

**IN THE MATTER OF THE CONSIDERATION OF A CEASE AND DESIST ORDER
AGAINST RUDY AND TONI MUSSI AND LORI MUSSI FOR UNAUTHORIZED
DIVERSION OF WATER FROM THE SACARAMENT–SAN JOAQUIN DELTA IN SAN
JOAQUIN COUNTY**

DIVISION OF WATER RIGHTS PROSECUTION TEAM EXHIBIT 01 (PT-01)

**JOINT WRITTEN TESTIMONY OF CHARLES ARNOLD, WATER RESOURCES
CONTROL ENGINEER AND MARK STRETARS, SENIOR WATER RESOURCES
CONTROL ENGINEER**

Introduction

Charles Arnold is a staff engineer with the State Water Resources Control Board, Division of Water Rights. He has worked in the Division of Water Rights for 5 years in the Compliance Unit. A copy of his resume is attached as Division Prosecution Team (PT-02) Exhibit. Mr. Arnold was given the task of evaluating Rudy and Tony Mussi and Lori Mussi's (Mussis) diversion of water from Middle River in San Joaquin County and to determine if a basis of right exists.

Mark Stretars is a professional Engineer, registered in California, and a Senior Water Resource Control Engineer with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division). He has 35+ years of experience in California water rights working for the Division in programs dealing with water right application acceptance, protest and hearing actions, complaint and compliance actions, and petitions for change and transfers of water. He is currently the Chief of the Compliance and Enforcement Unit. A copy of his resume as previously submitted is attached as PT-03.

The joint testimony, herein provided, identifies the personal knowledge of the evidence and actions leading to the Division's recommendation to issue the draft Cease and Desist Order against the Mussis.

Are the Mussis making unauthorized diversions of water from the Sacramento–San Joaquin Delta:

On July 16, 2008, The State Water Board adopted a Strategic Workplan Plan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Workplan). The Workplan emphasized the State Water Board's responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the Delta. As described in the Workplan, the Division initiated an investigation of the basis of water rights of existing diverters within the Delta.

Parcel 131-07-003 located on Roberts Island is owned by the Mussis. The property address is 6600 S. Inland Road, San Joaquin County and is situated on the north side of Howard Road. The San Joaquin County Assessors Map shows the property to be 70 acres (PT-04). The San Joaquin County crop data layer identifies the parcel as having been planted with 64.8 acres of corn in 2007. According to the 1980 California

Department of Water Resources publication "*Crop Water Use in California*," corn requires an estimated annual water consumption of 3.2 acre-feet per acre. (PT-05) Sixty four and eight-tenths acres planted with corn correlates to an estimated annual water consumption of 207 acre-feet.

On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands within the Delta (PT-06). The Division requested that each property owner either: inform the Division within 60 days as to the basis of their right to divert water by filing a Statement of Water Diversion and Use with appropriate evidence; define a contractual basis for diversion of water; or cease diversion of water until a basis of right is secured. The letter also informed the contacted property owners that a failure to respond may result in enforcement action.

The Division mailed the Mussis a copy of the February 18, 2009 letter as owners of Assessor Parcel 131-17-003. Additionally, on September 23, 2009, the Division mailed a second letter by Certified Mail (Certification # 7001 0320 1831 6337) to the Mussis at 4363 W. Muller Road, Stockton, CA 95206. U.S. Postal Service confirms delivery of the letter on September 24, 2009.

The Division, having determined that the property appeared to lack any continuity to surface streams, and having no evidence supporting any other basis for any right to divert and use water on the property, concluded that a threat of unauthorized diversion existed.

On December 14, 2009, in accord with Water Code sections 1831 -1836, The Division issued a Notice of Draft Cease and Desist Order (CDO) against the Mussis (PT-07). The draft Cease and Desist Order required the Mussis to cease and desist from diversion and use of water on Parcel 131-17-003 until sufficient evidence establishing a valid basis of right or an existing water supply contract to serve the property has been approved. If the Mussis disagreed with the facts or time schedules for the corrective actions set forth in the enclosed draft CDO, they were directed to request a hearing before the State Water Board no later than 20 days from the date of receipt of this notice. On December 30, 2009, counsel for the Mussis requested a hearing.

Aftermath of the request for hearing:

Following submission of a request for hearing on December 30, 2009, evidence was presented to the Division on March 5, 2010, indicating that the Mussis receive water from a cement-lined irrigation ditch abutting their property, that conveys water from a diversion point on Middle River. These documents thereafter indicate:

- The property is currently severed from any natural water course. (PT-08)
- The property was riparian to Duck Slough, a natural channel, in 1870 (PT-09).
- The Mussi property was shown abutting a natural channel on the 1911 United States Geological Survey Map entitled Holt Quadrangle, California. (PT-10)
- The Woods-Robinson-Vasquez District was created and began serving water to the properties in approximately 1925 through a point of diversion on Middle River. (PT-11, PT-12, PT-13, PT-14).

After reviewing the additional submitted evidence, there remains insufficient evidence that Mussi irrigated through a pre-1914 right up to the present, or from a riparian source after Duck Slough ceased to exist as a natural water course.

Conclusion:

The Division finds that Mussis' have not substantiated their claim of riparian rights for the property. There is insufficient evidence at this time to conclude that the natural water channel (Duck Slough) was replaced by the irrigation ditch currently abutting the Mussi's property in a manner sufficient to preserve a riparian right. Specifically, the Division cannot conclude that, between 1911, when there is evidence supporting the existence of Duck Slough, and 1925, when the Woods-Robinson-Vasquez District reportedly began serving water to the properties via a "ditch" conveying water pumped from Middle River, there was a natural water course capable of conveying water from Middle River to the property sufficient to support a retention of a riparian right to that water course.

Mussis have not provided any additional evidence to establish any other basis of right for their diversions. Acceptable information supporting a valid basis of right could include, but is not limited to: a chain of title supporting riparian status for the parcel; evidence supporting an existing or implied preservation of the riparian right established prior to severance of the parcel from the stream or another riparian parcel; evidence which verifies irrigation on the parcel prior to 1914 and documents the subsequent continuous use of water.