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19
20 BEFORE THE
21 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

22 In the Matter of the Draft Cease and Desist
23 Order Against Unauthorized Diversion of
24 Water by Mark and Valla Dunkel

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR RECONSIDERATION OF
ORDER DECLINING TO ISSUE CEASE
AND DESIST ORDER (DIVERSION OF
WATER BY MARK AND VALLA
DUNKEL)**

25
26 **I. INTRODUCTION**

27 The San Luis & Delta-Mendota Water Authority ("Water Authority") and State Water
28

1 Contractors (“SWC”), acting for and on behalf of their member agencies, and Modesto Irrigation
2 District (“MID”) (collectively, “Petitioners”) submit the following Memorandum of Points and
3 Authorities in Support of Petition for Reconsideration of Water Rights Order 2012-0016 (“Order
4 WR 2012-0016” or “Order”) Declining to Issue Cease and Desist Order against Mark and Valley
5 Dunkel (“Dunkels”). The Order should be rescinded for three reasons. First, the State Water
6 Resources Control Board (“State Water Board”) should rescind the Order until resolution of the
7 appeal in *Young et al. v. State Water Resources Control Board* (“Young Appeal”) and the
8 reopened hearing required by Order WR 2012-0012 (“Woods Hearing”), two related proceedings
9 that have the potential to substantively affect this matter. Second, the State Water Board should
10 rescind the Order because it is not supported by the substantial evidence. It does not contain
11 sufficient evidence to support a finding by the State Water Board of an intent to maintain a
12 riparian right on the noncontiguous Dunkel property. Third, the Order contains an error in law.
13 The Order is contrary to precedent regarding severance of riparian rights.

14 While the Order should be rescinded, Petitioners do not propose that the State Water
15 Board immediately issue a final cease and desist order against the Dunkels. Instead, they propose
16 that the State Water Board defer a decision pending completion of the Young Appeal and the
17 Woods Hearing.

18 Petitioners are not required to file this petition for reconsideration in order to exhaust
19 administrative remedies. However, they do so in the hope that the State Water Board will
20 reconsider and rescind Order WR 2012-0016 given these circumstances.

21 **II. STATEMENT OF FACTS**

22 On August 4, 2010, the State Water Board held a hearing pursuant to the Draft Cease and
23 Desist Order (“CDO”) issued by the State Water Board against the Dunkels. The CDO requested
24 that the Dunkels provide proof of their legal right to use water from the Middle River in San
25 Joaquin County on Parcel 162-090-01. In response, the Dunkels alleged they hold a riparian
26 right, despite their parcel not being contiguous to Middle River. The Dunkels argued that at the
27 time the parcel was severed from Middle River, the then-owners of the land (Wilhoit and
28

1 Douglass) intended to preserve the riparian right.¹ (Available on the State Water Board website
2 at http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/dunkelcdo_
3 [closingbriefs_dunkesdwacdwal091310.pdf](http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/dunkelcdo_closingbriefs_dunkesdwacdwal091310.pdf).)

4 Subsequent to the hearing pursuant to the Draft CDO, on August 7, 2012, the State Water
5 Board issued Order WR 2012-0012 Granting Reconsideration In the Matter of Petitions for
6 Reconsideration of Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation
7 Company (“Woods Order”). In the Woods Order, the State Water Board committed to re-
8 opening the hearing to allow Woods’ customers (including, presumably, the Dunkels) to
9 participate as parties, call witnesses, and cross-examine witnesses that have already testified on
10 behalf of other parties. The purpose of re-opening the hearing is to allow Woods’ customers to
11 supplement the evidentiary record with evidence of water rights they claim. (Order WR 2012-
12 0012 at p. 13.)

13 On or about September 19, 2012, the State Water Board issued a Draft Order Declining to
14 Issue Cease and Desist Order – in the Matter of the Alleged Unauthorized Division or Use of
15 Water by Mark and Valla Dunkel – Middle River in San Joaquin County (“Draft Order”). By
16 letter dated October 4, 2012, available through the State Water Board website at
17 http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/comments100
18 [412/stanley_powell.pdf](http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/comments100412/stanley_powell.pdf), the Water Authority and SWC submitted comments on the Draft Order.
19 They demonstrated the evidence relied upon in the Draft Order to support a finding that the
20 Dunkels’ property maintained a riparian right to Middle River was not sufficient. MID also
21 submitted written comments on October 4, 2012, available at [http://www.swrcb.](http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/comments100412/valerie_kincaid.pdf)
22 [ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/comments100412/valerie_kincai](http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/comments100412/valerie_kincaid.pdf)
23 [d.pdf](http://www.swrcb.ca.gov/waterrights/water_issues/programs/hearings/dunkel/docs/comments100412/valerie_kincaid.pdf). MID reiterated that the Dunkels were unable to produce evidence to establish the date
24 upon which the existing water delivery system was constructed and began putting water to
25 beneficial use. MID raised additional concerns with the inconsistency between the Draft Order

26 _____
27 ¹ The Dunkels also argued that their property maintained a riparian right by being adjacent
28 to an interior island slough, but the State Water Board declined to address this argument in Order
WR 2012-0016. (Order WR 2012 at p. 8.)

