

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2013-0018

In the Matter of Order WR 2012-0016
Declining to Issue Cease and Desist Order Against Mark and Valla Dunkel

SOURCES: Middle River

COUNTY: San Joaquin

ORDER DENYING PETITION FOR RECONSIDERATION OF ORDER WR 2012-0016

BY THE BOARD:

1.0 INTRODUCTION

By this Order, the State Water Resources Control Board (State Water Board or Board) denies a petition for reconsideration of [Order WR 2012-0016](#). San Luis & Delta-Mendota Water Authority, State Water Contractors acting for and on behalf of their member agencies, and Modesto Irrigation District (collectively, hereafter “Petitioners”) jointly filed the petition for reconsideration on November 15, 2012.

In Order WR 2012-0016, the State Water Board declined to issue a Cease and Desist Order (CDO) against Mark and Valla Dunkel (Dunkels) because the State Water Board found that the evidence contained in the administrative record did not demonstrate an actual or threatened unlawful diversion of water on the Dunkels’ property.

For the reasons set forth below, the Board finds that Order WR 2012-0016 was appropriate and proper, and therefore denies the petition for reconsideration. To the extent that any issue raised in the petition is not addressed in this Order, we conclude that the issue is not a substantial issue that merits review. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).)

2.0 LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND

Order WR 2012-0016 contains a detailed description of the legal, factual, and procedural background in this proceeding, the pertinent parts of which are summarized below.

2.1 Strategic Workplan

On July 16, 2008, the State Water Board adopted a Strategic Workplan (Workplan) for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Delta). The Workplan emphasized the Board's responsibility to vigorously enforce water rights by preventing the unauthorized diversions of water within the Delta. As directed by the Workplan, the Board's Division of Water Rights (Division) initiated an investigation of the basis of water rights of existing diverters within the Delta.

Thereafter, the Division reviewed a variety of information to identify parcels within the Delta upon which irrigation had taken place in the preceding several years but for which the Division had no record of any basis of right for water diversion. On February 18, 2009, the Division mailed letters to the owners of those parcels on Roberts and Union Islands. These letters requested that each property owner either: (1) inform the Division as to the basis of his water right within 60 days, (2) state a contractual basis for diversion of water, or (3) cease diversion of water until securing a basis of right.

The Division mailed such a letter to the Dunkels as owners of San Joaquin County Assessor's Parcel Number 162-090-01, located on Middle Roberts Island. On September 9, 2009, the Division mailed a second letter to the Dunkels by certified mail, but received no response.

2.2 Cease and Desist Authority for Water Right Violations

The State Water Board may issue a CDO in response to a violation or threatened violation of: (1) the prohibition against the unauthorized diversion or use of water; (2) a term or condition of a water right permit, license, certification, or registration; or (3) a State Water Board Order or decision issued pursuant to specified provisions of the Water Code. (Wat. Code, § 1831, subds. (a) & (d)(1-3).) The Board may require compliance immediately or may set a time schedule for compliance. (Wat. Code, § 1831, subd. (b).)

Before issuing a CDO, the Board must provide notice and an opportunity for a hearing to the person allegedly engaged in the violation. (Wat. Code, §§ 1831, subd. (c); 1834, subd. (a).) The notice must contain “a statement of facts and information that would tend to show” the alleged violation. (Wat. Code, § 1834, subd. (a).)

2.3 Notice of Proposed CDO Against Mark and Valla Dunkel

The Dunkels, and their tenants, use water diverted from Middle River on their parcel. On December 14, 2009, the Division’s Assistant Deputy Director for Water Rights (Assistant Deputy Director) issued a proposed CDO to the Dunkels for alleged violation and threatened violation of the prohibition against the unauthorized diversion or use of water. If imposed, the proposed CDO would have: (1) required the Dunkels to submit evidence sufficient to establish a basis of right for water diversion, (2) prohibited the Dunkels from diverting any water onto their property until the Assistant Deputy Director approved the exercise of the Dunkels’ water right, and (3) directed the Dunkels to submit a plan for permanently removing the diversion works on their property if they were unable to establish a basis of right within 90 days.

