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13 **STATE OF CALIFORNIA**  
14 **STATE WATER RESOURCES CONTROL BOARD**

15 )  
16 In the Matter of Draft Cease and Desist Order )  
17 No. 2009-00XX-DWR Enforcement Action 75 ) **MOTION FOR DIRECTED VERDICT**  
18 Against Mark and Valla Dunkel )

19 **I. INTRODUCTION**

20 Pursuant to a Draft Cease and Desist Order (“CDO”) issued by the California State  
21 Water Resources Control Board (“SWRCB”) against Mark and Valla Dunkel (the  
22 “Dunkels”) on December 14, 2009, requesting they provide proof of their legal right to use  
23 water from the Middle River in San Joaquin County on Parcel 162-090-01, the Dunkels  
24 requested a hearing before the SWRCB. Upon request of a hearing, the Dunkels alleged  
25 ownership of riparian and/or pre-1914 appropriative rights. (December 30, 2009 Letter from  
26 John Herrick Request for Hearing.) However, at the hearing, the Dunkels did not to provide  
27 any evidence of a water right specifically owned by them, separate, apart, and independent of  
28 water conveyed to them through the water rights of Woods Irrigation Company (“Woods

1 IC”). In fact, the Dunkels conceded that they held no water rights for Parcel 162-090-01, but  
2 merely purchased water from Woods IC. Therefore, the Modesto Irrigation District (“MID”)  
3 moves for a directed verdict and requests the SWRCB find the Dunkels have no independent  
4 riparian, pre-1914, or post-1914 appropriative water right in their own name. Based upon  
5 these findings, a final CDO against the Dunkels should be issued ordering the Dunkels to  
6 cease their threatened violation of section 1831 of the Water Code, as evidenced by their  
7 threat to divert water under their own claimed water rights.

## 8 **II. STATEMENT OF FACTS**

9 On February 18, 2009, the SWRCB mailed a letter to the Dunkels because the  
10 SWRCB determined the Dunkels had been irrigating Parcel 162-090-01 in the last few years,  
11 yet the SWRCB had no record of any basis of right for the Dunkels’ water diversion. (Exhibit  
12 PT-7.)

13 Pursuant to the letter, the Dunkels were instructed to inform the SWRCB within 60  
14 days as to the basis of their right by filing a Statement of Water Diversion and Use with  
15 appropriate evidence; define a contractual basis for diversion of water; or cease diversion of  
16 water until a basis of right could be secured. (Exhibit PT-7.)

17 After receiving no response from the Dunkels, the SWRCB sent the Dunkels a second  
18 letter on September 9, 2009, advising the Dunkels that the evidence the SWRCB possessed  
19 showed the Dunkels’ Parcel 162-090-01 was not riparian, and again requested the Dunkels  
20 provide evidence of the basis of their claimed right. (Exhibit PT-7.)

21 As of December 10, 2009, the Dunkels had not submitted the requested Statement of  
22 Water Diversion and Use, nor had they defined a contractual basis for diversion of water or  
23 ceased diversion of water as requested by the SWRCB. (Exhibit PT-7.)

24 On December 14, 2009, the SWRCB issued a Draft CDO against the Dunkels  
25 requesting they cease and desist their unauthorized diversion, collection and use of water in  
26 violation of section 1052 of the Water Code regarding their water use of Middle River in San  
27 Joaquin County on Parcel 162-090-01. (Exhibit PT-7.)

1 Pursuant to the December 14, 2009 Draft CDO, the Dunkels were required to submit  
2 to the SWRCB sufficient evidence establishing a valid basis of right or an existing water  
3 supply contract to serve the property. (Exhibit PT-7.) “Acceptable information supporting a  
4 valid basis of right could include, but is not limited to: a chain of title supporting riparian  
5 status for the parcel; evidence supporting an existing or implied preservation of the riparian  
6 right established prior to severance of the parcel from the stream or another riparian parcel;  
7 evidence which verifies irrigation on the parcel prior to 1914 and documents the subsequent  
8 continuous use of water; or statements which provide an alternative valid basis of right for  
9 diversions of water to the parcel.” (Exhibit PT-7.)

