

1 **JOHN HERRICK - SBN #139125**
4255 Pacific Avenue, Suite 2
2 Stockton, California 95207
Telephone: (209) 956-0150
3 Facsimile: (209) 956-0154
Email: jherrlaw@aol.com

4 Attorneys for MARK and VALLA DUNKEL

5 **DEAN RUIZ - SBN #213515**
Harris, Perisho & Ruiz
6 3439 Brookside Road, Suite 210
7 Stockton, CA 95210
Telephone: (209) 957-4254
8 Facsimile: (209) 957-5338
E-mail: dean@hpllp.com

9 Attorneys for CENTRAL DELTA WATER AGENCY
10 and SOUTH DELTA WATER AGENCY

11 **BEFORE THE CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**

13
14 In the Matter of Draft Cease and Desist) **MOTION AND MEMORANDUM OF**
15 Order No. 2009-00XX-DWR Against) **POINTS AND AUTHORITIES IN**
MARK and VALLA DUNKEL) **SUPPORT OF MOTION TO REOPEN**
16 _____) **DUNKEL CDO HEARING**

17 **I.**

18 **INTRODUCTION**

19 Mark and Valla Dunkel ("Dunkel"), South Delta Water Agency ("SDWA"), and Central
20 Delta Water Agency ("CDWA") herein bring this motion requesting that the Dunkel Cease and
21 Desist Order ("CDO") proceeding of May 5, 2010 be reopened. This motion is based on this
22 Memorandum of Points and Authorities, the attached Declaration of Dante J. Nomellini Sr., the
23 existing record in this matter, and such other and further evidence that may be presented between
24 now and the time the Board rules on this motion.

25 **II.**

26 **FACTUAL SUMMARY**

27 The Dunkel CDO proceeding took place on May 5, 2010. Prior to hearing, Dunkel and
28 members of the State Water Resources Control Board ("SWRCB") Prosecution Team were in

1 discussions with Dunkel's counsel regarding what evidence needed to be shown to establish
2 Dunkel's continued right to irrigate. In those discussions, Dunkel represented that he received water
3 from Woods Irrigation Company ("WIC") and that WIC has a pre-1914 right sufficient to cover
4 deliveries to Dunkel's property. The Prosecution Team's staff indicated that evidence in support of
5 such information would be sufficient to establish Dunkel's continued right to irrigate.

6 Dunkel and the Prosecution Team staff correctly believed that WIC indeed had a pre-1914
7 right of not less than 77.7cfs. Consequently, the parties conducted settlement negotiations based on
8 these assumptions but were unable to reach a final resolution in advance of the May 5, 2010 hearing.
9 During these settlement discussions, Prosecution Team staff did not ask Dunkel to provide evidence
10 of his own riparian or pre-1914 right. Rather, the Prosecution Team indicated that satisfactory
11 evidence that Dunkel receives delivery of water from WIC would be adequate to cause the CDO
12 hearing to be dropped unless WIC's rights were somehow found to be invalid or insufficient. In light
13 of these discussions and understandings, and based on the fact that Dunkel could easily establish
14 deliveries from WIC, Dunkel, reasonably, did not extend the time, effort or expense necessary to
15 demonstrate his riparian water rights associated with the property.

16 During the May 5, 2010, CDO proceedings, Modesto Irrigation District ("MID") San Luis
17 and Delta Mendota Water Authority ("SLDMWA") and State Water Contractor ("SWC"),
18 collectively ("MSS") presented rebuttal testimony which related to the California Supreme Court
19 case of *Woods Irrigation Company v. The Department of Employment* (1958) 50 Cal.2d 174 which
20 pertained to a dispute regarding whether WIC's employees were considered agricultural laborers,
21 thus exempting WIC from having to make unemployment insurance contributions for same.
22 Although MSS submitted this case to the Prosecution Team in early January 2010, it was not made
23 available to Dunkel until the presentation of MSS's rebuttal testimony. MSS argues that the holding
24 in the case should be interpreted to prevent Dunkel, and WIC, from arguing that WIC possess its
25 own water rights. In furtherance of its argument, MSS has filed a request for a Directed Verdict in
26 the Dunkel matter. MSS's interpretation of the holding in *WIC v. The Department of Employment*
27 is incorrect and misplaced. Please see the attached copy of a May 20, 2010, letter from John Herrick
28 to David Rose setting forth Dunkel's response to MSS's allegations regarding the applicability of

1 the holding in *WIC v. The Department of Employment* and which is incorporated herein as Exhibit
2 "A." Notwithstanding MSS's incorrect description of the *WIC v. The Department of Employment*
3 case, there is a concern that the SWRCB will issue a CDO which would somehow limit Dunkel's
4 ability to receive water through the WIC system. Therefore, subsequent to the evidence presented
5 by MSS on rebuttal, Dunkel has necessarily expanded its investigation and has discovered evidence
6 which clearly supports his own riparian water right in addition to the right held by WIC.