2.4 Evidentiary Hearing Concerning Proposed CDO Against Mark and Valla Dunkel

On December 30, 2009, the Dunkels timely requested a hearing. On February 18, 2010, the State Water Board issued a notice of public hearing on the proposed CDO against the Dunkels and proposed CDOs against landowners of several nearby parcels.¹ The joint hearings were held on May 5, June 9, July 9, and July 15, 2010. Board Chairman Charles Hoppin and former Board Member Arthur Baggett, Jr. presided over the hearing as Hearing Officers. The Hearing Officers were assisted by a staff Hearing Team.

At the hearing, the Dunkels, the State Water Board’s Prosecution Team, and joint participants Modesto Irrigation District, State Water Contractors, and San Luis & Delta-Mendota Water Authority appeared and presented cases-in-chief. Central Delta Water Agency, South Delta Water Agency, San Joaquin County, and the San Joaquin County Flood Control & Water Conservation District appeared only to participate by cross-examination or rebuttal and to

¹ The other parties in the joint notice were: (1) Rudy Mussi, Toni Mussi, and Lory C. Mussi Investment L.P., (2) Yong Pak and Sun Young, and (3) Gallo Vineyards, Inc. Gallo Vineyards, Inc. settled with the prosecution team before the hearing. (Order WR 2010-0026-EXEC.) The proceedings for the remaining parties moved forward jointly.

present non-evidentiary policy statements. The San Joaquin Farm Bureau and California Department of Water Resources appeared to present non-evidentiary policy statements only.

On August 4, 2010, the State Water Board continued the Dunkel hearing for the limited purpose of reopening the administrative hearing record to receive additional evidence relevant to the Dunkels' claim to hold riparian water rights. The Board continued the hearing after additional evidence relevant to the Dunkels' riparian claim was identified in a separate hearing addressing a proposed CDO against Woods Irrigation Company; this proceeding is discussed below in greater detail.

2.5 Order WR 2012-0016

Following the evidentiary hearing and the parties' submission of closing briefs, the State Water Board adopted Order WR 2012-0016 at its October 16, 2012 meeting. In Order WR 2012-0016, the Board declined to issue a CDO against the Dunkels because the Board found that there was no actual or threatened unlawful diversion of water on the Dunkels' property.

Order WR 2012-0016 rests on the Board's finding that the Dunkels' property retains riparian rights to Middle River. The Dunkels' property was once part of a larger parcel that abutted Middle River. The uncontested evidence showed that on September 29, 1911, the owners of this larger parcel entered into an irrigation agreement with Woods Irrigation Company to irrigate the entire parcel with water from Middle River. On November 29, 1911, a conveyance caused the Dunkels' property to be divided from the larger parcel and severed from physical connection to Middle River. The conveyance was made subject to the September 29, 1911 irrigation agreement.

When a riparian parcel is subdivided such that it is no longer contiguous to a watercourse, the riparian right formerly attached to the noncontiguous parcel may be retained upon a showing of intent to preserve the riparian right in the noncontiguous parcel. (*Hudson v. Dailey* (1909) 156 Cal. 617, 624-25.)

In Order WR 2012-0016, the Board found that the fact that the conveyance dividing the Dunkels' property was made subject to a previous irrigation agreement demonstrated an intent to preserve the riparian rights appurtenant to the Dunkels' property.²

A parcel with riparian rights may lawfully divert the natural flow of a stream, so long as the water diverted is put to reasonable and beneficial use on the parcel and the parcel is within the watershed. (*Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 754, 774-775.) Because there was no allegation or evidence suggesting that water use on the Dunkels' property was in excess of its riparian rights, the Board found that there was no evidence of an actual or threatened unlawful diversion on the Dunkels' property. The State Water Board therefore declined to issue a CDO.

Petitioners filed their petition for reconsideration on November 15, 2012.³

2.6 Related Proceedings Concerning Woods Irrigation Company

Woods Irrigation Company (Woods) is an irrigation company that diverts water from Middle River and conveys that water to parcels on Middle Roberts Island, including the Dunkels' property. In 2009, the Division commenced an investigation into the possibility that Woods was diverting water without authorization.

