



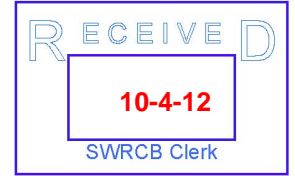
O'Laughlin & Paris LLP

Public Comment  
10/16/12 Bd. Mtg. Dunkel CDO Hearing  
Deadline: 10/4/12 by 12 noon

Attorneys at Law

SENT VIA EMAIL

October 4, 2012



Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**RE: COMMENT LETTER – 10/16/12 BOARD MEETING: DUNKEL CDO HEARING**

Dear Ms. Townsend,

On September 19, 2012, the State Water Resources Control Board (“State Water Board”) issued a draft Order declining to issue a cease and desist order against Mark and Valla Dunkel (“Draft Order”). If issued as drafted, the Draft Order would violate the rules of water rights.

The Draft Order declines to issue a cease and desist order based on the conclusion that a 1911 Agreement amounted to evidence that the Dunkel’s property retained a riparian right at the time it was severed from Middle River. The Draft Order specifically cites *Hudson v. Dailey* (1909) 156 Cal. 617 (“*Hudson*”), in support of its conclusion that there was evidence to retain a riparian right. In *Hudson*, the court provided that use of the watercourse and infrastructure, such as canals and ditches, in place at the time of the conveyance amount to evidence to preserve a riparian right. (*Hudson*, at 624-5.) The “mere fact” that the parcel was previously contiguous was not sufficient evidence of preservation. (*Id.*)

In the 1911 Agreement, landowners and the Woods Irrigation Company agreed to the future construction of conveyance facilities which would provide delivery and drainage of water. The 1911 Agreement does not provide proof that water was being diverted to the Dunkel property at the time it was severed from Middle River. Further, in opposite to *Hudson*, the 1911 Agreement provides evidence that conveyance facilities were not in place at the time of severance. The Dunkels were unable to produce evidence to establish the date upon which the existing water delivery system was constructed and began putting water to beneficial use. Therefore, unlike *Hudson*, Dunkel was unable to provide evidence showing water was being diverted or facilities to divert water were in place at the time land was separated from Middle River.

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State Water Resources Control Board  
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In addition, the State Water Board cannot rely upon the 1911 Agreements as evidence of preservation of a riparian right because the State Water Board has previously relied upon the 1911 Agreement to determine that Woods Irrigation Company may divert pursuant to pre-1914 water rights. (WR Order 2011-0005.) This determination means the State Water Board previously decided that the 1911 Agreement was evidence of water delivery pursuant to appropriative rights. The same diversion of water cannot also be counted to preserve riparian rights; a single diversion cannot result in establishing two different water rights. Therefore, because of the State Water Board's previous determination that the 1911 Agreement supports the establishment of a pre-1914 water right, the 1911 Agreement cannot also support a riparian right in the current matter.

For the reasons stated above, the State Water Board should not adopt the Draft Order. The State Water Board is tasked with upholding and enforcing the State's rules of water rights. Therefore, it should not issue an order that violates the same rules it is required to uphold.

Very truly yours,  
**O'LAUGHLIN & PARIS LLP**

  
VALERIE C. KINCAID

VCK/tlb