7 III.

8 ARGUMENT

9 A. Equity and Judicial Economy Require that the Dunkel CDO Hearing be Reopened.

10 The SWRCB's interest in conducting CDO Hearings is to determine whether lands are
11 receiving water under a valid water right. Prior to the commencement of the Dunkel CDO hearing,
12 there was no indication that Dunkel needed to establish anything other than the fact that the Dunkel
13 property historically and continually received water through WIC. The Dunkel hearing currently
14 remains open for the purpose of determining whether the results of the WIC CDO proceeding
15 scheduled for June 7, 2010, have any impact on the Dunkel proceeding. Reopening the Dunkel
16 hearing for the purposes of allowing Dunkel to present evidence of his own riparian rights will not
17 be unduly burdensome to the other parties and is consistent with the SWRCB's intentions with
18 respect to conducting the CDO proceedings, which is not simply to shut down diverters.

19 Pursuant to Water Code Section 1832, "*SWRCB may, after notice and opportunity for*
20 *hearing, upon its own motion, or upon receipt of an application from an aggrieved person, modify,*
21 *revoke, or stay in whole or in part any cease and desist order issued pursuant to this chapter.*" As
22 such, SWRCB has the discretion and authority to reopen a CDO proceeding once it becomes aware
23 of, or is presented with sufficient evidence indicating the need to do so. Judicial economy and the
24 efficient utilization of resources strongly suggests that the SWRCB should simply reopen the Dunkel
25 hearing at this point rather than at some later date.

26 B. The Facts Clearly Show that the Dunkel Property Maintained a Connection to a 27 Waterway and Thus Preserved a Riparian Right.

28 The testimony of Stephen Wee presented on behalf of MSS at the May 5, 2010 hearing

1 misrepresented that by way of a deed (MSS Exhibit 1H) from E.W.S. and Alice Woods to Jesse L.
2 Wilhoit and Mary L. Douglass and dated December 14, 1909 , the Dunkel property (as part of a
3 larger piece) was severed from a connection from Middle River (see MSS 1, page 3, lines 5-8).
4 However, a review of the subject deed shows Mr. Wee's representation to be false. Included as part
5 of the boundary description of the parcel is the language "... *thence meandering the right bank of*
6 *said Middle River upstream to the center*" [Emphasis added] This clearly shows that rather than
7 being severed as alleged by Mr. Lee, the subject deed confirmed a connection to Middle River.
8 Further, the transfers dealing with this land clearly show that the parcel was part of a much larger
9 piece owned jointly by the Woods brothers J.N. and E.W.S. When J.N. Woods died, the jointly held
10 lands were divided up, and portions distributed to J.N. Woods' heirs Jesse L. Wilhoit and Mary L.
11 Douglass; none of which indicates an intent to sever a riparian right. In fact, the distribution of
12 E.W.S Woods's estate, the formation of the Woods Irrigation Company, and then later the sale of
13 the property containing the Dunkel parcel all indicate an express intent to preserve the lands riparian
14 character by always maintaining a direct connection to Middle River and being part of an irrigation
15 system specifically committed to the purpose of supplying water to the land. A detailed
16 chronological discussion of this is contained in the attached Declaration by Dante J. Nomellini, Sr.

17 Also per the attached Declaration of Dante J. Nomellini, Sr., it is clear that the Dunkel
18 property abutted an interior island slough at any time of alleged severance. Per that Declaration the
19 Dunkel abuts an interior island slough that was eventually used as the initial portion of the main
20 Woods IC canal system. The slough is clearly identified on a 1915 map (confirming its prior
21 existence), as well as other maps from the same era. The slough was connected to Middle River via
22 a flood gate, the remnants of which can still be seen today.

23 Other portions of the Declaration provide additional evidence that no severance occurred and
24 that the property not only abutted a waterway and thus maintained a physical connection to the
25 waters of the Delta, but also preserved the ability to get water via contract.

26 Since the facts supporting a riparian right are clear, the SWRCB should re-open the Dunkel
27 Hearing to insure their decision is based on all the facts and the proper decision is indeed reached.
28 It would make no practical or legal sense to make a ruling which be clearly overturned in a court

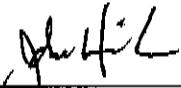
1 proceeding to finally determine the water rights associated with the property.

2 IV.

3 **CONCLUSION**

4 Based on the foregoing, the Dunkel CDO Hearing should be reopened to allow Dunkel to
5 present evidence in support of his own riparian water rights.

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7 Dated: June 5, 2010

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9 _____
10 JOHN HERRICK
11 Attorney Mark and Valla Dunkel
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