1 and Order 2012-0012. During the State Water Board's October 16, 2012 Board meeting, the
2 Water Authority and MID reiterated these written comments.

3 On October 16, 2012, the State Water Board issued Order WR 2012-0012. Petitioners'
4 comments were not addressed in the final Order.

5 **III. LEGAL STANDARD**

6 Petitioners request the State Water Board for reconsideration of the Order pursuant to
7 California Water Code section 1122 and sections 768 and 769 to title 23 of the California Code of
8 Regulations. "The board may order a reconsideration of all or part of a decision or order . . . on
9 the filing of a petition of any interested person or entity." (Wat. Code, § 1122.) This petition is
10 based upon the following two legal grounds: (1) "[t]he decision or order is not supported by
11 substantial evidence;" and (2) "[e]rror in law." (23 C.C.R. § 768(b), (d).)

12 **IV. DISCUSSION**

13 **A. The State Water Board Should Rescind Order WR 2012-0016 And**
14 **Reconsider The Matter Pending Resolution Of The Reopened Woods Hearing**

15 Events have transpired following the State Water Board's August 2010 hearing in this
16 matter that will have significant bearing on the present matter. First, in Order WR 2011-0005, the
17 State Water Board concluded that some lands within the Woods service area had retained riparian
18 rights to Middle River, while others had lost riparian rights with severance. (Order WR 2011-
19 0005 at pp. 21-27.) The State Water Board further concluded that the same September 29, 1911
20 agreements between Woods and the Dunkels' predecessors-in-interest indicate that, "to the extent
21 that water could not be delivered to the landowners pursuant to their own water rights, Woods
22 planned to develop a pre-1914 appropriative right."² (*Id.* at pp. 28, 31.)

23 Then, in Order WR 2012-0012, the State Water Board committed to re-open the Woods
24 hearing to allow the Woods' customers to present evidence, cross-examine witnesses who have

25 ² To the extent the State Water Board maintains that the September 29, 2011 agreements
26 evidence support for a pre-1914 appropriative water right as well as a riparian right, Petitioners
27 assert that this position presents an error in law. (23 C.C.R. § 768(d).) It is arbitrary and
28 capricious to find both an intent to maintain a riparian right and an intent to develop a pre-1914
appropriative right from the same document, without explaining how that document can evidence
intent regarding both types of rights.

1 already testified, and present arguments. It is anticipated that in a reopened Woods hearing,
2 Woods' customers (which includes the Dunkels) will present evidence pertaining to the water
3 rights possessed by Woods, and separately, by the customers. As a consequence of Order WR
4 2012-0012, prior findings by the State Water Board regarding the character of water rights in
5 Woods' service area are subject to change.

6 Evidence regarding the ownership of water rights in the Woods service area, including,
7 potentially, evidence regarding the alleged water rights available to the Dunkels, is directly
8 relevant to the resolution of this matter. Order WR 2012-0016 should accordingly be rescinded,
9 and the Dunkel matter reconsidered in connection with the reopened Woods' hearing.³

10 **B. Order WR 2012-0016 Is Not Supported By Substantial Evidence And The**
11 **State Water Board's Finding Regarding Intent To Retain A Riparian Right Is**
12 **Contrary To Law**

13 Order WR 2012-0016 states that "the evidence indicates that the [Dunkels'] property
14 retained riparian rights even after severance, and there is no indication that the Dunkels are using
15 water contrary to this right." (Order WR 2012-0016 at p. 6.) In support of this finding, the State
16 Water Board relies on two September 29, 1911 agreements between Woods and the Dunkels'
17 predecessors-in-interest, and a November 29, 1911 deed of conveyance that was conditioned
18 upon the agreements with Woods. (*Id.*) However, these documents do not discuss a riparian right
19 associated with the Dunkels' property. Accordingly, as a matter of law, the November 29, 1911
20 conveyance by Wilholl, Eaton and Buckley to Walters and Walters (Dunkels' predecessors-in-
21 interest) cut off the Dunkels' property from a riparian right.

