that there was probably more sloughs leading to that area.

"Q. How much water was diverted to Mr. Phelps' properties in any year prior to 1914?

"A. [Mr. Neudeck] I did not do any independent evaluation of quantity of water delivered." (RT Vol. 2, p. 283, ln. 3-23).

"Q. Do you have any knowledge on the pre-1914 water right claim for Mr. Phelps as to when his season of use was?

"A. [Mr. Neduck] No." (RT Vol. 2, p. 284, ln. 11-13).

A similar exchange occurred in regards to the Silva property.

"Q. Do you know if in regards to Mr. Silva's property if a pre-1914 right was recorded with the county recorder?

"A. [Mr. Neudeck] No, I do not.

"Q. Do you know if a conspicuous notice was placed at the point of diversion for Mr. Silva's property?

"A. [Mr. Neudeck] No, I do not.

"Q. Can you identify with particularity any year in which surface water was diverted from the San Joaquin River or Middle River onto this property under a pre-1914 claim?

"A. [Mr. Neudeck] I refer back to my exhibit [SDWA Ex. 3, Ex. D], and the interior sloughs; and it would be in the 1912 topo that indicated interior sloughs reaching Mr. Silva's property from the main stems? (sic)

"Q. Do you know how much water was diverted to this property under a claim of pre-1914 right?

"A. [Mr. Neudeck] No, I do not." (RT Vol. 2, p. 288-289).

In each of the above exchanges, Mr. Neudeck refused to address the question of what year, if any, water was actually diverted to and used on either the Phelps or Silva properties.[11] He instead discussed the possibility that in 1912, sloughs might have been contiguous to those properties. Whether or not such sloughs existed, were contiguous, and had water in them is irrelevant if the water in them was not actually diverted and put to use. Similarly, Mr. Neudeck was unable to identify the amount of water diverted to either property in any year prior to 1914, and was unaware if the procedures in effect in between 1872 and 1914 were complied with.

Appropriative rights, even those established before 1914, are limited to particular amounts and particular seasons of use. Absent specific information regarding the amount used, the season of use, the place of use, the place of diversion and the method of diversion, the SWRCB cannot conclude that any of the subject properties are benefited by appropriative rights that were established before 1914. Since the Respondents did not submit any such specific evidence, the SWRCB must conclude that Respondents have failed to carry their burden of demonstrating that their diversions that allegedly violated Term 91 were pursuant to an appropriative right that was established prior to 1914.

IV. CONCLUSION

For all of the above reasons, the SJRGA requests that the SWRCB find that Respondents Silva, Ratto, Conn and Phelps did not submit sufficient evidence to support a claim to either a riparian or pre-1914 appropriative water right.

Dated: April 16, 2003

O'LAUGHLIN & PARIS LLP

By 
Tim O'Laughlin
Attorneys for Intervenors SJRGA

[11] Although not asked directly about either the Conn or Ratto properties, neither Mr. Neudeck nor any other of the Respondents' witnesses were able to provide this type of specific information regarding either of those properties. It is worth remembering that, as a general matter, Mr. Neudeck testified that he was unable to provide any direct evidence that any of the subject properties, except perhaps the Ratto property, were farmed prior to 1900. (RT Vol. 2, p. 270, ln. 17-20). Mr. Neudeck also stated that he was unable to find records relating to the farming activities on any of the specific properties at issue. (RT Vol. 2, p. 271, ln. 15-20).

PROOF OF SERVICE BY MAIL
(Government Code §11440.20)

I, JILL L. DRAGSETH, declare that:

I am employed in the County of Butte, State of California. I am over the age of eighteen years and not a party to the within cause. My Business address is 2571 California Park Drive, Suite 210, Chico, California 95928. I am familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service pursuant to which practice all correspondence will be deposited with the United States Postal Service the same day as it is placed for collection in the ordinary course of business.

On April 16, 2003, I served the within **Closing Brief of Participants San Joaquin River Group Authority, et al.** on the parties in said cause, by placing a true copy thereof enclosed in a sealed envelope, certified/return receipt requested, addressed as follows, and placed each for collection following ordinary business practices:

Samantha K. Olson
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

John Herrick
South Delta Water Agency
4255 Pacific Avenue, Suite 2
Stockton, CA 95207

Dante John Nomellini
Central Delta Water Agency
P.O. Box 1461
Stockton, CA 95201-1461

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 16, 2003, at Chico, California.

JILL L. DRAGSETH