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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of: WATER RIGHT HEARING REGARDING ADOPTION OF DRAFT CEASE AND DESIST ORDER AGAINST RUDY MUSSI, TONI, MUSSI AND LORY C. MUSSI INVESTMENT LP, DRAFT ORDER WR 2009-0079-DWR AND ADOPTION OF DRAFT CEASE AND DESIST ORDER AGAINST YONG PAK AND SUN YOUNG DRAFT ORDER WR 2009-OOXX-DWR	**RUDY MUSSI, TONI MUSSI, AND LORY C. MUSSI INVESTMENT LP/YONG PAK AND SUN YOUNG/SOUTH DELTA WATER AGENCY/CENTRAL DELTA WATER AGENCY JOINT CLOSING BRIEF**

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I. INTRODUCTION

The present hearings are considering whether to issue Cease and Desist Orders against Mussi et. al. ("Mussi") and Pak and Young ("Pak") (sometimes collectively "Mussi/Pak). This and the other concurrent hearings present a significant amount of information regarding the conditions of the Delta during the late 1800's and early 1900's. The records of these hearings provide a wide range of information. However, Mussi/Pak's position can only fail if the Board makes evidentiary decisions which are contrary to known practices or common sense.

Thus, Mussi/Pak fails only if the Board finds that those who reclaimed the lands of the Delta made decisions against their own interests and against normal agricultural practices. It is only if those who reclaimed the land decided to only partially drain the swamp and overflowed lands, decided to not use old sloughs for irrigation, decided to not irrigate with the easily available water supply, decided to "dry farm" without using available water, decided to abandon old sloughs rather than keep them connected to the neighboring waterways, decided to agree to provide water to lands without actually doing so, and decided to minimize crop production by relying on the vagrancies of the weather rather than irrigation.

The Board can either decide that it will believe/rely on some evidence (especially maps) and ignore other (as asserted by the MSS parties), or it can decide to interpret all the offered evidence and reconcile the differences between them. The former would make much of the historic record "false" while the latter would provide a comprehensive picture of the Delta's history.

Intervenors (hereinafter "MSS parties" attempt to make this proceeding one of attack, destruction and revenge. Rather than address the causes of the decline of the Delta and expose their water rights to current and future obligations to superior rights and to the environment, they choose to try to destroy in-Delta water users. Exports kill fish, alter Delta inflow, radically change flow patterns, and suck channels dry. Upstream interests decrease downstream flow while ignoring obligations for downstream rights and fishery needs on the San Joaquin River and in the Delta. The policies of these parties? To destroy in-Delta interests so they need not acknowledge superior rights or the adverse effects of their own operations. The irony of it all is that if they are successful

in putting Delta agriculture out of business, the area would revert to natural conditions and consume more water than is currently used (Mussi Exhibit 9, pages 5-6, 9E, 9G).

Unfortunately, the SWRCB has joined this illogical attack making an examination of Delta water rights one of its priorities while ignoring clear permit and water right violations of the Intervenors. How these decisions are made cannot be discerned, but the preferences and biases of the Board are clear; a shortage of water for exporters must be addressed even if it means taking water away from others. A worse plan for California's future could not be imagined.

A few comments about the Intervenors is appropriate. First, it appears that there can be no harm suffered by Modesto Irrigation District. MID has no downstream obligations for water quality objectives or other required water flow related criteria. MID sometimes makes releases under the San Joaquin River Group Authorities' San Joaquin River Agreement which, in many years, provides water to meet the USBR obligation for Water Quality Objectives for Fish and Wildlife Beneficial Uses. However, as specifically requested by MID and other SJRGA parties in the D-1641 hearings, the water provided by MID for these purposes is "abandoned" at Vernalis (see for example No.1 on page 166 of D-1641).

Once "abandoned," this water is available for many other uses and can be diverted by many other users. In fact, the water is "abandoned" so that DWR and USBR can export it if conditions and permit requirements allow. When export operations cannot take advantage of these "abandoned" flows, the water is counted as "lost exports" allowing for later recoupment. Under this scenario, it is difficult to determine what harm could occur by diversions to the Mussi/Pak properties.

As to San Luis Delta-Mendota Water Authority and the State Water Contractors, they allege that diversions by Mussi/Pak limit their water supply and increase the projects burden to meet water quality objectives, which also decreases their water supply. No such injury has been alleged. Regardless of current rights, any diverter in the area should be able to get a supply contract from either DWR or USBR. Negotiations for just such a contract with DWR are ongoing, though DWR has not met with or proposed anything for over a year.

II. FACTUAL BACKGROUND

A brief background is helpful. The Pak property lies on the north and west side of Inland drive and is therefore on Lower Roberts Island. The Mussi property is on the east side of Inland Drive and therefore on Middle Roberts Island (see Pak Exhibit 3A, Mussi Exhibit 3A). Roberts Island is a large tract of land lying generally between the San Joaquin River and Middle River. [For reference see Pak Exhibit 3U]. Much of Roberts Island was Patented from the State of California to J.P. Whitney in 1876. Thereafter, the central portion of the island was sold to M.C. Fisher in 1877 who in turn sold the relevant portions of Middle Roberts to it to Stewart, King and Bunten also in 1877, and the relevant portions of Lower Roberts to the Glascow California Land Company also in 1877. Over the years 1889 - 1892, the Woods brothers, J.N. Woods and E.W.S. Woods purchased over 8,000 acres of Middle and Lower Roberts Island. The Pak property was sold to the Woods Bros. in 1896, while the Mussi Property was sold to Mr. Vasquez in 1891 (and was never owned by the Woods).

The Woods Brothers were noteworthy farmers in early California, first owning lands in the southern San Joaquin Valley, then moving to the Delta where they were important players in the final reclamation of the island. After having developed their Roberts Island lands for agricultural purposes, J.N. Woods died in 1906 which resulted in the jointly held lands being separated in a roughly east/west split, with E.W.S. Woods retaining the western portion and J.N. Woods' heirs the eastern. It appears J.N. Woods' heirs (Jessie L. Wilhoit and Mary L. Douglass "Wilhoit and Douglass") preferred to sell their lands rather than farm them. Consequently, the parties formed a corporation and entered into a number of agreements to facilitate the subdivision of the heirs lands. In 1909 they created WIC. During this time the Woods lands were already served by an irrigation and drainage system. In 1911, the parties then entered into two similar agreements; one wherein WIC promised to furnish water and drainage services to the lands owned by E.W.S. Woods and the other for the lands owned by Wilhoit and Douglass. The agreement with E.W.S. Woods covered the Pak property, but the Mussi (Vasquez) property was not originally subject to either agreement. These agreements committed WIC to provide such services to parcels of 40 acres or larger. The next day, they entered into agreements whereby these same landowners granted WIC the necessary

easements to maintain and operate the canal system for the irrigation and drainage. Thereafter, Wilhoit and Douglass sold their properties in 40 acre or larger parcels.

Over time, E.W.S. Woods eventually sold of his lands also. Eventually, the owners of both the Pak and Mussi properties formed their own private district to supply water to theirs and others' lands.

III. THE SWRCB HAS NO AUTHORITY TO DETERMINE RIPARIAN OR PRE-1014 WATER RIGHTS OR TO ISSUE A CEASE AND DESIST ORDER AGAINST SUCH RIGHT HOLDERS.

The State Water Board is considering the issuance of a cease and desist order against Mussi/Pak. The draft Cease and Desist Order (CDO) issued on December 28, 2009 and the prosecution team's (hereinafter "PT") presentation during the pending hearing recognizes that Duck Slough, a natural waterway abutted with properties as of 1911. The PT however did not have enough information to conclude that a riparian right was preserved up through the time the parties' current diversion system was installed (1925). The dispute therefore is to whether evidence exists confirming a riparian or other water right.

The draft CDO alleges that the CDO may be issued pursuant to Water Code section 1831 due to the unauthorized diversion, collection and use of water in violation of section 1052 of the Water Code. Water Code sections 1831 and 1052 do not grant the Board the authority to issue CDOs against Woods exercise of its pre-1914 water rights or the exercise of riparian water rights by property owners within Woods.

The Board's own literature states that the it "does not have the authority to determine the validity of vested rights other than appropriative rights initiated December 19, 1914 or later." Exhibit 1 to County's Request for Official Notice at p.7-8; *Natural Res. Def. Council v. Kempthorne* (2009) 621 F. Supp.2d 954, 963. Numerous Board water rights decisions and orders indicate that the Board has no power to adjudicate riparian and pre-1914 water rights and that the Board has no jurisdiction to validate riparian rights or pre-1914 appropriative rights; such a determination is only within the purview of a court of law. D 934 p. 3; D 1282 p. 7; D1290 p. 32; D1324 p. 3; D 1379 p. 8. The Board has no such authority in any proceedings which will result

in the Board making such determinations, including the instant CDO proceeding. Such determinations regarding riparian and pre-1914 water rights can only be made by a court of law.

While the Board does have some measure of enforcement authority over riparian and pre-1914 water rights, that authority is limited to actions involving waste, unreasonable use or diversion, lack of a beneficial use, or protection of public trust resources (Wat. Code § 275), none of which are alleged in the pending CDO (Exhibit PT-7) and such enforcement authority is not necessarily exercised in the form of a CDO. Similarly the pending CDO is not the result of a petition for a statutory adjudication or a referral form a court.

The Board's authority to issue cease and desist orders is limited to the specific situations authorized and enumerated in Water Code section 1831. Subsection (e) of section 1831 specifically provides that this Article does not authorize the board to regulate in any manner the "diversion or use of water not otherwise subject to regulation of the Board under this part." A complete review of every section in Part 2 of Division 2 reveals no authority of the Board to regulate claimed riparian or pre-1914 water rights in the manner of a CDO. *People v. Shirokow* (1980) 26 Cal.3d 301, clearly indicates that riparian and pre-1914 water rights are not subject to compliance with the statutory appropriation procedures in Division 2 of the Water Code. Contrary to the CDO, both the Board and *Shirokow* acknowledge that riparian and pre-1914 water right holders cannot be found to have violated any of Division 2's statutory appropriation procedures because those procedures simply do not apply to the exercise of such rights.

The *Racanelli* case indicates that in carrying out its authority, the Board does indeed make some determinations related to riparian and pre-1914 water rights. However, these determinations are limited to particular administrative processes and do not affect riparian and pre-1914 water right holders. The Board plays only a "limited role" in "enforcing rights of water rights holders, a task mainly left to the courts." *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 102.

As explained in *Racanelli*, where the Board lacks the authority to determine or affect riparian water rights and prior appropriative rights, including pre-1914 rights, when the Board is called upon to determine the availability of surplus water for purposes of issuing new appropriative

rights; and when, in a statutory adjudication, the Board's determinations ***are merely recommendations*** that must be approved by a court, then it is evident that the Board cannot make such water rights determinations generally, such as in the present matter. The Board's attempt to do so in the pending CDO, which are not court adjudication proceedings, is outside the scope of the Board's authority, and as such, contrary to law.

IV. THE MUSSI/PAK PROPERTIES ORIGINALLY ABUTTED A NATURAL WATERWAY AND HAVE ALWAYS MAINTAINED ACCESS TO WATER THUS INDICATING AN INTENT TO PRESERVE A RIPARIAN RIGHT.

The draft CDO's seek evidence of a water right to support the diversions of Mussi and Pak. Their diversions are for agricultural purposes on 70.18 and 40 acres of land respectively located on Roberts Island. As stated above, the Mussi property is east of and abuts Inland Drive (the approximately line of Duck Slough/High Ridge Levee) and is thus on Middle Roberts Island, while the Pak property is on the (north)west side of and abuts Inland Drive, and is thus on Lower Roberts Island. Both their diversions are supplied by a privately owned diversion facility known as the Woods Robinson Vasquez ("WRV") district. That joint operation was not formed or created under any district or water purveyor statutes. It is simply a jointly owned and operated diversion system.

Mussi/Pak each assert that they have preserved a riparian water right, though also claim a pre-1914 water right. For purposes of this section of this closing brief, we will review the facts supporting the riparian water right. Briefly, Mussi/Pak assert that their property abutted a number of waterways (including Duck Slough) up until such time as other conditions or improvements secured a separate method of delivering water to their lands, and such other conditions or improvements indicate an intent to preserve the riparian water right.

For the Pak property, it abutted Duck Slough up until the execution of a September 29, 1911 contract to furnish water (Pak Exhibit 3Q), which contract preserved the ability to deliver water to the property. Per the SWRCB finding in the Term 91 cases (WR2004-0004), such a contract shows sufficient intent to indicate the preservation of that riparian water right. In fact, the subject contract was the second of two executed on that same date which bound Woods Irrigation Company to provide water to certain lands owned by E.W.S. Woods and the lands of the heirs of his brother J.N. Woods; one of which contracts was central to the Term 91 case. The Pak property

was at that time owned by E.W.S. Woods. Eventually, the Pak property obtained the ability to receive water from the WRV district, indicating an unbroken ability to provide water to the property, and thus preserving the riparian water right.

