

MARK and VALLA DUNKEL CDO HEARING Landon Blake Testimony

Introduction

(P1) I have been asked to examine relevant documents from the Dunkel Parcel chain-of-title to determine if the property maintained a surface connection to a waterway. Although I am not an attorney and did not make any conclusions or findings on legal issues, I was told a conclusion about riparian rights may be drawn from evidence related to any surface connection to a waterway revealed by my chain-of-title research.

(P2) I will now summarize the conclusion I made after a thorough analysis of my research. I conclude that the Dunkel Parcel was directly connected to Middle River until the time of the Agreement to Furnish Water by and between Woods Irrigation Company and Jesse L. Wilhoit and Mary L. Douglass dated September 29, 1911 (Dunkel Exhibit 2B). I am also informed that by maintaining a method by which water could be delivered, the Dunkel Parcel would preserve its riparian right after its separation from a direct connection to Middle River. I believe the 1911 agreement and the natural interior sloughs and irrigation system in place by 1911 provides evidence of the necessary intent for the Dunkel Parcel to maintain a connection that could establish a riparian right, although I did not make a legal conclusion about this particular issue.

(P3) I will now explain (1) how I reached the conclusion that the Dunkel Parcel remained directly connected to Middle River before the 1911 agreement to furnish water and (2) present the evidence that I believe demonstrates the Dunkel Parcel actually preserved a direct connection to Middle River after separation from a direct surface connection.

Chain-of-Title Analysis

(P4) The chain-of-title analysis I conducted for this matter relied on documents obtained from chain-of-title research from three (3) sources. The first source is chain-of-title research conducted by Mr. Thurl Pankey, one of the principles of Central Valley Land Service Company and his associates. The second source is the chain-of-title research performed by Stephen Wee and submitted to this board as evidence in this matter. The third source is the chain-of-title research performed by me or under my direct supervision. I note that my chain-

of-title research revealed no apparent gaps in title for the current Dunkel Parcel. Any chain of title documents initially from other sources were confirmed by me.

(P5) I will begin with an examination of the transfers in the Dunkel Parcel chain-of-title that prove a direct surface connection to Middle River was maintained by the Dunkel Parcel until the 1911 agreement to furnish water. The first transfer examined in detail will be the government patent. The last transfer examined in detail will be the transfer that separated the Dunkel Parcel from a direct connection to Middle River. I will then briefly summarize the remaining transfers in the chain-of-title to date.

Transfer #1

State of California to JP Whitney (Patent)

Book 3 of Patents – Page 444

1/24/1876

(P6) The lands described in the patent from the State of California to JP Whitney include the current Dunkel Parcel and were connected to Middle River, Duck Slough, and Burns Cut Off. Beginning at the 16th line of the top of the second page of the patent the lands which include the current Dunkel Parcel are described as the “Fract Sec 1” or Fractional Section 1, “lying east and north of the Middle San Joaquin River”, in Township 1 North, Range 5 East. This patent and my visual representation of the patent is attached as Dunkel Exhibit 3A.

Transfer #2

JP Whitney to MC Fisher (Deed)

Book A of Deeds – Volume 33 – Page 289

1/17/1876

(P7) The lands described in the subsequent deed in the chain-of-title from JP Whitney to MC Fisher include the current Dunkel Parcel and were connected to Middle River, Duck Slough, and Burns Cut Off. Beginning at the 25th line counted from the top of the first page of the deed the lands which include the current Dunkel Parcel are described as the “portions of Section 1...lying east of Middle River”, in Township 1 North, Range 5 East. This deed and my visual representation of the patent is attached as Dunkel Exhibit 3B.

Transfer #3
MC Fisher to Stewart, Bunten, and King (Deed)
Book A of Deeds – Volume 37 – Page 529
9/11/1978

(P8) The lands described in the subsequent deed in the chain-of-title from MC Fisher to Stewart, Bunten, and King include the current Dunkel Parcel and were connected to Middle River, Duck Slough, and Burns Cut Off. Beginning at the 22nd line counted from the top of the second page of the deed the lands which include the current Dunkel Parcel are described as “portions of Section 1...lying east of Middle River”, in Township 1 North, Range 5 East. This deed and my visual representation of the patent is attached as Dunkel Exhibit 3C.