10 On December 30, 2009, John Herrick (“Mr. Herrick”), the attorney for the Dunkels,  
11 requested a hearing before the SWRCB regarding the allegations presented in the Draft CDO  
12 against the Dunkels. In his letter requesting a hearing, Mr. Herrick specifically identified the  
13 Dunkels as riparian and/or pre-1914 appropriative water right holders and distinctly  
14 recognized that “[a]t issue herein are the riparian rights of the diverters which are valuable  
15 property rights.” (December 30, 2009 Letter from John Herrick Request for Hearing.)

16 On February 9, 2010, MID requested to intervene as a party in the Dunkels’  
17 proceeding.

18 On February 18, 2010, the SWRCB issued a Notice of Public Hearing to inform the  
19 public of a hearing scheduled for May 5, 2010 to determine whether to adopt the Cease and  
20 Desist Order against the Dunkels.

21 At the hearing, the Dunkels submitted no evidence demonstrating that they held a  
22 riparian or pre-1914 appropriative water right independent and separate from Woods IC.

23 At the end of the Dunkel hearing on May 5, 2010, SWRCB Hearing Officer Baggett  
24 closed the hearing, prohibiting the Dunkels from submitting any additional information and  
25 evidence regarding riparian and/or pre-1914 appropriative water rights, with the exception of  
26 keeping the record open for the narrow purpose of considering any evidence or outcome  
27 determined in the Woods IC CDO proceeding. (RT 161:16-18.)

1 This Motion for Directed Verdict is ripe as the Dunkel hearing is closed, and the  
2 Dunkels failed to submit any acceptable evidence supporting a valid basis of right held by the  
3 Dunkels.

4 **III. ARGUMENT**

5 **A. Standard of Review**

6 A party may move for a directed verdict in its favor after all parties have finished  
7 presenting evidence in a trial by jury unless an earlier time is specified. (Cal. Code Civ. Proc.  
8 § 630.) The moving party may make such a motion without waiving his right to trial by jury  
9 in the event the motion is not granted. (Id.) “A nonsuit or a directed verdict may be granted  
10 ‘only when, disregarding conflicting evidence and giving to plaintiff’s evidence all the value  
11 to which it is legally entitled, herein indulging in every legitimate inference which may be  
12 drawn from that evidence, the result is a determination that there is no evidence of sufficient  
13 substantiality to support a verdict in favor of plaintiff if such a verdict were given.’” (In re  
14 Lances’ Estate (1932) 216 Cal. 397, 400 quoting Newson v. Hawley (1928) 205 Cal. 188.) In  
15 deciding whether to grant a nonsuit or a directed verdict, a trial court cannot weigh evidence  
16 or consider witness credibility. (Howard v. Owens Corning (1999) 72 Cal.App.4th 621, 629.)  
17 The test to determine whether directed verdict should be issued is whether there is substantial  
18 evidence in favor of the nonmoving party, no matter how slight it may be. (Id. at 631.)

19 **B. The SWRCB Should Find That The Dunkels Have No Independent Riparian**  
20 **Or Pre-1914 Appropriative Water Right In Their Own Name And Issue A**  
21 **Cease And Desist Order Against The Dunkels.**

22 The SWRCB should find the Dunkels have no independent riparian or pre-1914  
23 appropriative water right in their own name because they did not to provide any evidence of a  
24 water right specifically owned by them, separate, apart, and independent of Woods IC. The  
25 Dunkels conceded that they held no water rights for Parcel 162-090-01, but merely purchased  
26 water from Woods IC. The SWRCB may issue a cease and desist order commanding any  
27 person stop all unauthorized diversions or use of water subject Division Two of the Water  
28

1 Code when the SWRCB determines that the person diverting water is doing so unlawfully or  
2 threatening to do so unlawfully, which is a form of trespass. (Cal. Water Code §§ 1052,  
3 1831.) However, before issuing a cease and desist order, the SWRCB must provide notice  
4 and an opportunity for a hearing, and thus within 20 days of receipt of notice, the person  
5 against whom the ceases and desist order is to be issued may request a hearing to establish  
6 his or her basis of right to legally divert water. (Cal. Water Code §§ 1831, 1834.) If unable  
7 prove any basis of right to divert water, the SWRCB will issue the cease and desist order,  
8 prohibiting any further diversions by that person. (Cal. Water Code § 1831.)