For Mussi, his property was not owned by the Woods Bros., and not subject to either contract to furnish water. However, the evidence shows that not only was the property abutting Duck Slough, but always maintained the ability to, and did receive receive water from Woods Irrigation Company up through the time the WRV district began operating. These facts too indicate an intent by the landowners to maintain and preserve the ability to provide water to the property, and thus preserving the riparian water right.

A. The Evidence Clearly Shows the Existence of Duck Slough and Precludes the SWRCB From Adopting The MSS Parties' Position.

Central to both cases is the existence and extent of Duck Slough. The PT agreed with Mussi/Pak regarding the existence and extent of the slough up through 1911 (PT-01, page 2, RT Vol. III, page 688, 689). The MSS parties, though acknowledging the existence of Duck Slough at onetime, generally asserted it did not reach either the Mussi or Pak properties, was severed from main channels and that it was eventually filled in and did not contain "natural" water and thus did not confer any riparian rights (see generally MSS-R-Wee). Before reviewing the extensive evidence regarding Duck Slough, we will first show how the MSS parties are necessarily wrong in their conclusion that Duck Slough did not extend to the Mussi/Pak properties. Because the MSS parties have incorrectly described Duck Slough, the SWRCB should view all of their evidence in an unfavorable light.

Mussi/Pak assert that Duck Slough extended from Burns Cut-off to Middle River, and existed through 1928 (Pak Exhibit 3, page 7; WIC Exhibit 4, 4B)[1] and beyond . The PT agrees, up through 1911. An extremely large amount of information was presented on this issue in all the CDO hearings. To better understand the evidence and decision regarding Duck Slough, Board Members should first look at Mussi and Pak Exhibits 3A, 3N and 3O to get an accurate view of the

[1] Mussi/Pak refer to a few exhibits in the WIC hearing. A request for judicial notice of those matters is included herein.

relevant features on Roberts Island. Duck Slough follows a southwest line roughly from Burns Cut Off to Middle River. Along this same line, a feature known as High Ridge existed, having been built up by alluvial deposits from the flow in Duck Slough (Mussi Exhibit 1, RT Vol. I, pages 211 et seq., and pages 304, et seq.). Eventually, High Ridge was improved as a permanent structure, being thereafter called "High Ridge Levee" or sometimes "Cross Levee."

To agree with the MSS parties that Duck Slough did not abut the Mussi/Pak properties, ***one must conclude that the Engineers of the US Army (predecessor of US Army Corps of Engineers) and the California State Engineer both incorrectly drew the location and length of Duck Slough on official maps the later of which is dated 1895.*** The MSS parties assert that the slough did not even go in the direction indicated by these official maps, and was leveed off and filled in. This is of course an untenable position in any legal or administrative procedure. That is not to say that errors do not occur in mapping, but when a number of old official sources specifically identify a waterway, there is no basis for concluding it did not exist.

The confusion (as fomented by the MSS parties) stems from the fact that many old maps of the Delta do not include all features. As explained in the testimony of Mr. Neudeck [CITE], many maps are prepared for specific purposes and thus do not include things not germane to those purposes. In addition, drafters are not all surveyors, and may not accurately delineate a feature. Finally, map makers might simply use other information or incomplete sources rather than actually surveying a feature. However, when the State Surveyor and the (predecessor to the) Corps of Engineers produce maps of the Delta, one can only conclude they have done an accurate job, within the capabilities of the era.

With this in mind, we turn to the relevant maps evidencing the MSS parties mistaken conclusions. In the Mussi/Pak hearing the Respondents produce rebuttal Exhibits R-30 and R-40.[2] The former is a map produced by William Hammond Hall, the California State Engineer for many years. It is located in the State Archives, under the category "State Engineer-William Hammond Hall Papers" and is identified as 5290-18, entitled "Grand Island and Suisun Bay to Foothills and

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[2] These maps were located only after the deadline for submitting testimony in this and the other hearings had passed.

1st Standard North." It is dated therein as "ca 1880's." (see Mussi Exhibit R-30). The map clearly shows a labeled Duck Slough extending from Burns Cut-off in a southwesterly direction towards Middle River. Per the mapping and testimony produced by Mussi/Pak, this feature runs along and abuts each property. This issue of abutting is discussed hereinbelow.

The latter map referenced above is contained in a letter to Congress by the Secretary of War and Chief Engineer of the Army, dated January 10, 1895 (while the official Congressional document is dated January 22, 1895). The document contains a survey of Old River (in the Delta) and deals with a proposal to dredge portions thereof under a river and harbor act of 1894. The map attached to the letter contains a portion of Old River and specifics regarding the proposed dredging with an inset placing the subject portion of Old River in context with the Delta. These documents, including a blow-up of the inset map was provided as Mussi Exhibit R-40. That inset map clearly shows Duck Slough extending along the same line as the Hall map, though not quite as far. Clearly these two maps show Duck Slough well beyond the time Mr. Wee alleges it no longer existed and in places Mr. Wee alleges it did not exist.

One might speculate that these maps do not reflect conditions/feature as of their dates, or are mistakes, or (as suggested by counsel for MSS parties on cross-examination) that they might be drafts. However, that is indeed speculation. There is no evidence whatsoever supporting such assertions. We cannot be absolutely sure of the date of a map labeled "ca. 1880's" or of one attached to a 1895 letter. However, absent contrary evidence, the maps must be taken at face value; that is to say, sometime between the 1880's and 1895 the State Engineer and the Chief Engineer of the Army believed Duck Slough existed; and that it extended from Burns Cut-off all the way to the Mussi and Pak properties. This is very important because the MSS witness Mr. Wee[3] concluded that Duck Slough ***never*** extended this far or in that direction (MSS-R-Wee page 5), and was gone by the time Upper Roberts Island (at the time including Middle Roberts) was finally reclaimed between 1875 and 1877. Mr. Wee's conclusions are necessarily incorrect.

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[3] In general, the Board should give no credence to much of Mr. Wee's testimony for the reasons described in VI. below.

Mr. Wee concludes that Duck Slough extended no farther than 1-2 miles[4] off of Burns Cut-off, relying on a statement by Mr. E. E. Tucker (an engineer) who notes the "head" of Duck Slough is approximately two miles from Burns Cut-off (MSS-R-Wee, page 12, Exhibit 33). However, that statement cannot be reconciled with Mr. Wee's own exhibits referenced above. His maps (MSS R-Wee Exhibits 17A-19B) all show significant portions/tributaries of the slough extending at least twice this distance. See for example Mussi R-23, R-24, RT. Vol. IV pages 764 et seq. These maps, which predate the State Engineer's and (predecessor to the) Corps' map do not show Duck Slough extending towards or to the Mussi/Pak properties. Can all these seemingly contradictory maps be reconciled? Yes; easily. First, the maps cited by Mr. Wee are obviously much rougher in their specifics. MSS-R-Wee Exhibit 17A-C, produced by a Navy Commander is clearly not the result of careful surveying. The main channels appear to be rough approximations, and the interior island sloughs and channels merely lines representing the bare minimal information.

The other two maps MSS-R-Wee 18A-C and 19A-B are indeed much more precise. However, they are mapping ***pre***-reclamation lands. It would contrary to common sense to assume that the surveyors or investigators paddled their way up winding sloughs choked with tules in areas that were twice daily inundated by the tides. It is clear that although they attempted to generally locate main channels of the Delta, all the smaller ones are simply representations and cannot be considered the result of actual surveys.

When the engineer Mr. Tucker locates the "head" of Duck Slough (MSS-R-Wee, Exhibit 33) it only be a reference to a point where numerous other channels branched off (or fed) the largest portion of the slough. [Again, before reclamation the area was a tule marsh, subject to tidal flows, and likely difficult if not impossible to traverse, observe or map (see RT Vol. IV, page 777).] Thus, some channels of Duck Slough branched off and wended their way southward into the eastern portion of the Woods Bros.' lands, while at least one significant "tributary" continued on the line indicated by the State Engineer and the predecessor to the Corps; all the way to the

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[4] Mr. Wee constantly referenced the length of Duck Slough as "1-2 miles" even though all of the written sources he cites reference two miles.)

Mussi/Pak properties. We have no way of knowing the sizes of these various channels, but they certainly existed. They certainly did not disappear as they were still being used to drain the lands. These lands are below sea level and the ground water will rise to the surface without drainage (RT Vol. I, page 133, 231; Vol. II, page 412, 413). All these channels and old sloughs were the method (along with the levees) by which the landowners reclaimed their lands and kept them reclaimed [Mussi Exhibit 9, see RT Vol. II, pages 328-332]. Some of these channels and sloughs became the main canals of Woods Irrigation Company, and another provided drainage and irrigation (explained below) water along the northwest edge of much of the Woods' lands and the Mussi/Pak properties. In addition, if Mr. Tucker's reference to the "head" of Duck Slough is a complete statement of Duck Slough's extent, then the three branches off it identified by Mr. Wee would not exist. That is to say, Mr. Tucker clearly didn't state that Duck Slough ended at any particular point.

It cannot be overstated; Mr. Wee's conclusions about the location and extent of Duck Slough cannot be reconciled with the 1880's Hall and 1895 (predecessor to the) Corps maps. The only reasonable conclusion is that of the many smaller branches off (or part of) Duck Slough, one extended all the way to the Mussi/Pak properties as of at least 1895. Although this portion of Duck Slough was of unknown size, it could not have been insignificant given its delineation of the (predecessor to the) Corps' and State Engineer's maps. MSS parties response: that the words "Duck Slough" were meant to cover only the upper end of the channel marked, the rest of the line was the High Ridge Levee. This theme was echoed a number of times by the MSS parties' witnesses, especially Mr. Wee. However, he could never explain why someone would draw a line to designate a levee, but only have the line traverse ***part***, not all of the levee (see for example RT Vol. IV, page 772). According to Mr. Wee, the entire length of the Cross levee which now follows the same line as Duck Slough, was completed in 1877 but the later, conflicting maps drew a line along only a portion of that levee; mysteriously leaving the rest of the levee unmarked. Per Mr. Wee, the long line ***could not have been*** the slough even when the map designated the line as Duck Slough (Mussi R-30)! Such interpretations and conclusions are beyond consideration; they simply fly in the face of logic. Why would one draw a line to designate a levee but then only show a

portion of the levee's length? Mr. Wee and the MSS parties conclusions about Duck Slough are therefore wrong.

B. Other Evidence Clearly Indicates Duck Slough Extended Along the Properties of Mussi/Pak.

Mussi/Pak offered a number of witnesses and evidence confirming the existence and extent of Duck Slough. As a starting point, Mr. Nomellini testified at length regarding the practices associated with reclaiming the subject lands [Mussi Exhibit 9, see RT Vol. II, pages 328-332]. He first noted that any sinuous feature on a Delta Island is the result of the farmers adjusting to the natural features of the land. Thus curved lines do not indicate a farmer's preference or whim in marking and working fields, it indicates that an old slough or other waterway existed, around which the farmers operated.

These old sloughs were an integral part of the reclamation and farming process. Once the island (or portion thereof) was leveed off, the landowners used the natural channels within the leveed off area to drain the lands. Thus, at the junction of the levees and the old sloughs, sluice or flood gates were installed when leveeing took place. When the tide went out, the gates could be opened and the waters on the island allowed to drain out. This of course was the most economical method for drainage given that the natural drains (the sloughs) were already in place. Farming required a controlled application of water; local Delta farmers did and could not simply rely on the shallow groundwater seeping back up for irrigation (RT Vol. IV, pages 806-807). As a consequence, the landowners also operated the flood gates to allow rising tidal flow into the islands and onto the lands to for irrigation. [Mussi Exhibit 9, see RT Vol. II, pages 328-332] This dual function of the flood gates was a cornerstone of early Delta reclamation and farming. Mr. Nomellini showed existing evidence of such flood gates and testified about that dual use.

Next Mussi/Pak presented Mr. Ken Lajoie, a retired USGS Quaternary geologist. He was asked to apply his expertise in fluvial geomorphology to map the historic sloughs in the subject area. His testimony is Mussi/Pak Exhibit 1. After explaining the process followed, Mr. Lajoie presented a number of figures attached to his testimony. His work started with and added to that done by Brian Atwater who produced Geologic Maps of the Sacramento-San Joaquin Delta in

1982 for the USGS. At the time, Mr.Lajoie had been the supervisor of Mr. Atwater. RT Vol. I, page 221. Mr. Atwater's maps had been the first comprehensive mapping of historic sloughs in the Delta.

Figure 6 of Exhibit 1 shows the contours of the land features, from which Mr. Lajoie identified natural drainage channels of the area. Figure 9 shows the alluvial soil types, which closely matched the higher contours of Figure 6. From this information, Mr. Lajoie was able to conclude that Duck Slough was a main distributary channel off of Middle River, meaning that it carried high flows off that channel. By noting the extent of the alluvial deposits, Mr. Lajoie could conclusively show that Duck Slough was formed by this downstream flow from Middle River, because the amounts of alluvial deposits decreased in the downstream direction. [RT Vol. I, page 304, 305]

He was also able to identify smaller tributary channels to Duck Slough, indicating that certain areas drained into the Slough (Mussi/Pak Exhibit 1, text page before Figure 9). This information closely reflected Mr. Atwater's mapping, excepting that Mr. Lajoie was able to discern additional waterways and the direction of flow. Using current sources including maps and San Joaquin County Assessor maps, Mr. Lajoie was able to match the geologic record with the historic one. Pertinent to this matter, Mr. Lajoie was able to conclude that not only was Duck Slough a major historic waterway, but that it continued to exist through the modern time.