Transfer #4
Stewart, Bunten, King to John and EWS Woods (Deed)
6/8/1891

(P9) The lands described in the subsequent deed in the chain-of-title from Stewart, Bunten, and King to J.N. and E.W.S. Woods include the current Dunkel Parcel and were connected to Middle River. Beginning at the 27th line counted from the top of the first page of the deed the description of the lands which include the current Dunkel Parcel contains a controlling call “to the right bank of Middle River” and then another controlling call “running along said east bank”. This deed and my visual representation of the patent is attached as Dunkel Exhibit 3D.

Transfer #5
EWS and Alice Woods to Jesse Wilhoit and Mary Douglas
(Deed)
12/14/1909

(P10) The lands described in the subsequent deed in the chain-of-title from EWS Woods and Alice Woods to Jesse Wilhoit and Mary Douglas include the current Dunkel Parcel and were connected to Middle River. Beginning at the 26th line counted from the top of the beginning of the deed the description of the lands which include the current Dunkel Parcel contains a controlling call “to the right bank of Middle River” and then another controlling call to “meandering the right bank of the Middle River”. Beginning at the 26th line counted from the top of the second page the deed identifies the described parcel as including a portion of Section 1, Township 1 South, Range 5 East. I would also like to note the parcel geometry description contained in this deed also

contains a controlling call for the "center line of a main irrigation canal". This controlling call provides further evidence that the lands which contained the Dunkel Parcel were being irrigated at the time this description was written, at least as early as 1909. This deed and my visual representation of the patent is attached as Dunkel Exhibit 3E.

Transfer #6

**Jesse Wilhoit and Mary Douglas to EL Wilhoit, MD Eaton, and
WD Buckley (Deed)
9/30/1911**

(P11) The lands described in the subsequent deed in the chain-of-title from Jesse Wilhoit and Mary Douglas to EL Wilhoit, MD Eaton, and WD Buckley contain the same language related to Middle River as Transfer # 5 described above. This deed and my visual representation of the patent is attached as Dunkel Exhibit 3F.

Transfer #7

**EL Wilhoit, MD Eaton, and WD Buckley to WB and MF Walters
(Deed)
11/29/1911**

(P12) This deed transfers Lot 9 of the Wilhoit Douglas Tract. Lot 9 contains the current Dunkel Parcel, which covers the majority of the lot. This transfer separates the Dunkel Parcel from a direct surface connection to Middle River. After a discussion of the transfers in the Dunkel Parcel chain-of-title is concluded, I will discuss the evidence that the Dunkel Parcel maintained its connection to water from Middle River after this separation from a direct surface connection. This deed and my visual representation of the patent are attached as Dunkel Exhibit 3G. I note this transfer took place two (2) months after the September 29, 1911 agreement to furnish water to the lands that included the current Dunkel Parcel, indicating that at the time of separation from Middle River, the land owner had secured the right/ability to get water to the property.

(P13) There are 6 additional transfers in the Dunkel Parcel chain-of-title between Transfer #7 described above and the current grant deed from Silveira to Dunkel, the current owner. My examination of these documents did not reveal any language that pertains to riparian rights, water rights, or changes in the configuration of the parcel that would be material to the matter at hand. I will, however, list these remaining

transfers at this time for reference purposes. (The recording references for these transfers are explained in the footnote). These transfers have also been included as Dunkel Exhibit 3H.

List of Remaining Transfers

[8] Walters to Pardini [Book "A" 231-111] 10/01/1913

[9] Pardini to Alegretti [OR-339-460] 01/06/1931

[10] Alegretti to Pardini [OR-351-297] 01/06/1931

[11] Pardini to Avila [OR-753-124, & OR-1373-369] 08/27/1941 & 11/09/1951

[12] Avila to Avila & Mendonca (Distribution of Estate)[IN-90052530] 05/29/1990

[13] Avila & Mendonca to Silveira [IN-90051397, IN-90052531, IN-90052529] 05/23/1990, 05/29/1990, 05/29/1990

[14] Silveira to Dunkel [IN-91117374] 12/03/1991

Evidence of Preservation of Riparian Right After Separation In Transfer #7

(P14) I will now present evidence that shows the Dunkel Parcel maintained its connection to Middle River water after the separation of the direct surface connection to Middle River resulting from Transfer #7 described above. This evidence will include (1) a 1907/1908 map showing the current Dunkel Parcel as part of a larger ownership being served by an extensive irrigation system; (2) A map dated July 1914 that clearly shows the Dunkel Parcel directly connected to an interior island slough; and (3) a review of testimony submitted to the board in this hearing and other related hearings.