9         Consequently, the Dunkels need to provide evidence that they possess a riparian or a  
10 pre-1914 appropriative water right. To establish a riparian right, which would provide the  
11 Dunkels with the right to the reasonable and beneficial use of water on Parcel 162-090-01,  
12 Parcel 162-090-01 must be contiguous to the Middle River watercourse, Parcel 162-090-01  
13 must be the smallest parcel held under one title in the chain of title leading to the Dunkels as  
14 the current owners, and Parcel 162-090-01 must be located within the Middle River  
15 watershed. (See Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 528-529; Phelps v.  
16 State Water Resources Control Bd. (2007) 157 Cal.App.4th 89, 116.) Alternatively, for the  
17 Dunkels to establish ownership of a pre-1914 appropriative water right, they must provide  
18 evidence that their predecessors had actually diverted water from Middle River and put it to  
19 reasonable use, or that their predecessors posted notice of their appropriation at the point of  
20 diversion on Middle River and recorded that notice in the office of the county recorder prior  
21 to December 19, 1914. (See People v. Murrison (2002) 101 Cal.App.4th 349, 361; People v.  
22 Shirokow (1980) 26 Cal.3d 301.)

23         In this case, the SWRCB should find the Dunkels have no independent riparian or  
24 pre-1914 appropriative water right in their own name, and based upon these findings, issue a  
25 final CDO against the Dunkels. The Dunkels were given notice and they had an opportunity  
26 for a hearing to offer proof of each and every form of their basis of right to divert water.  
27 When requesting the hearing, their attorney Mr. Herrick alleged that the Dunkels held their  
28

1 own riparian and/or pre-1914 appropriative water rights and went on to purposely note that  
2 riparian diversions were the issue. (December 30, 2009 Letter from John Herrick Request for  
3 Hearing.) Additionally, Mr. Herrick even hinted at possible bias of the hearing officer  
4 because the hearing officer had commented that illegal diversions occurred as a result of  
5 severed riparian rights. (March 26, 2010 Letter from John Herrick to Dana Heinrich (Follow  
6 Up).) Thus, the Dunkels were clearly aware that the riparian and/or pre-1914 appropriative  
7 rights they alleged they held would be required to be proven at the CDO hearing. However,  
8 at the hearing, the Dunkels failed to provide any evidence of a riparian or a pre-1914  
9 appropriative water right. The Dunkels did not assert that Parcel 162-090-01 was contiguous  
10 to the Middle River, was the smallest parcel held under one title in the chain of title, or was  
11 located within the Middle River watershed. Nor did the Dunkels provide any evidence  
12 demonstrating their predecessors had diverted and used water from Middle River prior to  
13 1914.

14 The only evidence the Dunkels submitted consisted of the statements of Mr. Herrick  
15 and testimony of Mr. Celli and Mr. Grunsky, all of whom confirmed that the water the  
16 Dunkels divert for Parcel 162-090-01 is obtained from Woods IC. (Exhibits DUNKEL-1 and  
17 DUNKEL-2.) Mr. Herrick argued that the Dunkels held no water rights for Parcel 162-090-  
18 01, but merely purchased water from Woods IC, and thus issuing a CDO would have no  
19 bearing on the Dunkels, as they performed no action upon which a CDO could be based.

20 “It’s a proposed Cease and Desist Order against someone who  
21 purchases water from Woods Irrigation District. So we’re here  
22 with testimony and, I don’t know, ten attorneys, the Board, all the  
23 staff to argue over nothing. Now, if you want to order the Dunkels  
24 to stop doing something, I would like to know what that is. But  
25 there’s nothing for us to be here for.” (RT 13:22- 14:5.)

26 Additionally, Mr. Celli, who was authorized to testify on behalf of the Dunkels, stated  
27 that the water he used for farming Parcel 162-090-01 was obtained from Woods, IC. (RT

1 80:1-5.) Mr. Celli went on to confirm that he never asserted any riparian rights separate and  
2 apart from Woods IC on behalf of the Dunkels. (RT 80:5-8.)