The cross-examination of Mr. Lajoie attempted to question his sources and methods of investigation. Mr. Lajoie answered every such question in a manner that refuted any substantive claim that he might have been mistaken. [See, for example, RT Vol. I, page 311-312.] The MSS parties also tried to focus on the fact that the Atwater maps and Mr. Lajoie initially was focused on pre-1850 features. However, Mr. Lajoie clearly indicated that he was able to match those earlier features with historic ones.

Oddly, the MSS parties tried to rebut Mr. Lajoie's testimony through Mr. Jack Meyer, a "geoarchaeologist" who has a degree in sociology and anthropology. His direct testimony suggests no Duck Slough did or could exist in the area of the Mussi/Pak properties (RT Vol. IV, pages 858 et seq.). However, the cross-examination revealed he did not support his own assertions (RT Vol.

IV, pages 933 et.seq.). After presenting a number of exhibits attached to his MSS R-9, it appeared that his conclusions boiled down to two things. First, because he was aware of a native-American site (the location of which he could not disclose) somewhere near the elevated alluvial deposits along the line which Duck Slough traversed, he concluded that there could have been no flow there as the native-Americans would not be camped on wet ground or in a stream. This simplistic and unrealistic conclusion was shown to be just that when on cross-examination he admitted that the native-American camp could simply have been next to, not in the channel. (RT Vol. IV, pages 961-962.)

Mr. Meyer's second main conclusion was that he had identified the areas soil types and that Duck Slough was created by flow from Burns Cut-off, not from Middle River, and that he didn't think a channel branched off Middle River. Amazingly, Mr. Meyer presented an unreadable copy of the Holt map produced by Mr. Atwater in support of his conclusions (MSS R-9, page after Figure 11). However, when asked on cross-examination to examine the full size Atwater map, it was shown that Atwater indicated flow from Middle River, along the Duck Slough line asserted by Mussi/Pak (RT Vol. IV, pages 943-945). Even when confronted with the (predecessor to the) Corps map (Mussi/Pak R-40) Mr. Meyer could not bring himself to admit Duck Slough ran to the Mussi/Pak properties (RT Vol. IV, pages 940-942). It was clear to everyone who listened to Mr. Meyer that his testimony added no useful or substantive material, or that he was in anyway qualified to make conclusions about historic Delta channels.

Mussi/Pak then presented Mr. Don Moore, a registered geologist and certified hydrologist who is also an expert in aerial photography and the interpretation of such photos. (Mussi Exhibits 2 and 2A) Mr. Moore worked in conjunction with Mr. Lajoie as they examined and interpreted aerial photos of the subject area.[5] Mr. Moore reviewed 1937 and 1940 aerial photographs, the 1913 USGS Quadrangle Map, San Joaquin County Assessor maps and other historic information including maps of WIC. (see Mussi Exhibit 2). From all this information, Mr. Moore concluded

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[5] The cross-examination of Mr. Lajoie and Mr. Moore attempted to suggest that using various methods to enhance and interpret aerial photos by them somehow altered the data. Each was able to easily explain the common and accepted practices of such work and how none of their efforts created, altered or deleted information. CITE]

that the significant fluvial features still showing on 20th Century photographs indicated that Duck Slough had been a major water course (Mussi Exhibit 2, page 6).

Later in the hearing Mr. Moore discussed and presented Mussi/Pak Exhibits R-22-R-28 and R-30. By comparing known features such a irrigation and drainage ditches from various maps of the Woods Bros. Lands and the Woods Irrigation Company, Mr. Moore was able to match the historic sloughs to those ditches and canals. Mr. Moore showed that the channels contained on the Wee maps and the other maps of Duck Slough matched the fluvial channels on Roberts Island and the Woods irrigation canals (Mussi/Pak R-23 -R27). He showed that even as of 1937, one could find water in the remnants of Duck Slough. From this he concluded that those historic sloughs had been simply converted to use by the landowners for irrigation and drainage purposes; just as Mr. Nomellini had testified. It must be highlighted, that all the work of Mr. Moore and Mr. Lajoie confirmed the water course identified as Duck Slough on the State engineer and Corps map. Obviously this feature existed well in to the first part of the 20th Century.

Mussi/Pak next presented Christopher Neudeck, a licensed engineer and principle of Kjeldsen, Sinnock and Neudeck, Engineers. Besides giving an overview of reclamation practices (similar to that done by Mr. Nomellini) (Pak Exhibit 3, pages 8-10), Mr. Neudeck presented mapping of the Mussi and Pak parcels through the relevant time frame of 1911-1925 (see Mussi Exhibits 3A-3G and Pak Exhibits 3A-3G). The chain of title for each property was developed by Mr. Thurl Pankey (see Mussi Exhibit 6A, Pak Exhibit 6A).

Mr Neudeck also gave a comprehensive review of the other substantial evidence supporting the location and extent of Duck Slough. Two San Joaquin County Assessor maps included blue lines running along either the specific or general course of Duck Slough. (Mussi Exhibit 3I and 3L). MSS parties tried to suggest that these blue lines did not indicate any waterway, rather they must have been a representation of a levee. It is correct that only these two Assessor maps had the line in blue and that other main channels were not marked in blue. However but there is no apparent reason for an assessor map to include a sinuous line, marked in blue in the same location as Duck Slough in order to indicate a levee. We know Duck Slough was in this location contrary

to the assertion of MSS parties (Mussi R-40). Mr. Neudeck was clear that he did not rely solely on these blue lines, but used this in conjunction with other data.

Mr. Neudeck cited a portion of the Settlement Geography of the Delta which indicated that portions of Duck Slough were actually dredged to a size of 30' by 7' (Pak Exhibit 3, 3K). The MSS parties attempted to contradict this by suggesting other sources confirmed that the entire length of Duck Slough was not dredged, only a small portion. However, Mr. Neudeck never alleged the entire portion was dredged. The MSS parties evidence was contained in MSS- R-Wee-1-73 (which corresponds to the WIC hearing exhibits MSS- R-14 and attached exhibits). In those exhibits Mr. Wee provides various sources to set forth a more detailed timeline of how and when Duck Slough was partially dredged. However, none of that evidence contradicts Mr. Neudeck despite Mr. Wee's continued assertions to the contrary. In fact, one should note the Mr. Wee repeatedly states that the dredging of Duck Slough was minimal and ineffective; statements refuted by his own exhibits (see MSS- R-Wee, Exhibits MSS-R-Wee Exhibits 23-30).

Mr. Neudeck also presented Pak Exhibit 3N which is the *California State Engineer Department Topography and Irrigation Map of San Joaquin County*, dated 1886. This map clearly shows Duck Slough continuing from Burns Cut-off all the way past the Pak property and to the Mussi property (Pak Exhibit 3, page 4). His Exhibit 3O (1894 Stockton-Bellota Drainage District Map) shows Duck Slough again along this same line, now going all the way to Middle River. MSS parties question the Bellota map by stating only the upper portion of the line is Duck Slough, the remainder being the High Ridge levee. Although that is a possible interpretation, we also know that this map is earlier in date to the Corps map of 1895 which shows Duck Slough running almost this exact same length over this exact same course. It is more likely that the upper end of the line is not the only extent of Duck Slough, rather it is the deeper portion which was dredged.

Importantly, Mr. Neudeck also presented the *USGS Holt Quadrangle Map* of 1913 (with 1911 data) as his Pak Exhibit 3P. This map is important because it indicates a waterway running almost the entire length of Duck Slough, in the exact place of Duck Slough. This indicates that this channel continued to exist up through at least the time of the 1911 Agreement to Furnish Water which benefitted the Pak property. It is true that the indicated water does not extend all the

way to Middle River or Burns Cut-off, however, that does not mean the lands abutting it are not riparian. As asserted by Mussi/Pak and as confirmed by the PT witnesses, lands can be riparian to a lake or other body of non-flowing water (WIC RT Vol. I, pages 42-46). In this case, both Mr. Nomellini and Mr. Neudeck confirmed that since the channel is below the surface of the land, and that the groundwater in the area is at or near the surface level, the channel will always have water in it. Abutting a channel that always has water certainly confers riparian rights.

It is not at all certain the lack of a "complete blue line" on the 1913 Quad indicates a lack of connection to either Middle River or Burns Cut-off. There could just as well have been man-made surface channels which connected Duck Slough to those two channels (see Pak Exhibit 3, page 6 and 3T), but which happened to be dry at the time the USGS did its survey. Regardless, the Quadrangle indicates the lands abutted a waterway; the Quadrangle does not show man-made canals or ditches.

Given that Duck Slough existed and contained water up to the date of the 1911 Agreement (which benefitted the Pak property), that 1911 Agreement preserved the ability to deliver water to the Pak property, thus indicating the intent to preserve a riparian water right, just as was found in the Term 91 case (WR2004-0004).

The Mussi property (as did the Pak property) had its current diversion point (WRV system) installed as of approximately 1925. This is evidenced by the agreement presented with the testimony of Michael Robinson (Mussi Exhibit 5, 5A). However, Mr. Robinson also testified to other important facts. Mr. Robinson's family has owned the parcel neighboring the Mussi property since 1891, it having been purchased by his grand father at the same time Mussi predecessor in interest originally purchased the Mussi parcel (Mussi Exhibit 5). Mr. Robinson stated that although the 1925 agreement describes the installation of a new pump and ditch, he understood that there had been a previous diversion and ditch canal serving the properties prior to 1925. He also stated that the parcels had received water from the Woods Irrigation Company, the parcels being at the extreme end of the WIC system. Because it was at the end of that system, delivery of water was unreliable in the sense that they were regularly flooded. As a consequence, they and their neighbor Alice Woods (successor in interest to E.W.S. Woods) decided to install and operate

their own diversion rather than rely on WIC. Thus, the testimony is that the Mussi property received water, or had the ability to receive water without interruption up through the installation of the present system. This indicates the intent to preserve the riparian right.

Other data indicated the continued ability to receive water after the date of the 1913 Quadrangle map. Mr. Neudeck testified as to a 1941 court case between Robinson (and Mussi's predecessor in interest) and their neighbor to the west. In that case, the court noted that in an effort to mitigate seepage onto the neighbor's lands, Mussi et. al. had filled in a slough in 1928 they had kept full "of water." (Mussi Exhibit 4B, page 8.) This confirms that at least some portions of Duck Slough remained and had water well into the 1920's. Mr. Neudeck explained how the text of the case had apparently misstated the location of the slough, putting it on the east side instead of the west side of the Mussi property. Of course, filling in a slough on the eastside of the property would not address seepage to the neighbor on the west.

In addition, Mr. Neudeck testified to other maps which indicated either the existence of old sloughs, or of canals where those old sloughs previously existed; all of which indicated that water was always available to the Mussi property (See Mussi Exhibit 3R, 3S, 3T and 3U) through 1941 and 1976. [The SWRCB is also directed to the direct and rebuttal testimony of Dante Nomellini which provides a complete description of the known conditions in the area (RT Vol. II, pages 321 et. seq.; Vol. IV, pages 726, et. seq) Of special note is his identification of a number of old (still existing) flood gates immediately downstream of the current WRV diversion. These old flood gates likely were used to supply both the Mussi and the Pak property before the year 1900 (RT Vol. IV, pages 740-745).

Mr. Wee's view of Duck Slough and reclamation practices was substantially different and bears examination. Mr. Wee informs us that Duck Slough came off Burns Cut-off, in a southwesterly direction, then turned southeasterly, branching into three distinct channels. In support of this assertion, Mr. Wee provides three maps dated 1850, 1869, and 1872. (MSS- R-Wee, Exhibits 17A - 19B.) As we can see from an examination of those maps, they indicate that the three sub-channels off Duck Slough travel into and through the eastern half of the WIC service area on Middle Roberts Island. Hence any lands abutting these channels would have riparian rights

at least as of the time of these maps. As we can see, the subchannels as represented on the 1850 map extend all the way (south) about 2/3's of the way to the WIC main diversion point, thus going into a good portion of the WIC service area..