² Order WR 2012-0016 does not constitute an adjudication or determination of the Dunkels' riparian claim of right within the meaning of a statutory stream adjudication, which determines the extent and priority of the right pursuant to procedures making the determination binding on all claimants to water from the stream system. (See Wat. Code, §§ 2501, 2525, 2774.) Order WR 2012-0016 is not simply an exercise of the Board's prosecutorial discretion, however. Order WR 2012-0016 reflects the Board's decision, based upon the weight of the evidence admitted in an adjudicative proceeding, that an actual or threatened unlawful diversion of water on the Dunkels' property did not exist, and therefore the issuance of a CDO against the Dunkels was unwarranted. (Compare with State Water Board Order WR 2012-0035 at pp. 7-8 [Board's approval of a settlement between the Prosecution Team and a diverter need not be supported by substantial evidence, as approval of a settlement agreement does not require determination of whether an actual or threatened unlawful diversion of water exists].)

³ The State Water Board is directed to act on a petition for reconsideration within 90 days of the date upon which the Board adopts the decision or order that is the subject of the petition. (Wat. Code, § 1122.) If the Board fails to act during that 90-day period, a petitioner may seek judicial review, but the Board retains jurisdiction to act on the petition. (State Water Board [Order WR 2009-0061](#) at p. 2, fn. 1; see also *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145-48; *Edwards v. Steele* (1979) 25 Cal.3d 406, 409-10; State Water Board [Order WQ 98-05-UST](#) at pp. 3-4.)

On December 28, 2009, the Division's Assistant Deputy Director issued a proposed CDO to Woods for alleged violation and threatened violation of the prohibition against the unauthorized diversion or use of water. If imposed, the proposed CDO would have required Woods to cease diversions in excess of 77.7 cubic feet per second (cfs) unless it met certain requirements. Woods timely requested a hearing on January 11, 2010. On April 7, 2010, the State Water Board issued a notice for a hearing to be held on June 7, 2010. The hearing was held on June 7, 2010, but not completed, and continued on June 10, June 24, June 25, June 28, and July 2, 2010. Board Vice-Chair Frances Spivy-Weber and former Board Member Walter Pettit presided over the hearing as Hearing Officers. The Hearing Officers were assisted by a staff Hearing Team.

At the hearing, Woods, the State Water Board's Prosecution Team, and joint participants Modesto Irrigation District, State Water Contractors, and San Luis & Delta-Mendota Water Authority appeared and presented cases-in-chief. Central Delta Water Agency, South Delta Water Agency, San Joaquin County, and the San Joaquin County Flood Control & Water Conservation District appeared only to participate by cross-examination or rebuttal and to present non-evidentiary policy statements. The San Joaquin Farm Bureau appeared to present non-evidentiary policy statements only.

Following the evidentiary hearing and the parties' submission of closing briefs, the State Water Board adopted [Order WR 2011-0005](#) at its February 1, 2011 meeting. Order WR 2011-0005 directed Woods to: (1) cease and desist diverting water from Middle River in excess of 77.7 cfs, (2) meet certain monitoring requirements, and (3) comply with certain requirements prior to diverting at a rate greater than 77.7 cfs.

On March 2, 2011, several of Woods's customers—R.D.C. Farms, Inc., Ronald & Janet Del Carlo, Eddie Vierra Farms, LLC, Dianne E. Young, and Warren P. Schmidt as Trustee of the Schmidt Family Revocable Trust (Customers)—jointly filed a timely petition for reconsideration of Order WR 2011-0005.⁴ The Customers alleged that their due process rights were violated because the State Water Board did not provide each of them individual notice of the hearing concerning the proposed CDO against Woods and did not afford them a fair hearing. The Customers also argued that the Board did not have jurisdiction to issue a CDO against Woods

⁴ Woods Irrigation Company, South Delta Water Agency, and Central Delta Water Agency also jointly filed a timely petition for reconsideration. Their petition is not relevant to this order.

- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

On reconsideration, the State Water Board may:

- (1) Refuse to reconsider the decision or Order if the petition fails to raise substantial issues related to the causes for reconsideration;
- (2) Deny the petition upon a finding that the decision or Order was appropriate and proper;
- (3) Set aside or modify the decision or Order; or
- (4) Take other appropriate action.

(Cal. Code Regs., tit. 23, § 770, subd. (a).)

4.0 DISCUSSION

Petitioners raise two arguments for reconsideration of Order WR 2012-0016. First, Petitioners argue that the potential for new evidence to be introduced in the reopened proceeding against Woods favors rescinding Order WR 2012-0016 and waiting until a hearing in the Woods proceeding has been completed before determining whether to issue a CDO against the Dunkels. Second, Petitioners argue that Order WR 2012-0016 is unsupported by substantial evidence, as insufficient evidence was presented at the hearing to establish that the Dunkels' property retains riparian rights. Accordingly, Petitioners argue that Order WR 2012-0016 contains an error in law because, as a matter of law, the Dunkels' property lost its riparian rights when it was severed from a larger parcel on November 29, 1911.