(P15) In the rebuttal testimony presented by MID et. al. in the Woods Irrigation Company hearing, Stephen Wee provided a copy of an April 15, 1875 article in the *Stockton Daily Independent* which included a printing of a "General Report of Charles D. Gibbs." In that report, Mr. Gibbs identified an open (undammed) slough on Middle River. [See MSS R-14, Pages 6-7 and Exhibit 21 attached thereto.] Based on the description in the General Report, this slough was in the area of the current Woods Irrigation Company main diversion point. Stephen Wee

agrees with this general location of the slough [see MSS R-14 Exhibit 22.] The written records available do not confirm when or if that slough was actually dammed off, though Stephen Wee concludes that as part of the completion of the reclamation of Middle Roberts Island it must have been dammed.

(P16) In that same rebuttal testimony, Stephen Wee references a 1898 article in the *Pacific Rural Press* entitled "Agricultural Review." The article is divided according to county, and under the portion for San Joaquin County, it mentions the Woods Brothers activities on Roberts Island, noting "The irrigation system will be made a permanent one, and for that reason a substantial headgate is being fixed in the levee at the Middle river (sic) end of the canal. Most of the irrigation is being done by means of siphons, which conduct the water over the tops of the levees." [See MSS R-14 WIC Exhibit 5.] Excepting for the smaller Woods Irrigation Company diversion point, I believe the information produced in the Woods Irrigation Company hearing and the testimony by Dante J. Nomellini herein provide that the main diversion point for Woods Irrigation Company has remained at the same location since the company's inception. This means that the "substantial headgate" referenced above was a predecessor facility of this diversion, at this same location.

(P17) Mr. Moore's testimony in the Woods Irrigation Company hearing (WIC Exhibit 2 and 2-2K) identifies a number of old sloughs, including a number that run through what is now the Woods Irrigation Company service area. His exhibit relies on, and includes an overlay of a map produced by Kenneth Lajoie in the Mussi et. al. and Pak and Young hearing (Exhibit 1, Figure 9 therein). One of the identified sloughs runs from the current Woods Irrigation Company diversion point in a (generally) northeasterly direction. From the maps discussed below, I believe we can match the slough identified by Mr. Gibbs in 1875, the headgate identified 1898, and the slough identified by Mr. Moore with a portion of the current Woods Irrigation Company delivery system; which system abuts the Dunkel property.

1907/1908 Map of Woods Brothers Lands

(P18) The 1907/1908 Map of Woods Brothers Lands was previously submitted to the board as WIC Exhibit 6J. It shows that an extensive irrigation system was in place at least as early as 1907/1908. This irrigation system served lands owned by J.N. and E.W.S. Woods, which contained the current Dunkel Parcel and are described in Transfer #4. This map does not directly contain a date on its face, but Page 3 of my

testimony in the Woods Irrigation Company hearing before this board contains my explanation of how the date of the map was determined (WIC Exhibit 6).

July 1914 "San Joaquin Delta Map"

(P19) The map entitled "San Joaquin Delta", dated July 1914, and produced by Hendersen and Billwiller, Civil and Hydraulic Engineers was recently obtained from the San Joaquin County Surveyor's Office. It was previously submitted to the board as WIC Exhibit 6K in the Woods IC hearing. The enlargement of the "Legend" and a portion of the map in the vicinity of the Dunkel Parcel are included as part of the same exhibit.

(P20) The map shows "Canals, Ditches and Small Sloughs" as a dotted line and "Channels, Rivers, Sloughs and Cuts" as two solid lines. This map shows dotted lines in all the same locations as the Map of Woods Brothers Lands described above, and in a few other locations. These lines indicate that an extensive system of canals or ditches provided water to the area within the WIC service area from not only 1914, but confirms my conclusions in the Woods Irrigation Company hearing before this board regarding the "Map of Woods Brothers Lands" which showed that this system existed at least as early as 1907/1908.