Mr. Wee also confirms that as of at least 1876, two flood gates were installed at the mouth of Duck Slough to regulate drainage (MSS- R-Wee, page 13, Exhibit 36). He concludes these constituted a severance of any rights on Duck Slough. On cross-examination, the PT witness admitted that a channel that naturally fills with water would confer riparian rights on the lands abutting it. (WIC RT Vol I. pages 42-46). He also acknowledged that Delta sloughs do naturally fill with water and thus even if not connected to a main channel could confer a riparian right. (RT Vol I, pages 42-50). Mr. Wee believes there was little irrigation on most of the lands until well into the 20th Century and thus the landowners allowed rising ground water to provide irrigation. This would necessitate the continuous drainage of the lands, which means the old sloughs would be constantly filling as they drained the lands, the water exiting through the flood gates. Not only would this apply to the sub-channels of Duck Slough Mr. Wee identified, but it would also apply to the main portion of Duck Slough extending to the Mussi/Pak properties. This means that those properties abutted a channel which constantly filled with water that moved "downstream" to Burns Cut-off. The flood gates Mr. Wee identifies could not have constituted a severance of riparian rights as they were merely used as means of regulating what was natural flow (tide) back into the channel; riparian lands by definition. Since Mr. Wee believes the flood gates were only used for drainage, he is therefore acquiescing to the fact the properties were riparian. [ADD NEUDECK]

Under Mr. Nomellini's testimony, the Duck Slough flood gates were likely also operated to deliver water by trapping high tides. Under that scenario, the landowners were maintaining the ability to deliver water to their property, thus indicating the intent to preserve the riparian right. The flood gates could not have constituted a severance of riparian rights if they were being used to both deliver water to and away from the properties.

There was quite some testimony and cross-examination regarding the ability to tidally pump water from either the Middle River end or the Burns Cut-off end of Duck Slough. The only confusion was the MSS parties attempt to cloud the issue. Both Mr. Nomellini and Mr. Neudeck

testified that due to the very slight slope of the lands in question, it would be possible to tidally pump water to the properties from either direction (RT Vol. II, pages 408-411). Recall that Mr. Moore and Mr. Lajoie also indicated that water could and did enter both ends of Duck Slough. In fact, Duck Slough was created by the Middle River flow, so of course water could be supplied to the channel from this direction.

Under either scenario (Wee's or Nomellini's) these channels remained connected to a main channel, natural tide water could flow in, and/or natural water in the channels could flow out, and thus there was no severance of any abutting lands connection to a water supply.[6]

Duck Slough's connection to Middle River was leveed off and its own flood gate likely installed, as represented by Mr. Nomellini (RT. Vol. II, pages 336-337). In the Woods hearing, Mr. Wee referenced a source which identified the remaining "open" sloughs on Middle River as of 1875 (MSS-R-Wee, page 9, Exhibit 21), which suggests that other sloughs were dammed, and installed with flood gates. It is important to recall that the Mussi parcel was originally purchased and severed from a much larger parcel back in 1891. At that time, the area was still being reclaimed and drained; there were few if any roads. The purchaser's (Vasquez) only real and reliable method of accessing his property was via boat, which would require a waterway bordering the property. If that waterway was leveed off, a flood gage would maintain the ability to irrigate the lands. Which is more likely; purchasing land that was accessible and could be irrigated, or purchasing land one could not get to and could not irrigate? Further, Mr. Wee presented us with a another quote that indicated that lands on Roberts Island were being irrigated via siphons when flood gates were not yet installed (WIC hearing, MSS-R-14 Exhibit 5). Under any scenario, the owner maintained the ability to deliver water to his lands.

Some of Mr. Wee's information is very helpful in learning the history of Middle Roberts Island. However, at every turn, Mr. Wee uses his initial conclusion (that Duck Slough can't exist for purposes of determining the riparian status of lands) to rationalize contrary evidence out of existence. Mr. Wee's data suggests/covers some things, but is silent as to much of the relevant

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[6] The law does not limit riparian rights to a natural channel *Chowchilla Farms v. Martin* (1933) 219 Cal.1, 18-26.

issues herein. He provides us with information of levee work, reclamation and early surveys. None of his information addresses the issues of whether the subject parcels abutted Duck Slough or other channels, whether landowners maintained the ability to get water to their lands, whether natural features were converted/improved over time to drain and irrigate the lands or whether landowners simply purchased lands, owned them for scores of years, minimized the uses thereof until finally deciding to figure out somehow to irrigate them. The Mussi/Pak evidence does go directly to these issues and provides a complete and sensible history of the parcels; which history includes the continuos and uninterrupted ability to deliver water for agricultural purposes. As stated by Mr. Mussi and Mr. Prichard, we know these lands were being farmed and what was being grown. This information necessarily leads us to conclude they were applying water to irrigate the lands as of 1914 (RT Vol. IV, pages 805 et seq.; Mussi Exhibit 5 and 8). No reasonable person could conclude this irrigation practice was somehow shortlived, unique or sporadic.

The Mussi/Pak evidence fits perfectly with all the other evidence (even the MSS parties') and requires no decision about what is to be believed and what is not. As related above, the common practice of the era was to dam off old sloughs while installing sluice or flood gates for both drainage and irrigation purposes. (Mussi Exhibit 9, RT Vol. II, pages 328-332) Hence, a Duck Slough was not severed and isolated from the main channel of Burns Cut-off or Middle River, it remained connected until farming practices resulted in a newer or more efficient method of delivering water. No one would dispose of a method of getting water to their agricultural land before securing an alternate method/source. Building a levee along an old slough did not result in there being no more slough, it resulted in a deepened channel (Mussi Exhibit 3, pages 3-4, and 8-9). Even one portion of a slough may not have been referenced by one source, that does not mean its reference in another is incorrect.

Thus the Pak property was riparian to Duck Slough up until it became subject to the 1911 agreement, and therefore preserved it riparian water rights. The Mussi property was riparian to Duck Slough up through at least 1911, and was thereafter being served water by other means until the current system was installed, thus preserving its riparian water rights.

To show how interior sloughs maintained connections to the main channels, WIC presented Mr. Blake (see WIC-6; especially RT Vol. III page 824 et seq.) who reviewed the transfers of land by which the Woods Bros. purchased the properties which eventually became the WIC service area. He then matched each transfer to a waterway showing how all the lands maintained a connection, allowing us to conclude a riparian right existed on each parcel. His testimony is WIC Exhibit 6, as corrected/amended during his direct examination (RT Vol. III pages 744 et seq.). As can be seen through WIC-6H-1, there were 11 relevant transactions whereby the Woods Bros. acquired these lands. (See also MSS R-14 WIC Exhibit 7A.) These transactions were all dated between 1889 and 1892, but were recorded on only six different dates (MSS R-14 WIC Exhibit 7A). It appears these purchases were part of an overall (and not simply coincidental) deal. Mr. Blake identifies how each parcel of land maintained a connection to some waterway, until and when purchased by the Woods. Thereafter, the points of diversion, or the location of where a riparian right would attach sometimes changes. MSS parties attempted to suggest such changing a riparian right from on body of water to another is not allowed. They are incorrect as provided above.

The evidence thus shows that all of the lands within owned by the E.W.S. Woods and Wilhoit and Douglass (the heirs of J.N. Woods) abutted a waterway or ways at the time it was purchased by the Woods Bros., that once purchased its actual source of water for irrigation purposes may have changed from one channel to another, and that all these lands were served by the WIC diversion/irrigation system as of the date of the 1911 agreements.

C. A Riparian Landowner May Change His Point Of Diversion From A Slough To An Interconnected River, And Vice Versa.

It is well accepted that an individual exercising a water right may change his point of diversion to any point along a watercourse, so long as this change in the point of diversion does not cause injury to the rights of other water users (*Kidd v. Laird* (1860) 15 Cal. 161, 179, 181).

Sloughs that are interconnected with a watercourse, such as a river, and that are supplied with water from the watercourse, are considered part of that watercourse and lands contiguous to the slough have riparian rights in the waters of both the slough and the river to which the slough is

connected during such times as the water of the river is present in the slough *(Turner v. The James Canal Company et al.* (1909) 155 Cal. 82, 82; see also *Miller & Lux v. Enterprise Canal & Land Co.* (1915) 169 Cal. 415, 420-421; Hutchins, The California Law of Water Rights (1956) p. 217-218).

Therefore, a landowner whose land is riparian to a slough may lawfully divert water from the main body of a river that is interconnected with, and supplies water to that slough, so long as water from the river would be naturally present in that slough. Likewise, a landowner whose land is riparian to a river may change his point of diversion to a point on an interconnected slough, so long as he causes no injury to others diverting from the slough.

The Delta is an estuarine, not tributary watershed. Tributary watersheds have definite directional flow, and can have rivers and tributaries that may seasonally, or in periods of drought, have diminished flow or completely run dry. Changing a point of diversion from one tributary, branch, or stream of a tributary watershed to a separate tributary, branch, or stream is generally impermissible under California case law, because to do so would constitute a change in the actual source of water diverted.

By contrast, the Delta's system of rivers, channels, and sloughs are all interconnected, and the tidal pressure from the ocean keeps the various inter-delta rivers, channels, and sloughs full of water, the level of which is more or less influenced solely by the high and low tides. As a result the Delta is more like a lake or common "pool" as opposed to a network of separate bodies of water.[7]

Therefore, Delta landowners whose lands may have been riparian to a particular river or slough at the time of the issuance of a patent for Swamp and Overflowed Land were entitled to use the water of any interconnected Delta channel, slough, or river, and could lawfully change their

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[7] At one point in these proceedings, SWRCB staff asked a question regarding the availability of water in the Southern Delta. Although not relevant to this proceeding, the issue of availability is moot with regard to channels within the tidal zone; they always have water. Though quality may vary, such changes in quality have no effect on whether a riparian right exists. Even if availability were an issue, it would be nearly impossible to determine the amount of flow in the channels from any particular source at any particular time as the Delta is a large pool of waters which entered this "reservoirs" over time.

point of diversion to any of the above without losing their riparian status and without having changed the source of water diverted under the changed point of diversion.

In this case, the Mussi and Pak properties were originally riparian to Duck Slough (and the Delta pool in general) but later shifted the place where they diverted their water. Even under the most stringent interpretation, the properties always received water from Middle River and/or the San Joaquin River; the use of one having no effect on the other's supply.

D. A Landowner May Possess, And Simultaneously Exercise Both Riparian And Appropriative Rights On The Same Parcel Of Land.

"It is established in California that a person may be possessed of rights as to the use of the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator." (*Pleasant Valley Canal Co. v. Borror (1998) 61 Cal.App.4th 742, citing Rindge v. Crags Land Co.* (1922) 56 Cal. App. 247, 252).

"We know of no reason why a party may not acquire by appropriation a right to the use of the water of a stream to which his lands are riparian." (*Porters Bar Dredging, Co. v. Beaudry* (1911) 15 Cal. App. 751).

The State Board has also acknowledged that a riparian right and an appropriative right could exist simultaneously for the benefit of a parcel of property (State Water Rights Board Decision D 1282, p. 6, 10).

The establishment of an appropriative right on otherwise riparian land can occur either prior to the issuance of a patent, or after the issuance of the patent and vesting of the riparian right (*Rindge v. Crags Land Co.* (1922) 56 Cal. App. 247, 252; State Water Rights Board Decision D 1282).

In these proceedings, the MSS parties often tried to assert that there could be no such overlap of water rights and that a party was obligated to separate and clarify the water rights being used at any time. That is of course incorrect. It would only be a proceeding between competing users that the use of any particular right would need to be determined as the source of a diversion.

E. Certificates Of Purchase Cannot Be Relied Upon To Demonstrate Severance Of Riparian Rights.

The MSS parties through their witnesses Mr. Wee continually asserted that certificates of purchases were relevant in determining riparian rights. As provided below, that is a gross misstatement of the law.

Certificates of Purchase, alone, did not designate a legal parcel. California's statute relating to the sale of public lands and the issuance of patents states quite clearly:

> ". . .[p]atents may be issued to the original holder of the certificate of purchase, or his legal representatives, heirs, or assigns, as the case may be, and *such patent may be for any amount of land* the party applying may be the owner of, *whether it be for a greater, or less, amount than the original certificate of purchase calls for.*" (Emphasis added). (Cal Stats. of 1861, Ch 251, Section 1 (Approved April 29, 1861)).

Riparian rights do not attach to property, nor vest in a landowner, until the land at issue passes into private ownership through issuance of a patent from the State or Federal government, and any diversion of water occurring on public land prior to issuance of a patent was appropriative in nature, regardless of whether the land abutted a watercourse: "As to land held by the government, it is not considered that a riparian right has attached until that land has been transmitted to private ownership. . ." (*Rindge v. Crags Land Company* (1922) 56 Cal. App. 247, 252).

During possession of the land, but before the claimant obtained fee title by means of a patent, claimant could, of course, divert water for domestic, agricultural or other purposes. Under California case law, this diversion constituted an *appropriative right*, not a riparian right (*Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal. App. 4th 742, 774; *Rindge v. Crags Land Co.* (1922) 56 Cal. App. 247, 252).

The only relevance certificates of purchase have with respect to riparian rights is in determining the date of a riparian claimant's lawful entry and possession of land for the purposes of establishing its priority, or lack thereof, over a competing appropriative right.

In *Lux v. Haggin* (1886) 69 Cal. 255, 430) , the court stated that the Certificates of Purchase should have been deemed admissible in a "limited sense" as evidence to show when equitable title to public land was obtained, and that should a patent have been issued for those Certificates of Purchase, the patent would operate by *relation back* to the date of those Certificates

of Purchase for the purpose of proving a date of lawful entry and possession of the land (*Lux v. Haggin.*) Establishing the date of priority relative to riparian and appropriative rights was necessary due to the fact that prior appropriative rights were acknowledged and protected under an Act of Congress approved July 26, 1866 *(39 Cong. Ch. 263, July 26, 1866, 14 Stat. 253, §9*) and landowners obtaining title to land by issuance of a patent would obtain a riparian right *subject* to any pre-existing appropriative rights.