4.1 Effect of the Reopened Woods Hearing

Petitioners' first argument presents no valid basis for the State Water Board to reconsider Order WR 2012-0016. This argument is based on the speculative possibility that the parties to the reopened Woods hearing *might* introduce evidence relevant to the Dunkels' water rights: "It is

anticipated that in a reopened Woods hearing, Woods' customers (which includes the Dunkels) will present evidence pertaining to the water rights possessed by Woods, and separately, by the customers." (Petitioners' Memorandum of Points and Authorities in Support of Petition for Reconsideration at p. 5 [hereafter "Petition"].) Petitioners identify no relevant evidence that might be produced at the reopened Woods hearing that would support a different finding concerning the riparian rights appurtenant to the Dunkels' property; indeed, the Board finds it highly unlikely that any party to the hearing will present such evidence. Further, even if Petitioners could identify such evidence, they must demonstrate that, in the exercise of reasonable diligence, the evidence could not have been produced at the evidentiary hearing on Order WR 2012-0016 to establish a basis for the Board to reconsider it. (Cal. Code Regs., tit. 23, § 770, subd. (a).) Petitioners have failed to do so. Consequently, Petitioners have failed to state a valid basis for reconsideration.

4.2 Evidence of the Dunkels' Property's Riparian Rights

Petitioners' second argument also fails to present a basis for the State Water Board to reconsider Order WR 2012-0016. Petitioners assert that the conveyance severing the Dunkels' property from contact with Middle River, and the irrigation agreement to which it was subject, are not the type of evidence that can demonstrate an intent to maintain a parcel's riparian rights following its severance from a watercourse. Petitioners correctly note that *Hudson v. Dailey* identifies several types of evidence that may be sufficient to establish such intent. (Petition at pp. 6-7, citing *Hudson v. Dailey, supra*, 156 Cal. 617 at pp. 624-25.) Petitioners are in error, however, in their assertion that because the evidence the Board relied upon in Order WR 2012-0016 is not of the kind identified in *Hudson v. Dailey*, it is insufficient to establish intent to maintain post-severance riparian rights.

In *Hudson v. Dailey*, the California Supreme Court simply identified *some* types of evidence that may be sufficient to establish an intent to maintain post-severance riparian rights; it did not purport to put forth an exhaustive list of such evidence. (*Hudson v. Dailey, supra*, 156 Cal. 617 at pp. 624-25.) Consequently, the State Water Board is permitted to rely upon any relevant evidence demonstrating an intent to maintain riparian rights for the Dunkels' parcel post-severance, so long as that evidence was of the sort that responsible persons are accustomed to rely upon in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) The Board's

conclusion that the conveyance and the related irrigation agreement constituted such evidence was valid.

Petitioners also rely upon the court's treatment of the language in a deed at issue in *Hudson v. Dailey* in support of the argument that the irrigation agreement at issue in this case is insufficient evidence of the intent to maintain riparian rights on the Dunkels' parcel. This argument fails because of a misinterpretation of that case's holding.

4.2.1 Analysis of *Hudson v. Dailey*

The lands at issue in *Hudson v. Dailey* were originally part of a Mexican land grant known as Rancho de la Puente, through which San Jose Creek flowed. (*Hudson v. Dailey, supra*, 156 Cal. 617 at p. 623.) The Mexican government granted Rancho de la Puente jointly to John Rowland and William Workman. (*Ibid.*) Subsequently, in 1868, Rowland and Workman agreed to partition their land into two parcels by a deed which contained a covenant reserving to each of the new parcels an equal right to use the waters of San Jose Creek. (*Ibid.*) Sometime after the 1868 partition, plaintiff Victoria Hudson acquired a 760-acre parcel that was formerly part of the Rowland parcel. (*Id.* at pp. 620, 624.) After San Jose Creek's flow was depleted due to diversions upstream, Hudson brought suit against Ella Dailey and several other defendants in 1909 to obtain a judicial determination that her water rights were superior. (*Id.* at p. 620.) Dailey and the remaining defendants also owned lands subdivided from either the Rowland parcel or the Workman parcel.⁶ (*Id.* at p. 624.)

