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Re: MID et. al.'s Motion for Directed Verdict; Draft CDO re Dunkel

Dear Hearing Officers Hoppin and Baggett:

On behalf of Mark and Valla Dunkel, we request that the above referenced Motion for Directed Verdict be denied. We are in the process of preparing a motion to re-open the evidentiary portion of the Dunkel hearing and expect to file it within the next two days.

As you know from the May 5, 2010 hearing the SWRCB Division of Water Rights staff originally inquired into the basis for Dunkel applying water to their land. Through various communications, staff was informed that the Dunkels were receiving water from the Woods Irrigation Company, and that Woods IC claimed a pre-1914 right to divert water. In addition the Dunkels asserted their own riparian and pre-1914 rights. With those underlying facts, the Dunkels case in chief at the May 5 hearing was limited to showing the delivery of water from Woods, as that was all staff would require to end their inquiry.

At the May 5 hearing, MID et. al. misrepresented a 1956 case (*Woods Irrigation Company v. Department of Employment, et. al.*) by claiming it finally determined that Woods IC held no water rights. The specifics of that case, and the reasons why it does not act as issue preclusion here will be addressed in the final briefing in this matter. In response to the MID et. al.'s "evidence" and the hearing officers desire to complete the hearing that day, Dunkels put on brief rebuttal testimony indicating that their property bordered an interior island slough and that it thereby retained its connection to Middle River.

The documents and declarations supporting the to-be-filed Motion to Re-open the Hearing will include clear and incontrovertible evidence that the Dunkel property bordered an old slough, which slough was used by the Woods Brothers for irrigating their lands well before the property was separated from a surface connection to a main waterway. Bordering such a slough, which was/is used for irrigation constitutes sufficient evidence to indicate that the landowners

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never intended to sever the riparian rights to the land, because the slough maintained a direct connection between the main channel (Middle River) and the property. Other evidence of water rights will also be proffered.

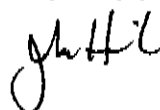
We understand that MID et. al. will argue that the failure to present this evidence at the May 5 hearing precludes Dunkel from presenting it now. However, that is not the case. It was reasonable for the Dunkels to not spend the time and money developing the facts to support their riparian and pre-1914 rights given their reasonable reliance on Woods IC's claimed pre-1914 water rights and their discussions with the staff on that very issue. In fact the parties attempted to reach a settlement which include acknowledgment of Dunkels' reliance on the Woods IC rights. The settlement was not finalized for other reasons.

The purpose of the Division's investigations is to insure that diversions are legal. The purpose is not to play "gotcha" and find ways to shut down legal diverters in the Delta. Thus what is important are the facts. Decisions by the SWRCB should be based on all the facts, not just some of them as MID et. al. would like.

When the Motion to Re-open the Hearing is filed, the hearing officers can see that sufficient evidence exists to prove (at least) a riparian water right exists for the Dunkel property. Granting the MID et. al.'s motion would not be a final determination of the Dunkels water rights, and thus the Dunkels could still petition the courts to determine what they are now prepared to show to the SWRCB. Thus is no valid reason to preclude Dunkels from showing their other water rights.

The hearing officers should therefore deny the MID et. al. motion for a directed verdict.

Very truly yours,



JOHN HERRICK

cc' (via e-mail):

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