F. Contrary To The MSS Parties' Assertions, The Deeds In The Chain Of Title Show That The Mussi/Pak Properties Both Abutted Duck Slough.

The MSS parties next tired to assert that even if Duck Slough ran between the Mussi and Pak properties, it did not abut the Pak property, and thus the Pak property could not be riparian to it. Their arguments were put forth by Mr. Wee after having examined some of the relevant deeds. However, Mussi/Pak showed that Mr. Wee was incorrect again. Mr. Landon Blake, a certified surveyor was called as a witness.

Mr. Blake testified at length regarding the various calls in the relevant deeds and how they had changed over time. His testimony is too precise to adequately summarize, so the SWRCB is encourage to read his testimony contained in RT vol IV, pages 785 et. seq. Basically, Mr. Blake explained how surveyors handle property descriptions along sinuous lines such as levees and waterways (RT vol IV, page 792 et. seq.), especially here in the Delta. He provided examples of the guidelines for such descriptions, and gave examples of how other surveys in the area handled these things (RT vol IV, pages 798 et. seq.). Mr. Blake traced the relevant deeds and calls, describing what was included in the deeds on one side of Duck Slough/high Ridge Levee and on the other. Importantly, he noted that an interpretation other than the one he gave would result in a gap of land not owned by any party (RT vol IV, page 797). That is to say, when the common landowner (Fisher; see Mussi Exhibit 3, pak Exhibit 3) transferred Middle Roberts lands to one party and Lower Roberts lands to another, he certainly did not mean to leave a narrow strip between the two; he transferred all of his property. In fact, Mr. Blake noted that any change in the call in a subsequent deed cannot result in a change in the area of land covered, meaning that the different calls cannot decrease the size of the parcel or separate it from the slough if earlier deeds

confirmed the land abutted the slough (RT vol IV, pages 801-802). Mr. Blake also noted that the calls in one of the deeds confirms the existence of Duck Slough (RT vol IV, pages 796-797).

Pursuant to Mr. Blake's expert analysis he concluded that both the Mussi and the Pak property abutted Duck Slough under the various deeds that transferred those and the larger parcels in which they were previously contained (RT vol IV, pages 802-803). The MSS parties witness has no real training in such surveying or deed interpretation, and thus his contrary conclusions should be discounted. Again, under the MSS parties' deed interpretation, a gap of land resulted from the early transfer. It is unreasonable to make a conclusion like that.

V. MUSSI/PAK PROVIDED SUFFICIENT EVIDENCE TO SUPPORT PRE-1914 RIGHTS.

MSS parties assert that old sloughs which would have conferred riparian water rights were filled in, did not exist, and were not used. They assert that people bought land on reclaimed (or to-be-reclaimed) islands with no means of irrigating such lands; that they drained the swamp and overflowed lands leaving themselves no method of irrigation except rainfall, that they dammed off sloughs and did not use the twice daily tidal action to provide irrigation water. In sum, MSS parties theories are that the Delta developed in a manner contrary to common sense and normal agricultural practices.

However, Mussi/Pak provided evidence of a prima facie showing of a pre-1914 water right. Relevant to that evidence is the law guiding pre-1914 rights, how they are created and interpreted.

A. Proof Of A Pre-1914 Right Requires Only That Water Be Put To Use, And Such Right Can Develop Over Time.

1. Elements Necessary To Establish A Pre-1914 Water Right

Appropriate rights prior to the 1914 enactment of the Water Commission Act are commonly referred to as "pre-1914 rights." *People v. Murison* (2002) 101 Cal.App.4th 349, 359, f.n. 6. Such pre-1914 rights were available by simply diverting water and putting it to a beneficial use (Id at page 361). With regard to the quantity of water secured by a pre-1914 water right holder,

> "An appropriator, as against subsequent appropriators, is entitled to the continued flow to the head of his ditch of the amount of water that he, in the

past, whenever that quantity was present, has diverted for beneficial purposes, plus a reasonable conveyance lost, subject to a limitation that the amount be not more than is reasonably necessary, under reasonable methods of diversion, to supply the area of land theretofore served by his ditch." *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District* (1935) 3 Cal.2d 489, 546-547.

It is further understood that the maximum quantity of water secured by an appropriative right is measured by the maximum amount of water devoted to a beneficial use at some time within the period by which a right would otherwise be barred for non-use. *Erickson v. Queen Valley Ranch* (1971) 22 Cal.App.3rd 578, 584.

Prior to 1914, an appropriate right for the diversion and use of water could be obtained two ways. First, one could acquire a non-statutory (common law) appropriative right by simply diverting water and putting it to beneficial use. *Haight v. Costanich* (1920) 194 P.26, 184 Cal.426. Second, after 1872, a statutory appropriative right could be acquired by complying with Civil Code Section 1410 et seq. (*Id.*) Under the Civil Code, a person wishing to appropriate water was required to post a written notice at the point of intended diversion and record a copy of the notice with the county recorder's office which stated the following: The amount of water appropriated, the purchase for which the appropriated water would be used, the place of use, and the means by which the water could be diverted (Cal. Civil Code Sections 1410 through 1422, now partially repealed and partially reenacted in the Water Code; *Wells A. Hutchins, the California Law of Water Rights* (1956) at 89).

Generally, the measure of an appropriative right is the amount of water that is put to reasonable beneficial use, plus an allowance for reasonable conveyance lost. *Felsemthal v. Warring* (1919) 40 Cal.App.119, 133.

B. Once A Prima Facie Case For A Pre-1914 Right Is Shown, The Burden Shifts To Other Parties Alleging Loss Or Abandonment.

In establishing the nature and extent of a pre-1914 right, the board must apply the "preponderance of the evidence" standard. This standard requires a showing that respondent's version of the facts is "more likely than not" or, stated another way, "that the existence of a

particular fact is more probable than its non-existence." *Beck Development Company, Inc. v. Southern Pacific Transportation Company* (1996) 44 Cal.App.4th 1160-1205.

Once the claimant of a pre-1914 water right puts on prima facie evidence of the existence of a pre-1914 right, the burden shifts to the petitioner, or Board (or MSS parties) in this case, to show that the pre-1914 right was lost or abandoned. (See e.g., *(Lema v. Ferrari* (1938) 27 Cal. App.2d 65, 72-73; *Erickson v. Queen Valley Ranch Company* (1971) 22 Cal.App.3d 578, 582.)

C. SWRCB Requires Evidence Of A Pre-1914 Water Right Be Interpreted In The Light Most Favorable To Mussi/Pak.

Mussi/Pak is faced with the task of presenting evidence to substantiate a pre-1914 water right which was perfected nearly 100 years ago. The Board has previously and properly recognized the difficulty associated with locating and presenting such evidence and has determined that ***evidence introduced in support of a pre-1914 water right must be considered in the light most favorable to the claimant.*** Specifically, in Order No. WR95-10 California-American Water Company, ("Cal-Am"), the Board provided as follows:

> "For purposes of this order in evaluating Cal-Am's claims, the evidence in the hearing record is considered in the light most favorable to Cal-Am due to the difficulty, at this date, of obtaining evidence that specific pre-1914 appropriative claims of right were actually perfected and have been preserved by continuous use." Order No. WR95-10, page 17.

An additional 15 years have passed since the Cal-Am Order making Muss/Pak's challenge in locating and producing evidence to substantiate its pre-1914 Water Right that much more difficult. The evidence addressed in the Mussi/Pak matter must be viewed in the light most favorable to Mussi/Pak.

D. The Doctrine of Progressive Use And Development Allows WIC's Pre-1914 Water Right To Increase Over Time.

The quantity of water to which an appropriator is entitled is not necessarily limited to the amount actually used at the time of the original diversion. Under the doctrine of progressive use and development, pre-1914 appropriations may be enlarged beyond the original appropriation (*Haight* at 194; *Hutchins* at 118). Under the progressive use and development doctrine, the quantity of water to which an appropriator is entitled is a fact specific inquiry. According to the

ruling in *Haight*, the right to take an additional amount of water reasonably necessary to meet increasing needs is not unrestricted. The additional water or use must have been within the scope of the original intent, and additional water must be taken and put to a beneficial use in keeping with the original intent, and within a reasonable time by the use of reasonable diligence. *Haight* at page 194. As such, the progressive use and development doctrine allows an appropriator to increase the amount of water diverted under pre-1914 right, provided: a) the increased diversion is in accordance with a plan of development; and b) the plan is carried out within a reasonable time by the use of reasonable diligence. See Cal-Am at page 15, *Senior v. Anderson* (1896) 115 Cal.496, 503-504; 47 P.454; *Trimble v. Heller* (1913) 23 Cal.App.436, 443-444, 138 P.376; see Cal-Am at page 16.

The evidence (as set forth below) clearly shows that WIC and its predecessors diverted and put water to use, thus establishing a pre-1914 water right.

E. Mussi/Pak Presented Substantial Evidence That Water Was Put To Use Prior To 1914 Thus Establishing a Pre-1914 Water Right.

Initially, it must be noted that providing evidence of actual diversions from 96 years ago would likely be a daunting task for any water users. It would be the rare case indeed where actual measurements from 100 years ago exist which recorded the rate or amount of flow under a diversion. The SWRCB has already addressed this time sensitive issue, most recently in the Cal Am order as referenced above. Because of the Cal Am case, the Mussi/Pak evidence must be viewed in a light most favorable to WIC.

In the Cal AM order the SWRCB relied on three pieces of information to find a pre-1914 water right: a petition of the Monterey County Water Works ("MCWW") for an increase of its water rates filed before the California Railroad Commission; the MCWW's brief dated June 29, 1914 supporting its position for increased water rates (Page 6 of that brief discussed various estimates of water use and presented a likely total); and a January 27, 1915 Engineer's Report to the MCWW about the impact of the Railroad Commission's decision regarding MCWW's petition for a rate increase. Table 1A of that exhibit presented the MCWW's annual use of water in 1913-1914 as 43,444,600 cubic feet (997 afa). (Cal Am WR 95-10 at pages 21, 22)

With this limited amount of evidence supporting the Cal Am right, we now examine what evidence exists for the Mussi/Pak pre-1914 water right.

The initial evidence for a pre-1914 right for Mussi and Pak is set forth in the testimony of Terry Prichard. Mr. Prichard presented a map (Mussi R-5) which was a combination of a soils map, a Google Earth map, and a 1914 map of Roberts Island (*Gateway Map* of San Joaquin County). The 1914 map indicated what crops were being grown, especially alfalfa and beans. This may confirm those crops on the Mussi and Pak parcels. Mr Prichard testified that once the lands were drained, the soils required that irrigation water be applied to support the crops grown. He concluded that not irrigating was not an option given these conditions (RT vol IV, pages 805-807).

Additionally, Mr. Neudeck confirmed this same irrigation need, especially with regard to a multi-year crop like alfalfa which needs water in the summer months (RT Vol.III, page 628). Further, Mr. Mussi also made this same point about the knowing what crops were being grown in 1914 tells us that irrigation must have been occurring. All this adds up the fact that the only evidence presented indicates that as of 1914, water was being applied to the Mussi and Pak properties, in amounts to support alfalfa and bean crops.

The evidence provided by Mr Michael Robinson (Mussi Exhibit 5, RT Vol. pages 481-484)confirms that there was no gap in water delivery to these properties subsequent to 1914 and up until the time the current system of diversion was installed in 1925. The only conclusion therefore is that Mussi and Pak began irrigating their properties before the 1914 date which constitutes a pre-1914 water right.

In support of this, the SWRCB is also referred to the numerous other references and documents provided by Mr. Nomellini both in his direct and in his rebuttal testimony which indicate that water was always available to the properties (see Mussi Exhibit 9; RT Vol. IV, pages 726 et. seq). Mr.. Nomellini explained how after draining the lands for reclamation, the farmers then operated the slurry or flood gates to deliver water for irrigation (WIC Exhibit 8, pages 3-7). There was no contrary evidence to Mr. Nomellini's, Mr. Robinson's, Mr. Mussi's or Mr. Prichard's testimony. In addition, Mr. Lajoie and Mr, Moore's testimony connected old sloughs

to later existing irrigation and drainage canals (Mussi Exhibits 1 and 2), and Mr. Neudeck who showed how various sources of water were available to these lands (Mussi Exhibit 3, pages 6-7).

Taken together, the above information, when viewed in a light most favorable to the parties, leads to the conclusion that a pre-1914 right exists for both Mussi and Pak.

MSS parties only real argument here is to suggest that some of the land was too high in elevation (in relation to the River) and thus was not irrigated via a gravity flow system. As previously set forth above, the lands are slightly above and mostly below sea level meaning that water could flow onto them via gravity; also indicating that water was easily available.

Using the SWRCB staff general rule or 1 cfs per 100 acres, the amount of the pre-1914 rights for Mussi and Pak would be approximately .7 cfs and .4 cfs respectively.

F. MSS' Argument That The Case Of Woods Irrigation Company v. The Department of Employment Estopps WIC From Claiming Its Own Water Rights Is Legally And Factually Incorrect.