22 The November 29, 1911 deed does not state that a riparian right was conveyed. "The rule
23 is well settled . . . that where the owner of a riparian tract conveys away a noncontiguous portion
24 of the tract by a deed that is silent as to riparian rights, the conveyed parcel is forever deprived of
25 its riparian status." (Hutchins, *The Cal. Law of Water Rights* (1956) p. 195 (citing *Rancho Santa*

26 ³ The State Water Board has agreed not to conduct any further administrative proceedings
27 relating to Order WR 2011-0005 or WR 2012-0012 until the appeal pending in *Young, et al. v.*
28 *State Water Resources Control Board, et al.*, Case No. C068559 ("Young Appeal"), is resolved.
The Young Appeal will consider whether the State Water Board has the authority to define the
extent of claimed riparian or pre-1914 appropriative water rights when exercising its power to
issue cease and desist orders against unlawful diversions of water.

1 *Margarita v. Vail* (1938) 11 Cal. 501, 538); *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal.
2 327, 331 [applying presumption]; 6 Miller & Starr Cal. Real Estate (3d ed. 2000) § 17:25.) The
3 Supreme Court has long recognized this presumption can be overcome by evidence
4 demonstrating that the grantor (at the time of severance) intended to cause the noncontiguous
5 parcel to maintain a riparian right. (*Hudson v. Dailey* (1909) 156 Cal. 617, 624-25.) The courts
6 have identified evidence that can be used to prove intent, including:

- 7 • If the tract conveyed received water from the water source before and after the
severance;
- 8 • If at the time of conveyance there were ditches leading from the water source to the
tract conveyed;
- 9 • If the use of the water on the noncontiguous parcel before and after the conveyance
was “open;” and
- 10 • If at the time of conveyance the use of the water is reasonably necessary to the use and
11 benefit of the noncontiguous parcel.

12 (*Hudson v. Dailey, supra*, 156 Cal. at pp. 624-25; *Holmes v. Nay* (1921) 186 Cal. 231, 237; see
13 also *Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1420.⁴)

14 In Order WR 2012-0016, the State Water Board did not rely on any of these types of
15 evidence. The State Water Board did not find the Dunkels’ property received water from Middle
16 River prior to severance. It did not find there were ditches leading from Middle River to the
17 Dunkels’ property at the time of severance. It did not find the use of water on the Dunkels’
18 property was “open.” And, it did not find the use of water from Middle River was reasonably
19 necessary to the use and benefit of the Dunkels’ property. Where courts have faced a similar
20 dearth of evidence in the past, they have declined to conclude that the owners of the severed
21 parcel retained a riparian right. (E.g., *Hudson v. Dailey* (1909) 156 Cal. 617, 625.) While the
22 Order cites *Hudson*, the Order’s reasoning is directly contrary to *Hudson*.

23 In *Hudson* the plaintiff alleged that defendants were unlawfully interfering with her
24 riparian rights to the surface flow of San Jose Creek. The plaintiff’s land and most of the
25 defendants’ lands were once a part of a Mexican land grant, the Rancho de la Puente. The two

26 ⁴ In Order WR 2012-016, the State Water Board listed examples of evidence that can be
27 used to prove the intent to retain a riparian right, as outlined by the Supreme Court in *Hudson v.*
28 *Dailey*, but did not analyze whether any of the listed evidence existed regarding the Dunkels’
property. (Order at p. 7.)

1 owners of the rancho made a deed of partition in 1868. That deed included a covenant that
2 despite the partition, the rights to use the water of San Jose Creek would “continue and remain as
3 heretofore” with each owner and their “heirs and assigns” would have “equal shares” to that
4 water. (*Hudson, supra*, 156 Cal. at p. 623.) In *Hudson*, the Supreme Court held that this
5 covenant alone was insufficient to secure a riparian right in the defendants, who were subsequent
6 grantees of parcels that did not abut the stream. (*Id.* at p. 624.) Absent evidence of subsequent
7 conveyances transferring the right, and absent evidence about the use of water from the stream on
8 the severed parcels at the time of severance, the court held there was insufficient evidence to
9 overcome the presumption and support a claim of riparian right. (*Id.* at pp. 624-625.) The court
10 explained: although the record contained evidence that each of the defendants had used water
11 from the creek for some time, “the conditions of such use, and the nature of the right under which
12 it was had, [were] not shown,” nor “[h]ow long the use had continued.” (*Id.*)

13 On the facts here, *Hudson* compels a finding that the Dunkels have failed to prove their
14 parcel has a riparian right. The Order cites no evidence of ditches or use of water at the Dunkels’
15 property at time of severance, and no deeds expressly conveying a riparian right. If the covenant
16 in the original deed of partition in *Hudson* was insufficient to support a claim of riparian right, so
17 too is the September 29, 1911 agreement, because it is even less probative of such an intent. Nor
18 is the September 11, 1911 agreement a sufficient substitute for actual evidence of water delivery
19 and use on the Dunkel parcel, just as the 1868 deed of partition was not a sufficient substitute for
20 such evidence in *Hudson*. Hence, the Order is not supported by substantial evidence and is
21 contrary to *Hudson*.