(P21) The enlargement of the area around the current Dunkel Parcel clearly shows that an interior island slough in the area continues to exist and be used in 1914. This slough runs from the WIC diversion in a northeasterly direction. We see a bridge over the slough, and a number of dotted lines (canals/ditches) coming off of it. The southwesterly end of this slough reaches to Middle River. At that time, the slough was apparently being filled by the flood gate, and/or pumps. This same slough is also evident in the 1911 Stockton USGS Quad (7 ½ Miniute) Topographic Map, which is attached as Dunkel Exhibit 3I.

(P22) I have personally visited the WIC diversion and observed an old flood gate structure made of brick. This structure goes through the levee, not over it, and we can still see the mechanism used to regulate the water into the slough. The evidence shows the Dunkel Parcel was abutting this original interior island slough from at least the time of the 1907/1908 map mentioned in the "Map of Woods Brothers Lands".

(P23) Based on the evidence described above, I conclude that not only did the Dunkel property maintain a connection to Middle River as part of a larger parcel up to and past the date of the 1911 agreement to furnish water, but also that the land which actually became the Dunkel parcel abutted a channel/slough/canal which was directly connected to Middle River and was used for the delivery of water for irrigation. Thus, any separation of the Dunkel property from the larger parcel which connected to Middle River did not result in the Dunkel property being without access to water. I believe this situation indicates that for any subsequent transfer of the property there was clearly intent to preserve the right to get water to the parcel.

(P24) In reaching these conclusions. I am taking into account the testimony of Dante J. Nomellini offered in this hearing where he cites language from "The Settlement Geography" of the Delta. That language and his testimony indicate that when sloughs were dammed off, the common practice was to install a sluice or flood gate for the purposes of both irrigation and drainage. In that instance, an alleged damming off of the slough which abuts the Dunkel property would have not affected the direct connection of that property to Middle River if the damming included a flood gate. Since the Dunkel property even today abuts the same old slough being used by Woods Irrigation Company for the delivery of irrigation water, it is clear the property maintained a riparian connection to Middle River.

(P25) I would like to note an error in the record, which alleged a severance of the Dunkel parcel. This error was pointed out by Mr. Nomellini in his declaration in support of the Motion to Re-Open this proceeding. I was asked to address this issue in case the declaration is not considered evidence for purposes of the record herein.

(P26) In MSS 1 of this hearing, Stephen Wee identifies the deed from E.W.S. and Alice Woods to Jesse L. Wilhoit and Mary L. Douglass, dated December 14, 1909 as the instrument that severs the Dunkel parcel from a connection to Middle River (see page 3, first full paragraph). He makes this statement even though his Exhibit 1G shows the transferred parcel still connecting to Middle River. His statement is incorrect. As Mr. Nomellini pointed out and as I described in the paragraph above dealing with Transfer #5 (Paragraph 10), that deed's description of the boundary of the land being transferred contains the language "... to the right bank of Middle River ... meandering the right bank of the Middle River ..." Clearly this deed did not sever the Dunkel property from Middle River.

(P27) I believe Stephen Wee corrected this error (without specifically stating such) in his rebuttal testimony in the Woods Irrigation Company hearing. In MSS R-14 in that hearing, on pages 23-25 and as graphically shown on WIC Exhibit 7A, attached thereto, Stephen Wee notes that a parcel of 710.85 acres (which contains the Dunkel property) "... was the only parcel that remained riparian through 1911 ..." via Middle River. This latter testimony by Stephen Wee is correct. The Dunkel parcel was not separated out/off from the larger parcel (connected to Middle River) until the deed dated November 29, 1911; two months and one day after the Dunkel property was the subject of the 1911 Agreement to Furnish Water (between Woods Irrigation Company and Wilhoit and Douglass).

Conclusion

(P28) I conclude that the Dunkel Parcel was directly connected to Middle River until the time of the Agreement to Furnish Water by and between Woods Irrigation Company and Jesse L. Wilhoit and Mary L. Douglass dated September 19, 1911. I believe the 1911 agreement to furnish water and the natural interior sloughs and irrigation system in place well before 1911 provides evidence of the intent for the Dunkel Parcel to maintain a connection that could establish a riparian right, although I did not make a legal conclusion about this particular issue.

Footnote: In the recording references listed above "Book A" is Book A of Deeds, San Joaquin County Records. "OR" is an abbreviation for Official Records of San Joaquin County. "IN" is an abbreviation for instrument number of San Joaquin County Records. Book or Volume is the first number listed in these recording references, while the page number is listed second.