Since the evidence indicates that both (or either) the Mussi and Pak properties may have received water from WIC, we are including the following sections to address an MSS parties' argument that WIC has no water rights to deliver. These arguments and law also address the possible situation of WIC delivering its pre-1914 right water to the parties.

The MSS parties claim that a court case had determined WIC had no water rights. This turns out to be a false assertion on their part. The MSS parties referenced the California Supreme Court Case of *Woods Irrigation Company v. Department of Employment* (1958) 50 Cal.2d. 174 , and provide a portion of the Reporter's Transcript from the Appellate Court (MSS-5). Although the Supreme Court's recitation of the facts mentions that WIC has no water rights of its own, that fact was not at issue in the case. MSS parties try to argue that this case bars WIC from asserting its pre-1914 water right. That argument falls apart on review.

1. WIC's Pre-1914 Rights are not Precluded by Collateral Estoppel Because the Required Elements for Collateral Estoppel are not Present.

The elements required to apply the doctrine of collateral estoppel/issue preclusion are well settled. As set forth in the California supreme court in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, and its progeny, the doctrine applies only if several threshold requirements are

fulfilled. First, the issue sought to be precluded from re-litigation must be *identical* to that decided in the former proceeding. Second, this issue *must have been actually litigated* in the former proceeding. Third, the issue must have been *necessarily* decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. The party asserting collateral estoppel bears the burden of establishing these requirements. *Id. at 341.* Even assuming all the threshold requirements are satisfied, the court must look to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting. *Id. at 342 - 343.*

The existence of water rights were not at issue and, therefore, were not litigated in *WIC v. The Department of Employment* (1958) 50 Cal.2d 174. Rather, the issue before the court was whether WIC's employees were agricultural laborers and, thus, whether WIC was exempt from having to make unemployment insurance contributions on their behalf. The existence of WIC's water rights or those of its shareholders, was not challenged or at risk. MSS incorrectly asserts that, based on statements in the Reporter's Transcript on Appeal, WIC's attorney, Gilbert Jones, stated that WID had no water rights . The actual testimony from The Reporter's Transcript On Appeal (MSS-1E), page 140 lines 21-23 is:

Q: I see. And does it own any water rights?

A: No water rights whatever are transferred by the owners of this land to this company.

Hence, a review of the testimony relied upon by MSS parties reveals that WIC's attorney at the time did not answer a question directly. Instead of answering whether water rights were held or owned, Mr. Jones offered a non-responsive statement regarding the lack of any transfer of water rights. As will be touched on below, a reading of the complete documents indicates that at this part of the testimony, and at all other parts therein, the discussion and testimony pertained to riparian water rights with no discussion or position given on any pre-1914 rights.

An actual determination of whether WIC held its own water rights, independent of its shareholders, was not a part, nor was deciding it necessary for the court's ultimate determination that WIC employees were exempt agricultural laborers. Consequently, the issues litigated in *WIC v.*

Dept. of Employment are very different than those at issue in the CDO proceeding. Based on the obvious differences between the two cases, it is clear that the first three elements necessary to support a finding of collateral estoppel/issue preclusion are not satisfied and that the doctrine does not apply in this instance. The issue of WIC's water rights was not decided in the former proceeding. And, it was not necessarily decided in the former proceeding. Furthermore the former proceeding was not a water right adjudication nor was it a quiet title action. The *WIC v. Department of Employment* proceeding clearly did not involve a legal action to determine any water rights held by WIC.

In addition to failing to satisfy the first three elements of collateral estoppel/issue preclusion, the issues in dispute in the WIC CDO proceedings are important from a statewide public policy perspective. This is another factor preventing the SWRCB from determining that WIC is estopped from asserting, and further establishing, its water rights in the CDO proceeding.

As referenced above, it is quite obvious that the testimony in the *WIC v. Dept. of Employment* was focused on the fact that WIC was delivering the riparian right water of those being served through common facilities. The fact that such delivery also establishes a pre-1914 right does not appear to have been at issue in the case.[8]

2. WIC's Pre-1914 Water Right Cannot Be Barred By Res Judicata/Claim Preclusion.

Res judicata, or claim preclusion, prevents the re-litigation of a claim previously tried and decided. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal. 4th 888, 896-897. The claim in *WIC v. Department of Employment* specifically addressed WIC's claim that its employees were agricultural laborers thereby exempting WIC from having to make unemployment insurance contributions on their behalf. Any discussion of WIC's water rights, or the status of same, was not related to the claims at issue. Thus, the doctrine of res judicata is not applicable.

3. WIC's Pre-1914 Water Right Cannot Be Barred By The Doctrine of Judicial Estoppel.

[8] The ability to hold multiple water rights is addressed in Section IV G. 2 herein below.

Any contention that WIC is judicially estopped from asserting pre-1914 and riparian water rights in the subject CDO proceedings is misplaced. In *WIC v. Department of Employment* , the issues before the court clearly did not pertain to WIC's water rights. The evidence in the matter included superfluous, limited testimony related to water rights which was unclear and non-responsive. Moreover, there is no indication whatsoever that even the limited and incomplete discussion pertaining to water, involved or contemplated pre-1914 appropriate rights.

The doctrine of judicial estoppel seeks to preclude a party from gaining a litigation advantage by espousing one position and then seeking a second advantage by taking an incompatible position. *Jhaveri v. Teitelbaum*, (2009) 176 Cal. App.4th, 740. The dual purpose of the doctrine are to maintain the integrity of the judicial system and protect parties from unfair strategies of their opponents. *Id.* WIC's water rights were not at issue in *WIC v. Department of Employment* , and pre-1914 rights were not discussed. WIC has gains no unfair advantage against its opponents or unfairly surprises them in this matter by asserting its own pre-1914 rights and the riparian rights of its member shareholders. WIC did not initiate this proceeding other than to request a hearing to prevent the Draft CDO from being adopted without opposition. WIC's opponents in this proceeding have always known WIC claims to have valid water rights both on its own accord and through its member shareholders. WIC has been in existence diverting water onto Roberts Island since at least 1911. MSS parties, and WIC's other opponents in this proceeding cannot seriously claim they have been unfairly surprised or disadvantaged because WIC continues to assert its right to legally divert water from the Delta. MSS parties' claim that the doctrine of judicial estoppel applies in this context has no merit.

4. Any Assertion That WIC Cannot Assert Its Pre-1914 Water Rights Before The SWRCB Because The California Supreme Allegedly Has Exclusive Jurisdiction Is Incorrect.

MSS parties' position regarding alleged exclusive jurisdiction defies logic. MSS parties asks the SWRCB to find that it has no jurisdiction to determine WIC's water rights yet MSS parties took an opposite position in opposing a recent writ of prohibition filed by the Mussi et., al petitioners challenging SWRCB's authority to conduct the subject CDO proceedings. Moreover, MSS parties is asking the SWRCB to find that WIC is forever barred from defending or proving its

water rights because of a decision in an unemployment insurance case in which water rights were not at issue. Clearly, MSS parties' assertions must be rejected.

VI. MSS PARTIES WITNESS MR. WEE'S TESTIMONY IS UNRELIABLE BASED ON THE PRESENTATION OF INACCURATE INFORMATION AND A FAILURE TO EXPLAIN THE SAME.

In support of their theories Intervenors present basically one "expert" witness who does title work for water rights fights. This "expert" interpreted every bit of evidence to support his theory of no Delta rights; the same expert whose report alleged a near complete lack of riparian rights in the Delta based solely on a review of Assessor maps; the same expert who could not bring himself to admit that an agreement to provide water was not intent of the landowner to preserve a riparian right. As we shall see, this "expert" should not be given any credence given his "mistaken" assertions on the record and his inability to explain such mistakes.

In the related hearing for Dunkel, Mr. Wee (Dunkel MSS 1) first claimed that a deed dated December 28, 1909 resulted in a severance of the property at issue therein (Dunkel MSS Exhibit 1H). However, even his own exhibit attached to his testimony wherein he made the claim showed that the subject deed resulted in a parcel which abutted Middle River, and thus maintained a riparian right (Dunkel MSS 1G). In the cross examination of the witness, he expressed his belief that Certificates of Purchase ("CP's") could result in a severance of a riparian right. Mr. Wee's belief is of course incorrect. A CP confers an ability to purchase property from the State, it is not a transfer of ownership. Thus with no transfer, there can be no severance. In fact, a riparian water right does not exist on property while the State owns it, but comes into existence after the State transfers the property to a party. Hence, Mr. Wee's theory of CP's "severing" riparian rights is both backwards and wrong.

When the Dunkel matter was re-opened pursuant to a motion by Dunkel.[9] Mr. Wee explained his incorrect conclusion about severance by alleging that a simple mapping error of CP's which included and neighbored the Dunkel parcel was the reason for the incorrect conclusion. On cross-examination and in fact under simple analysis his explanation does not hold up.

First, Mr. Wee did not ever allege that any original CP caused a severance of the Dunkel property. Neither did he allege that the Patent, or any deed in the chain (before the 1909 deed) caused a severance. The CP mapping error did not lead him to some deed which did cause a severance; he mapped the correct deeds in the chain. Thus, an incorrect mapping of a CP did not lead to a mistaken deed being examined.

Second, when determining whether a deed severs property from a connection to a waterway, the mapping of the CP has no bearing on whether the deeded property abuts a waterway or not. One does not "look back" in time to the CP to interpret a later deed unless one already alleges the CP caused a severance; something Mr. Wee specifically did not do. In fact, if the CP caused the severance, the later deed would be irrelevant.

Third, in this hearing, Mr. Wee asserted that a larger parcel (including Dunkel's) remained riparian to Middle River as of 1911; testimony presented after the Dunkel hearing was completed. Yet, Mr. Wee claimed he did not notice that his two testimonies were in conflict until after he saw the Motion to Re-Open Dunkel. His statements simply cannot be believed; the connections to waterways is central to both hearings and he must have known that when he asserted the land was riparian it was contrary to his recent assertion it was not.

In this hearing, Mr. Wee presented MSS R-14 Exhibit 24 which included the quote ". . . we stepped onboard the steamer Sea Clara Crow . . .and in a few hours were landed at Camp No. 2, on Duck Slough near the center of the island. . . ." Mr. Wee summarized these words as the parties

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[9] The Intervenors either knew, or at least became aware that Mr. Wee (on their behalf) submitted incorrect testimony when they reviewed his testimony and exhibits, or when they read Dunkel's motion to re-open that hearing. However, neither counsel or Mr. Wee attempted to correct the mistake (which went to the core issue before the SWRCB). Counsel for Intervenors were required under the Code of Ethics to correct the mistake as soon as they became aware of it. Instead, Intervenors attempted to prevail based upon evidence they knew was incorrect.

taking the steamer and " . . . disembarked at Burns Cut-Off near the mount of Duck Slough. . . ." Taking a steamer or a slough to the center of the island cannot be described as "near the mouth" of the slough. This further exemplifies Mr. Wee's tendency to misstate facts to support preconceived conclusions.

Mr. Wee's positions, statements and explanations defy logic and cannot be accepted as true. If the error was simple one, Mr. Wee could have simply said he made a mistake and made a statement which was not supported by his research. Instead, he developed a nonsensical explanation about CP's and mapping. The Board can make its own conclusions about why and what, but it is clear that Mr. Wee's testimony in these hearings must be considered suspect and should not be given any weight given his failure to explain his submittal of incorrect information.

VII. THE LANGUAGE IN THE RELEVANT DEEDS PRESERVED A RIPARIAN RIGHT FOR MUSSI/PAK.

The original deeds transferring the relevant lands subsequent to the Patent, were J.P Whitney to M.C. Fisher, then M.C. Fisher to Stewart et .al. These deeds are found as Mussi and Pak Exhibits 3C and 3D. Each of these contains a provision transferring "tenements, hereditaments and appurtenances." Though this should be sufficient for purposes of the evaluation below, subsequent deeds in the chains also included this language.

A. The Riparian Water Rights For The Mussi and Pak Lands Were Retained In The Parcels That Were No Longer Contiguous To A Water Course Due To The Language In The Deeds In All Alleged Severances.

The 1907 case of *Anaheim v. Fuller* (1907) 150 Cal. 327 at page 331[10] is cited for the "well settlement rule that where the owner of a riparian tract conveys away a noncontiguous portion of the tract by a deed that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status." *Santa Margarita v. Vail* (1938) 11 Ca.2d 501, 538. "If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and from riparian rights therein, unless the conveyance declares the contrary." "Land thus conveyed and

[10] It is important to note that later cases clarified that "intent" of the parties is controlling and not just language in the deed.

severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership." *Anaheim v. Fuller* (1907) 150 Cal. 327, 331. WIC is not contending that any riparian water rights are regained due to the later merger of the ownership of a prior severed parcel with the Woods brothers. Rather, WIC is contending that the language in the deeds did in fact retain the riparian water rights of those parcels that were separated from the watercourse.

