

John Herrick

Attorney at Law
4255 Pacific Avenue, Suite 2
Stockton, CA 95207
Telephone (209) 956-0150
Fax (209) 956-0154
E-mail: Jherrlaw@aol.com

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Via E-Mail: commentletters@waterboards.ca.gov

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

Re: Draft Order 2012-00XX, in the Matter of the Draft Cease and Desist Order
Against Unauthorized Diversion of Water by Mark and Valla Dunkel

Dear Ms. Townsend:

The following are the comments submitted on behalf of Mark and Valla Dunkel regarding the Draft Order 2012-00XX, dated September 19, 2012 in the Matter of the Draft Cease and Desist Order Against Unauthorized Diversion of Water by Mark and Valla Dunkel.

The Dunkels support and recommend, as provided below, adoption of the Draft Order which concludes that the evidence submitted in the hearing clearly indicates that the predecessors in interest to the Dunkel property intended to retain a riparian right associated with that property. As correctly cited by the Draft order, documents filed in San Joaquin County clearly indicate that prior to any severance of surface conductivity with Middle River, the relevant parties provided a means by which water could, was, and continued to be provided to the property. Such a situation can only mean that the parties intended to retain the riparian right. It cannot be interpreted to mean they intended to lose or forfeit the right.

The Draft Order's treatment of the arguments by Modesto Irrigation District, State Water Contractors and San Luis Delta-Mendota Water Authority is correct and should remain in the final Order. Those parties' evidence supports the Board's findings in the Draft Order but their arguments are contrary to the facts, common sense and logical reasoning.

The Dunkel's only dispute with the language contained in the Draft Order is the Board's continuing assertions of authority over riparian and pre-1914 rights. Dunkels' closing brief sets forth the reasons why such authority does not exist in this and other similar circumstances. This and related issues are currently before an appellate court which will determine the existence and extent of any such authority. Therefore, Dunkels request the Board include a brief description of that ongoing appellate litigation and a recognition that Dunkels and others dispute the authority claimed in the Draft Order. With such additional language, the final Order will not create any confusion about the ultimate decision and will avoid any duplicative treatment of the issue

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should any party feel the need to appeal this decision or be involved in such appeal.

With regard to the other evidence and argument regarding claimed pre-1914 rights and other support for the retention of riparian rights, the Dunkels recognize the Draft order need not reach conclusions about such rights and facts, but continue to assert them.

With such clarification regarding the dispute over Board authority, the Dunkels recommend adoption of a final Order in line with the Draft order.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Herrick". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

JOHN HERRICK
Counsel for Mark and Valla Dunkel