22 In cases where the grantor kept the noncontiguous parcel for himself, rather than convey it
23 to a third party (the Dunkel scenario), courts have similarly declined to find preservation of a
24 riparian right when faced with similarly minimal evidence. In *Eutenier v. Kluge* (2006) 2006 WL
25 2879781 (not published), the only evidence presented in support of intent to preserve a riparian
26 right for Kluge’s noncontiguous parcel was Kluge’s own testimony recounting statements by a
27 third party that “I [Mr. Kluge] should be happy to sell this property . . . because we’re going to
28 get all the water in the world from this reservoir, and . . . I could keep my riparian rights.” (2006

1 WL 2879781, at p. 6.) Little weight was given to this testimony; and significant weight was
2 given to the fact that at the time of conveyance of the riparian parcel, Kluge also deeded an
3 easement to the grantee, demonstrating that Kluge was familiar with the form and effect of a grant
4 of easement. (*Id.* at p. 7.) The court therefore found “substantial evidence to support the trial
5 court’s determination that Kluge failed to prove that a loss of riparian rights was not intended.”
6 (*Id.* at p. 8.) As in *Eutenier v. Kluge*, there is no proof that loss of a riparian right for the
7 Dunkels’ property was not intended.

8 Order WR 2012-0016 cites to State Water Board Order WR 2004-0004 (“Phelps Order”)
9 for support of its finding here. In the Phelps Order, the State Water Board consider a claim by a
10 landowner (“Silva”) that his noncontiguous parcel maintained a riparian right to water in Middle
11 River. The State Water Board concluded that the September 29, 1911 water supply agreement
12 evidenced an intention by the parties to the conveyance to maintain a riparian right. (Phelps
13 Order at p. 27.) There is no discussion in the Phelps Order of the evidence presented in that
14 proceeding regarding use of water on the Silva parcel at the time of severance. The Phelps Order
15 does not discuss *Hudson*. Hence it is not persuasive here, and, in any event, cannot excuse the
16 failings of the Order in this proceeding, as presented above.

17 **V. CONCLUSION**

18 Based on the foregoing, Petitioners respectfully request the State Water Board rescind
19 Order WR 2012-0016 and defer its decision on whether to issue to the Dunkels a cease and desist
20 order until after it has completed the hearing in the Woods matter, as directed in Order WR 2012-
21 0012.

22 Dated: November 15, 2012

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1 **PROOF OF SERVICE**

2 I, Sherrie Cork, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On November 15, 2012, served a
6 copy of the within document(s):

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION
8 FOR RECONSIDERATION OF ORDER DECLINING TO ISSUE CEASE AND
9 DESIST ORDER (DIVERSION OF WATER BY MARK AND VALLA DUNKEL)**

- 10 by transmitting via facsimile the document(s) listed above to the fax number(s) set
11 forth below on this date before 5:00 p.m.
- 12 by placing the document(s) listed above in a sealed envelope with postage thereon
13 fully prepaid, in the United States mail at Sacramento, California addressed as set
14 forth below.
- 15 by placing the document(s) listed above in a sealed Federal Express envelope and
16 affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal
17 Express agent for delivery.
- 18 by personally delivering the document(s) listed above to the person(s) at the
19 address(es) set forth below.
- 20 by transmitting via e-mail or electronic transmission the document(s) listed above
21 to the person(s) at the e-mail address(es) set forth below.

22 *See Attached Service List*

23 I am readily familiar with the firm's practice of collection and processing correspondence
24 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
25 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
26 motion of the party served, service is presumed invalid if postal cancellation date or postage
27 meter date is more than one day after date of deposit for mailing in affidavit.

28 I declare that I am employed in the office of a member of the bar of this court at whose
direction the service was made.

Executed on November 15, 2012, at Sacramento, California.



Sherrie Cork

1 *In The Matter of the Draft Cease and Desist Order Against Unauthorized Diversion of Water by*
2 *Mark and Valla Dunkel*

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