1. Hereditaments Language Within Deeds Conveyed Riparian Rights To Parcels Separated From The Watercourse.

A riparian water right is considered a hereditament. In 1886 the Supreme Court in *Lux v. Haggin* repeatedly described the right of the riparian proprietor to the use of the water as an "incorporeal hereditament appertaining to the land." *Lux v. Haggin* (1886) 69 Cal. 255, 300, 391, 392, 430. It was quite clear at the time of *Lux v. Haggin* that a riparian water right was considered a hereditament stating, "The supreme court of California has not been silent with respect to the subject. 'The right to running water is defined to be a corporeal right or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes. *Sacket* v. *Wheaton*, 17 Pick. 105; 1 Cruise, Dig. 39; Ang. 3.' *Hill* v. *Newman*, 5 Cal. 445." *Lux v. Haggin* (1886) 69 Cal. 255, 392.

Again in 1890 riparian water rights were clearly described by the California Supreme Court as a corporeal hereditament stating: "To the extent that it existed, it was an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or by condemnation, or extinguished by prescription, but could not be defeated by simple appropriation." *Alta Land & Water Co. v. Hancock* (1890) 85 Cal. 219, 223 Clearly it was a very reasonable interpretation in 1890 that a reverence in a deed granting the "tenements, hereditaments and appurtenances" granted to the conveyed land the riparian water rights in which the conveyed land had previously enjoyed prior to the conveyance. At the time there was no law to the contrary, and WIC contends that even today there is no law to the contrary.

Although severance of the riparian water right is alleged, it is quite clear from the face of the deeds that each deed conveyed the existing riparian water rights to those parcels which were no longer contiguous to a watercourse.

2. Reference To Hereditaments Language In The 1972 Case *Murphy Slough* Is Distinguishable.

In 1972 the Fifth District Court of Appeal in *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, held that a prior transfer of a 100 foot strip of land to a reclamation district along a watercourse that allegedly severed the grantor's remaining land from the watercourse did not extinguish the grantor's riparian water rights to the remaining land no longer contiguous to the watercourse. First, the situation at issue is reversed from the examination of intent of the conveyance in *Murphy Slough Assn.* In *Murphy Slough Assn.* the grantor retained the resulting noncontiguous parcel and the Court evaluated whether the deed language of hereditaments granted such grantor's riparian water rights to grantee. In this factual situation the presumption is that riparian water rights pass by a grant of land to the grantee even though the instrument is silent concerning the riparian right. *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 656. This is not the presumption at issue in this hearing.

3. Intent Of Parties Prevails, Derived From Extrinsic Evidence And the Deed Itself.

"We conclude that the overriding principle in determining the consequence of a conveyance of land insofar as riparian rights are concerned is the intention of the parties to the conveyance." *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 657. It is not necessary that the conveyance specifically specify that riparian water rights are transferred; rather the intent of the grantor is evaluated. "The extrinsic evidence and the deed itself establish status of riparian water rights." *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 658 Use of water from the watercourse, ditches serving the parcel or other conditions can indicate an intent to continue to have the riparian right notwithstanding the lack of contiguity with the watercourse. *Hudson v. Dailey* (1909) 156 Cal. 617, 624-625.

The *Murphy Slough* Court found that a riparian water right was retained in the noncontiguous parcel by, in part, the actions of the parties after the alleged severance. The Court concluded that the later deeds of the grantors conveyed 9 and 18 years after the alleged severance indicated the parties belief that the early deed had retained the riparian rights of the noncontiguous parcel. *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 657-658. In addition the Court relied on the fact that "the evidence is uncontradicted that respondents have been taking water from the Murphy Slough continuously for the past 30 years and appellant at no time has sought to intervene to prevent such taking" to conclude that the intent of the parties was to retain the riparian water right to the non contiguous parcel (*Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 658

Similar conclusions can be made in the case before the State Water Board. The Mussi/Pak property was reclaimed for purposes of cultivation. Great expense and effort was taken to reclaim the land and put it to cultivation and the Woods brothers acquired the property on Roberts Island for the purpose of farming. These facts together with the deed language conveying all "hereditaments" which clearly include riparian water rights supports the conclusion that the intent of the grantors was to convey the riparian water rights to the parcels which were allegedly no longer contiguous to watercourses.

B. Once Riparian Rights Have Been Retained To Lands Separated From The Waterways The Riparian Rights Do Not Need To Be Mentioned Or Retained In Future Deeds.

Once riparian rights have been retained they remain and do not need to be mentioned or retained in future deeds. Once preserved, the riparian rights of non-contiguous land remains throughout the chain of title. *Rancho Santa Margarita v. Vail* (1938) 11 Cal 2d 501, 538; *Miller & Lux v J. G. James Co.*, (1919) 179 Cal 689, 690-691; *Strong v Baldwin* (1908) 154 Cal 150, 156-157. Once the riparian rights are preserved at the time the land is separated from the various waterways, then that land forever retains riparian rights as it can never lose them through future separations from waterways since there cannot be any future separations from waterways, the land has already been separated from the waterways. "If the grant deed conveys the riparian rights to the noncontiguous parcel, that parcel retains its riparian status." (*Rancho Santa Margarita v. Vail*

(1938) 11 Cal.2d 501, 539.) Riparian right is a "vested right inherent in and a part of the land [citations] and passes by a grant of land to the grantee even though the instrument is silent concerning the riparian right [citations]." (*Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 655-656.) Thus, once a riparian right is retained in a parcel separated from the watercourse, the riparian right passes by grant of the land in future conveyances even though the future conveyance is silent concerning the retained riparian right. Therefore it is not necessary for any deeds subsequent to the conveyances retaining the riparian water rights in the noncontiguous parcels to mention, retain or transfer such retained riparian water rights within Woods Irrigation Company.

C. The Amount Of Water In A Stream Has No Bearing On Determining If The Tract Is Riparian.

"The amount of water in the stream has no bearing whatever in determining whether a particular tract is riparian." *Rancho Santa Margarita v. Vail* (1938) 11 Cal. 2d 501, 534. "In determining the riparian status of land the same rules of law apply regardless of the size of the tract, the extent of the watershed or the amount of the run off." The quantity of water available does not impact the status of the land as riparian.

Thus the amount of water within Duck Slough has no bearing on whether the land along Duck Slough is riparian or not. The mere location adjacent to the slough, which has some water, is sufficient evidence to support a riparian water right.

D. Partition Does Not Sever The Riparian Lands.

"Upon the partition of riparian lands, the decree being silent as to the division of riparian rights, each parcel retains its water right." *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 540.

VIII. ALL OF THE MUSSI AND PAK LANDS ARE RIPARIAN TO THE DELTA POOL.

The Delta Pool is like a lake. Even without river flow the lands within the tidal range are riparian to the Delta Pool. It is common knowledge that the Delta Pool has an outlet at Carquinez for the inflow from the multitude of tributaries flowing into and through the Delta. For most of the

time in most years there is river flow into and out of the Delta Pool. Even without river flow, the tides move water into and out of the Delta Pool. On the ebb tides, water flows out of the Delta Pool through Suisun Bay and the Carquinez Strait. On the flood tides, water from the ocean via San Francisco Bay flows inland through Carquinez Strait. Absent export project operations, most of the time there is a net outflow. The tidal cycle includes two ebb tides and two flood tides about every 25 hours. Tidal effects extend inland to about West Sacramento on the Sacramento River and to Vernalis on the San Joaquin River.

The law is crystal clear that riparian rights extend to lands contiguous to lakes and ponds and similar waterbodies just as they do to lands contiguous to flowing rivers and streams.

> "It is not essential to a watercourse that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent, marking the line between bed and banks. The law cannot fix the limits of variation in these and other particulars. As was said, in effect, by Curtis, J. (*Howard v. Ingersoll*, 13 How. 428), the bed and banks or the channel is in all cases a natural object, to be sought after, not merely by the application of any abstract rules, but, 'like other natural objects, to be sought for and found by the distinctive appearances it presents.' Whether, however, worn deep by the action of the water, or following a natural depression without any marked erosion of soil or rock; whether distinguished by a difference of vegetation or otherwise rendered perceptible,– a channel is necessary to the constitution of a watercourse.
>
> . . . We can conceive that along the course of a stream there may be shallow places where the water spreads and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on each side. In such case, if water flowed periodically at the portion of the depression, it flowed in a channel, notwithstanding the fact that, the water being *withdrawn*, the 'distinctive appearances' that it had ever flowed there would soon disappear." *Lux v. Haggin* (1886) 69 Cal. 255, 418 and 419.

The Delta Pool is wide where the tidal influence intersects the flow from the numerous tributaries and generally narrows as flow moves west becoming a very distinct single channel at Carquinez Strait.

Even without flow, the Delta Pool is a water body to which riparian rights attach. In the case of *Turner v. James Canal Co.* (1909) 155 Cal. 82, the California Supreme Court addressed the question of riparian rights to Fresno Slough during the very considerable period of each year when there was no flow from the Kings River. At page 87, the Court states:

> "The right of a riparian owner to the use of water bordering upon his land does not, as plaintiffs contend, arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the

current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of those opportunities, advantages, and benefits. ***Duckworth v. Watsonville, etc., Co., 150 Cal. 526, 89 Pac. 338.*** Out of regard to the equal rights of others whose lands may abut upon the same water, the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share thereof; but, with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream."

At page 88, the Court concludes:

"As we have concluded that riparian rights do exist in a body of water not flowing, it is unnecessary to discuss the question of the things essential to a water course."

IX. DAMMING OF SLOUGHS AND OTHER WATERCOURSES BY WAY OF CONSTRUCTION OF LEVEES WITH OR WITHOUT FLOODGATES DOES NOT CHANGE THE CHARACTER OF THE WATERCOURSE OR THE RIPARIAN STATUS OF THE LANDS CONTIGUOUS THERETO.

Just as the dams on the various rivers and streams throughout the State do not change the riparian status of the lands along the rivers and streams, the construction of levees across the hundreds of sloughs and other watercourses in the Delta does not change the character of the watercourse or riparian status of lands along the watercourse. The availability of water in such a watercourse may be altered, however, riparian rights are not lost by non-use and the existence of a watercourse is not dependent on a continuous flow or even a constant supply of water.

In *Smith v. City of Los Angeles* (1944) 66 Cal.App.2d 562 the court at page 579 cites 25 California Jurisprudence, page 1038, section 38 for the statement of the law:

" 'A watercourse does not lose its character as such by reason of the fact that it is improved by deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. *Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period,*-although such diversion may deprive lower riparians of their rights,-nor by reason of the fact that the water has all been dammed at a place far up the stream. ...' " (Italics added.)

See also the case of *Lindblom v. Round Val. Water Co.* (1918) 178 Cal. 450 where the diversion by way of an upstream dam had extended for a period of almost thirty (30) years before there was a five (5) year interruption in diversion from the dam resulting in restoration of natural flow to the downstream riparians.

When flow is re-established, riparian water rights attach to such flow.

X. THE ARTIFICIAL CHANGES TO NATURAL SLOUGHS AND THE CANALS, DITCHES AND BORROW PITS CONSTRUCTED AS A PART OF OR AFTER RECLAMATION ARE WATERCOURSES TO WHICH RIPARIAN RIGHTS ATTACH.

The current WRV district facilities have been in place for more than eighty (80) years, and the levees for more than one hundred thirty (130) years. The current facilities clearly substitute for the natural sloughs and pre-reclamation water pool supplying Delta lands.

In the case of *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, the California Supreme Court discusses the riparian nature of artificial watercourses and summarizes authorities at page 17, "If it is nothing more than an artificial water course there can be no riparian rights upon it, whereas if it is a substitute for a natural water course, so that it can be regarded as a natural water course, riparian rights may attach to it."

At page 18:

> "Upon the other hand, however, the authorities hold that a watercourse, although constructed artificially, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to be deemed by prescription natural watercourses. Such is the case where the whole stream is diverted into the new channel, and thereby the artificial channel is substituted for the natural. Where this is done under such circumstances as to indicate that it is to be permanent, riparian rights may attach to the artificial channel. And it is further held the where the artificial watercourse was not created by joint action of the owners, it may become such a one to which riparian right may attach, if the various owners along its course have always treated it as such."

The interconnection of the Duck Slough/High Ridge Levees watercourse to the various rivers, sloughs, and the Delta Pool provides riparian status to the contiguous lands as to the watercourse or water body providing water at the time. See *Turner v. James Canal Co.* (1909) 155 Cal. 82 and *Miller and Lux v. James* (1919) 180 Cal. 38.

The Duck Slough/High Ridge levee is clearly a stream-type watercourse which prior to the construction of levees and drains as part of the reclamation process deposited alluvium from upstream areas in a manner which created natural banks or levees. Because the area is Swamp and Overflowed lands and subjected to the tides of the Delta Pool, the slough and adjoining land absent reclamation would contact the natural ebb and flood tide flows of the Pool even in the absence of tributary flow. The Delta Pool is a waterbody like a lake with flow from both upstream tributaries and tides.

The subject Pak & Young and Mussi properties are contiguous to both the Duck Slough/High Ridge levee stream-type watercourse and to the Delta Pool and are riparian to such watercourses/waterbodies. Interruption of natural flows by the construction of levees and drains does not change the riparian status of the subject lands. They are also contiguous to the artificial channels, ditches and canals modifying the natural system.