The California Supreme Court concluded that the 1868 deed of partition entitled the owner of each parcel to make use of an equal share of the waters flowing from San Jose Creek. (*Hudson v. Dailey, supra*, 156 Cal. 617 at p. 624.) The court further concluded, however, that the 1868 deed had no effect on the riparian rights of a parcel later subdivided from either the Rowland parcel or the Workman parcel and severed at that time from contiguity with San Jose Creek. (*Id.* at pp. 624-25.) The court explained that, notwithstanding the language in the 1868 deed, a subsequent conveyance that severed a parcel from the stream would not have conveyed a riparian right unless the severance was: 1) by a deed that explicitly preserved the

⁶ The court was unable to determine from which of the two prior parcels the defendants' parcels were subdivided.

parcel's riparian right; or 2) the circumstances at the time of severance otherwise established an intent to preserve the parcel's riparian right. (*Ibid.*)

There was insufficient evidence for the court to determine: 1) whether Dailey's parcel and the remaining defendants' parcels were contiguous to San Jose Creek; 2) what provisions were contained in the deeds by which the parcels may have been severed; or 3) what the circumstances were at the time of any severance. (*Hudson v. Dailey, supra*, 156 Cal. 617 at p. 625.) For these reasons, the court concluded that the evidence was insufficient to determine whether the defendants' parcels were riparian. (*Id.* at pp. 624-25.)

4.2.2 Application of *Hudson v. Dailey*

Hudson v. Dailey affirms that parcels may retain riparian rights after severance from a watercourse if there is intent to preserve riparian rights for the severed parcel at the time of severance. (*Hudson v. Dailey, supra*, 156 Cal. 617 at pp. 624-25.)

Petitioners argue that because the California Supreme Court found that the deed at issue in *Hudson v. Dailey* was insufficient to preserve riparian rights, the September 29, 1911 irrigation agreement must be insufficient evidence of intent to preserve the riparian rights of the Dunkels' parcel because "it is even less probative of [an intent to retain riparian rights]." (Petition at p. 7.) This argument misconstrues the effect of the court's holding in *Hudson v. Dailey*.

The 1868 deed at issue in *Hudson v. Dailey* partitioned Rancho de la Puente into two parcels. Thereafter, land was subdivided from one or both of those parcels and, at the time of subdivision, that land may have been severed from contiguity with San Jose Creek. The court held that the 1868 deed alone was insufficient evidence to preserve riparian rights for a parcel *subsequently* severed from contiguity with San Jose Creek. *Hudson v. Dailey* does not stand for the proposition that the language contained in the 1868 partition deed, which preserved and divided equally the original owners' water rights, is insufficient evidence of intent to maintain a riparian right. The court did not address the issue of whether such language would have been sufficient if it had been contained in subsequent deeds that severed parcels from the stream.

Here, as discussed above, the November 29, 1911 deed that severed what is now the Dunkels' parcel from Middle River referred to a pre-existing irrigation agreement, which demonstrated

intent to preserve riparian rights for the severed parcel. Unlike the situation in *Hudson v. Dailey*, the administrative record contained evidence of the parties' intent at the time of severance. Therefore, the California Supreme Court's analysis of the 1868 deed at issue in *Hudson v. Dailey* addresses circumstances completely different than those presented here, as that deed had no bearing on the parties' intent at the time when the parcels in question may have been severed from the stream. For the foregoing reasons, petitioners have failed to show that Order WR 2012-0016 was unsupported by substantial evidence, and their argument that Order WR 2012-0016 contains an error in law is without merit.

5.0 CONCLUSION

For the foregoing reasons, the State Water Board finds that Order WR 2012-0016 was appropriate and proper. Therefore, the Petitioners' petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that Order WR 2012-0016 is affirmed, and the petition for reconsideration jointly filed by San Luis & Delta-Mendota Water Authority, State Water Contractors acting for and on behalf of their member agencies, and Modesto Irrigation District is denied for the foregoing reasons.

CERTIFICATION


The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Board held on April 9, 2013.

AYE: Chair Felicia Marcus
 Vice Chair Frances Spivy-Weber
 Board Member Tam M. Doduc
 Board Member Steven Moore
 Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board