3 Mr. Grunsky, the president of Woods IC, further testified that the basis of the right to  
4 divert water used for the Dunkels' Parcel 162-090-01 is via Woods IC's pre-1914 water  
5 right. (Exhibit DUNKEL-2.)

6 The Dunkels have admitted that they held no water rights separate, apart and  
7 independent of Wood IC for use on Parcel 162-090-01. In fact, Mr. Herrick, the attorney for  
8 the Dunkels, stated that the CDO hearing itself was unnecessary because the Dunkels  
9 received water from Woods IC. (RT 13:22-14:5.) Additionally, not only did the Dunkels fail  
10 to provide evidence that they possess any legal riparian or pre-1914 appropriative right to  
11 divert water for Parcel 162-090-01 of which they were aware they needed to provide, but  
12 they have squandered their opportunity to do so because the hearing is closed, prohibiting the  
13 Dunkels from submitting any additional information and evidence regarding riparian and/or  
14 pre-1914 appropriative water rights. (RT 161:16-18.)

15 As such, this Motion for Directed Verdict is ripe because the Dunkel hearing is  
16 closed, but for keeping the record open for the narrow purpose of considering the  
17 determination in the Woods IC proceeding, which is not relevant here because the Woods IC  
18 hearing has not yet commenced. (RT 161:16-18.) What is relevant, however, is that if Woods  
19 IC is found not to have the water rights Woods IC claims to have and as a result can no  
20 longer provide water to the Dunkels for Parcel 162-090-01, the Dunkels have threatened to  
21 continue to divert water under their own alleged riparian and/or pre-1914 appropriative water  
22 rights. Yet these are the very same rights that the Dunkels failed to prove at the hearing, and  
23 in fact have admitted they do not have.

24 As there is no evidence of sufficient substantiality to support a verdict in favor of the  
25 Dunkels having any basis of right to divert, the SWRCB should grant MID's motion for  
26 directed verdict, find that the Dunkels have no riparian, pre-1914 or post-1914 appropriative  
27 water rights, and issue a final CDO ordering the Dunkels to cease their threatened violation

1 of section 1831 of the Water Code, as evidenced by their threat to divert water under their  
2 own claimed water rights.

3 **IV. CONCLUSION**

4 Despite after having alleged ownership of riparian and/or pre-1914 appropriative  
5 water rights and receiving proper notice that they needed to provide evidence of each and  
6 every basis of those alleged rights to divert water from the Middle River in San Joaquin  
7 County for use on Parcel 162-090-01, the Dunkels completely failed to provided any  
8 evidence of a water right specifically owned by them, separate, apart, and independent of  
9 water conveyed to them through the water rights of Woods IC. They provided no evidence of  
10 a riparian right, nor evidence of a pre-1914 or post-1914 appropriative right, and now they  
11 have no ability to submit any additional information and evidence regarding riparian and/or  
12 pre-1914 appropriative water rights because the hearing has been closed as to such evidence.  
13 Thus, the SWRCB should grant MID's directed verdict, find that the Dunkels have no  
14 riparian, pre-1914 or post-1914 appropriative water rights, and issue a final CDO against the  
15 Dunkels ordering the Dunkels to cease their threatened violation of section 1831 of the Water  
16 Code, as evidenced by their threat to divert water under their own claimed water rights.

17  
18 DATED: May 28, 2010

19 Respectfully submitted

20 **O'LAUGHLIN & PARIS LLP**

21  
22 By:



23 TIM O'LAUGHLIN

24 Attorney for

25 MODESTO IRRIGATION DISTRICT



**PROOF OF SERVICE**  
(Government Code §11440.20)

I, CHERYL L. CHAPLIN, declare that:

I am employed in the County of Butte, State of California. I am over the age of eighteen years and not a party to the within cause. My Business address is P.O. Box 9259, Chico, California 95927-9259. On this date, in the following manner, I served the foregoing document(s) identified as:

**MOTION FOR DIRECTED VERDICT**

**UNITED STATES MAIL** [CCP §1013] I enclosed the documents in a sealed envelope addressed to the following persons and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our practice for collection processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid at Chico, California addressed as below:

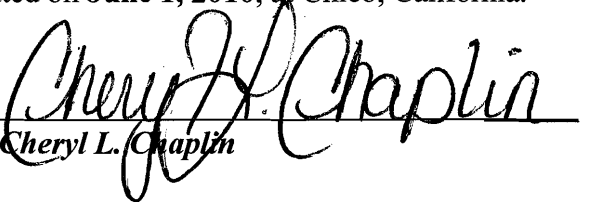
**FACSIMILE** Based on prior consent, I caused the documents to be sent to the following persons via telecopier/facsimile machine a true copy thereof to the parties indicated below:

**OVERNIGHT DELIVERY** [CCP §1013(c)] I enclosed the documents in a sealed envelope provided by an overnight delivery carrier and addressed it to the persons identified below. I placed said envelope for collection at a regularly utilized drop box of the overnight carrier.

**E-MAIL** [CCP §1010.6] Based on a court order or an agreement of the parties to accept service by e-mail, I caused the documents to be sent to the e-mail addresses indicated in the attached Service List of Participants.

**PERSONAL DELIVERY** [CCP §415.10] I personally delivered the documents to the persons identified below:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on **June 1, 2010**, at Chico, California.

  
Cheryl L. Chaplin

1 HEARING REGARDING ADOPTION OF DRAFT CEASE AND DESIST ORDER  
2 AGAINST: MARK AND VALLA DUNKEL (MIDDLE RIVER) - SAN JOAQUIN  
3 COUNTY - SCHEDULED TO COMMENCE ON MAY 5, 2010

4 SERVICE LIST OF PARTICIPANTS

5 PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND  
6 OTHER DOCUMENTS. (The participants listed below AGREED TO ACCEPT electronic service,  
pursuant to the rules specified in the hearing notice.)

<p>7 MARK AND VALLA DUNKEL 8 c/o John Herrick, Esq. 9 4255 Pacific Avenue, Suite 2 10 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a> 11 c/o Dean Ruiz, Esq. 12 Harris, Perisho &amp; Ruiz 13 3439 Brookside Road, Suite 210 14 Stockton, CA 95219 <a href="mailto:dean@hpllp.com">dean@hpllp.com</a></p>	<p>DIVISION OF WATER RIGHTS PROSECUTION TEAM c/o David Rose State Water Resources Control Board 1001 I Street Sacramento, CA 95814 <a href="mailto:DRose@waterboards.ca.gov">DRose@waterboards.ca.gov</a></p>
<p>15 CENTRAL DELTA WATER AGENCY 16 c/o Dean Ruiz, Esq. 17 Harris, Perisho &amp; Ruiz 18 3439 Brookside Road, Suite 210 19 Stockton, CA 95219 <a href="mailto:dean@hpllp.com">dean@hpllp.com</a></p>	<p>SOUTH DELTA WATER AGENCY c/o John Herrick Attorney at Law 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a> c/o Dean Ruiz, Esq. Harris, Perisho &amp; Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <a href="mailto:dean@hpllp.com">dean@hpllp.com</a></p>

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<p>SAN JOAQUIN COUNTY AND THE SAN JOAQUIN COUNTY FLOOD CONTROL &amp; WATER CONSERVATION DISTRICT c/o DeeAnne M. Gillick Neumiller &amp; Beardslee P.O. Box 20 Stockton, CA 95201-3020 <a href="mailto:dgillick@neumiller.com">dgillick@neumiller.com</a> <a href="mailto:tshephard@neumiller.com">tshephard@neumiller.com</a></p>	<p>STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moskovitz, Tiedemann &amp; Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 <a href="mailto:spowell@kmtg.com">spowell@kmtg.com</a></p>
<p>SAN LUIS &amp; DELTA-MENDOTA WATER AUTHORITY c/o Jon D. Rubin diepenbrock □ harrison 400 Capitol Mall, Suite 1800, Sacramento, California 95814 <a href="mailto:jrubin@diepenbrock.com">jrubin@diepenbrock.com</a></p>	