XI. THE SEVERANCE OF RIPARIAN WATER RIGHTS FROM SWAMP AND OVERFLOWED LANDS OF THE DELTA IS BOTH CONTRARY TO LAW AND PHYSICALLY IMPOSSIBLE.

All of the lands presently owned by Mussi/Pak were swamp and overflowed lands patented into private ownership. The intent of the swamp and overflowed lands acts was to encourage reclamation by alteration of the existing condition of the Delta. In their undeveloped, unreclaimed state, the Delta lands were Swamp and Overflowed lands, unfit for cultivation or other productive use. Such being the case, the lands were patented into private ownership by acts of Congress and mesne acts of the Legislature of the State of California, for the expressed purposed of reclamation. The intent of the State of California was that the Swamp and Overflowed lands be reclaimed in exactly the manner in which, for the most part, they now exist.

The Delta's Swamp and Overflowed lands were acquired by the State of California from the United States and patented into private ownership by virtue of the Act of Congress of September 28, 1850 (9 U.S. Stats. at Large, p. 519), commonly known as the Arkansas Act. Various acts of the State of California to further and facilitate the reclamation of the Delta and other areas were enacted, including the Act of May 1, 1851 (St. 1851, p. 409); the Act of April 28, 1855 (St. 1855, p. 189); the Act of April 21, 1858 (St. 1858, p. 198); the Act of April 18, 1859 (St.

1859, p. 340); the Act of May 13, 1861 (St. 1861, p. 355); the Act of April 27, 1863 (St. 1863, p. 684); the Act of April 2, 1866 (St. 1866, p. 799); the Act of March 28, 1868 (St. 1868, p. 507) creating regular reclamation districts; the Act of March 16, 1872 (Stat. 1871-1872, p. 383); and many others.

When the federal government conveyed the Delta lands to the State, the State actually became duty bound to carry out in good faith the objects for which the grant was made, and thereby assumed an obligation to reclaim the lands. "The object of the Federal Government in making this munificent donation to the several States was to promote the speedy reclamation of the lands and thus invite to them population and settlement, thereby opening new fields for industry and increasing the general prosperity." *Kimball v. Reclamation Fund Commissioners* (1873) 45 Cal. 344, 360. In *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 634, the California Supreme Court noted the "[I]nterest of the state alone in the reclamation and bringing into use of its Swamp and Overflowed land--an interest which is accentuated by the duties which it may have assumed under its acceptance of the Arkansas grant." In this regard, it was stated in *Kings County v. Tulare County* (1898) 119 Cal. 509, 514-515 that "The purpose of the grant to the state-to wit, the reclamation of the lands-seems to have been the governing principle of their disposition and management. Certain results of the grant of swamp and overflowed lands to the state, and of our legislation respecting those lands, seem clear enough, to wit: The grant was for the purpose of securing their reclamation. The State has never deviated from a consistent course of legislation to attain that purpose."

Without any improvement or reclamation, the owner of lands within the Delta was possessed of a variety of water rights. This included the traditionally thought of surface rights in waterbodies and other watercourses consisting of riparian and appropriative rights. However, due to the unique hydrologic conditions of the Delta, other water rights are implicated as well, including groundwater, spring water, diffused surface water, and tidal flows. This same hydrology created an environment that both the federal and state government deemed to be contrary to the public interest: It created a swampy environment in which all of the Delta lands were periodically inundated. In passing the original Arkansas Act and the action of the State of California that

followed, it was deemed to be in the public interest to seek to permanently alter the state of affairs for the lands of the Delta, by reclamation efforts that would bring about a comprehensive alteration of the existing water management practices and facilities in the Delta. This was the actual intent.

In *Kings County v. Tulare County*, *supra*, the California Supreme Court observed that "The purpose of the grant [pursuant to the Arkansas Act] was to enable the state to reclaim the lands by means of levees and drains." 119 Cal. 511. The comprehensive water management system in the Delta, by virtue of such reclamation efforts, brought about a fundamental change in many of the hydraulic forces within the Delta. By virtue of the Arkansas Act and the State and private action that followed, no longer was it accepted that water had to periodically inundate the Delta lands - substantial levee systems would be engineered to eliminate the inundation that periodically occurred. The levees at the foundation of reclamation would, as intended by the State of California, fundamentally change the flow of water in the countless waterways of the Delta. By cutting off much of the Delta lands inside the levee systems from the water that flowed to the land and hundreds of sloughs, riparian lands in the Delta were impacted virtually everywhere - all brought about and caused by the publicly desired reclamation that included levee construction.

While the levees were the most visible monuments to the physical change of the Delta altering the conveyance and availability of water to Delta lands, a water table at or immediately below the surface created other conditions to be remedied by the reclamation encouraged by the Arkansas Act and the ensuing acts of the state of California. The intricate, natural web of surface channels, creeks, and sloughs, the percolating and seepage waters appearing in open springs, and the marshy lands influenced by both the tidal flows and seasonal flood flows, all had to be dealt with on the interior of the leveed Delta lands. Without control of these hydraulic forces, the leveed islands would be little more than a bog or lake surrounded by a wall of levee. But also, the control of those same hydraulic forces were the instruments of alteration for the delivery of water within and to the Delta lands. The Delta lands within the levees had to be internally drained and managed for irrigation to accomplish the reclamation objectives of the state and federal governments. The accepted and anticipated manner in which that would be accomplished was a fundamental alteration of the way water within a levee system was controlled, both to convey water to and

transport it away from the lands. This control was a system of canals, ditches, floodgates, sluicegates, siphons, pumps, and other works which would regulate the flow of water within the leveed lands, and thus create artificial channels, creeks, and the like to alter the natural ones. Just as the levees had altered the watering and dewatering of the lands - so too would the intricate internal systems alter the watering and dewatering of the lands, thus effecting a fundamental change in the water delivery to the lands within the levee system. No longer would natural waterways, springs, and percolating waters wet the land. Instead, an organized and controlled system would do so. This was the intent of the federal and State governments, and it would be loathsome for either to maintain a position contrary to the accomplishment of exactly what they intended.

Critical to the economic viability of the lands and economic support of the levees and drainage necessary to reclaim and sustain the reclamation is the ability to cultivate various crops including the timely application and utilization of water for surface and sub-irrigation. Consistent with its obligation to the Federal Government the State has encouraged the private investment in the reclamation of the Swamp and Overflowed Lands and enjoyed the benefit of the general prosperity resulting therefrom. The State has monitored the irrigation and use of water on lands in the Delta and has for many years recognized the Delta lowlands including the subject parcels as enjoying riparian water rights. See Central Valley Project, Delta Lowlands Service Area Investigations Report Area DL-9, Stockton to Middle River and Vicinity, January 1964 (a copy of the report is WIC 8B). Included in said excerpts is "Table 8. Unit Consumptive Use of Water In Sacramento-San Joaquin Delta" which shows that for every use there is a net savings of water over "Tule and Swamp" which is the unreclaimed condition.

Because the subject parcels are "Swamp and Overflowed Lands," their productive use was and is clearly dependent upon reclamation requiring construction, operation and maintenance of levees and drains. In order to fund such reclamation, economically viable agriculture was and is required. Clearly a Grantor of a parcel being separated from a waterway would receive no benefit from depriving the separated parcel of a riparian water supply. If the separated parcel could not economically bear the burden of its share of the cost of reclamation, then a greater

burden would fall on the Grantor. Additionally, the water consumption resulting from unreclaimed land "Tule and Swamp" is clearly higher than that from irrigated cropland. Due to the high water table and/or inundation, the abandoned land would return to swamp or a waterbody. For swamp and overflowed lands the intent to convey riparian water rights with the land should be clear and only a clear expression to the contrary should be viewed as negating such intent.

Maintenance of riparian rights during and throughout the reclamation process, and its supplanting of the natural system with an artificial system, is fully supported by the law - in part because there are circumstances in which "an artificial watercourse may originate in such a manner as to give rise to riparian rights; such as where an existing stream is diverted into a new channel, and the artificial channel is permanently substituted for the natural one." *Tusher v. Gabrielsen* (1998) 68 Cal.App. 4th 131, 134-135. This is precisely what happened in Delta reclamation. The construction of levees and drainage and irrigation systems within the Delta lands were permanently substituted for the numerous natural watercourses within the Delta lands, including the countless tiny sloughs, creeks, rivulets, and the like.

XII. EQUITABLE ESTOPPEL FORECLOSES ANY OPPORTUNITY FOR THE SWRCB TO CONTEST THE RIGHTS OF OWNERS OF RECLAIMED SWAMP AND OVERFLOWED LANDS TO WATER.

As stated, the reclamation was not only contemplated by the State and Federal government - it was expressly intended and encouraged by multiple acts of the legislature over a long period of time. This was done for what then were, and what remain, a number of benefits, including commerce, agriculture, transportation, navigation, health, and development. It was well known what reclamation efforts were expected to be accomplished, as was the substantial undertaking and expense necessary to accomplish the reclamation. Furthermore, it was known or should have been known that a permanent change would be brought about in the way the reclaimed lands were watered and dewatered. Since the initial reclamation efforts and improvements, great expense has been incurred and is continuing to be incurred in maintaining and improving those reclamation works. The methodology and deployment of practices for watering and dewatering the reclaimed lands has been well known, and is and was open and notorious - for the world, including the State of California, to see. Over the years there has been a continued reliance by private parties, and

acquiescence by the State, in the diversion and application of water by Delta water users. Further, the subject lands have always been regarded as having the reputation of being possessed of riparian rights. Moreover, there has been great public and private reliance and expectation upon the continued validity and enjoyment of Delta water rights, and the continued maintenance and improvement of the reclamation works. Indeed, it is a matter of common knowledge that without the continued maintenance of these reclamation works, the water quality and supply of many outside the Delta would be impaired. Again, all of this has been not only with the knowledge of, but the actual encouragement of, the State of California. Good conscience and fair dealing does not allow the State of California to literally renounce the water rights enjoyed in the Delta based on the very reclamation the State of California encouraged.

The State of California's tacit participation in the efforts necessary for Delta reclamation requires application of the doctrine of estoppel as applied in *City of Long Beach v. Mansell* (1970) 3 Cal.3d. 462, 487-501. At 3 Cal.3d 488, the California Supreme Court repeated from Lord Denman's opinion in *Packard v. Sears & Barrett* (K.B. 1837) 6 Ad. & Ell. 369, 474, the classic elements of the doctrine: "[T]he rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain State of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; . . . ." Noting this as a long established doctrine in this state, in *City of Long Beach v. Mansell*, *supra*, the California Supreme Court quoted its earlier decision in *Seymour v. Oelrichs* (1909) 156 Cal. 782, in turn quoting the U.S. Supreme Court: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." (156 Cal. at p. 795.)

Qualitatively, the government action in the *City of Long Beach* case was much less significant than here. Nevertheless, the California Supreme Court concluded "without hesitation that the activities, representations, and conduct of the State and its sub-trustee the city during the period here in question rise to the level of culpability necessary to support an equitable estoppel

against them." Later, the Third Appellate District considered equitable estoppel in *Phelps v. State Water Res. Control Bd.* (2007) 157 Cal.App. 4th 89, repeating the two-part test when the government is involved, including the four classic elements of estoppel, from *J.H. McKnight Ranch, Inc. v. Franchise Tax Board* (2003) 110 Cal.App.4th 978, 991:

> "First, a court must determine whether the traditional elements necessary for assertion of an estoppel against a private party are present. These elements include the following: '(1) The party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' [Citation] Second, the court must weigh the equities and consider the impact on public policy of permitting an estoppel in a given case."

Here, it is beyond doubt the State was apprised of how the reclamation would be accomplished, and the State intended that its conduct would be acted upon in the precise manner in which it was acted upon. Further, there is no evidence that those relying upon the State's conduct were otherwise aware nor did the State make any effort to make them aware to the contrary, and the owners clearly relied on the continued viability of their water supply and the underlying rights. Not only was this the case during initial reclamation, but for the over 100 years that have passed. Over the years there has continued actual State participation in and continued encouragement of the reclamation. Each of the four classic elements is thus well established.

As to the second part of the test, the impact on public policy, there is but one reasonable conclusion and it is inescapable. If one cannot rely upon the government in this type of situation, the consequences will be dire. To be sure, it would work a great fraud and injustice were the State to be allowed to repudiate the entitlement of the owners of the reclaimed lands to a water supply consistent with their time-honored use.

XIII. THE HYDROLOGIC CONNECTION BETWEEN THE SHALLOW GROUNDWATER AND THE SURFACE STREAMS AFFORDS MUSSI AND PAK & YOUNG RIPARIAN AND/OR OVERLYING RIGHTS TO DIVERT DIRECTLY FROM THOSE STREAMS.

In *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, the California Supreme Court held that a landowner with lands overlying groundwater that is hydrologically connected to a

surface stream but whose lands are separated from the surface stream on the surface does not have "the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from the surface stream, and there apply it to use on the latter, *to the injury of lands which abut upon the proper banks of the surface stream* . . . ." (*Id.*, p. 332, emphasis added.) The question left unresolved by *Anaheim*, and at issue herein, is whether such a landowner can lawfully make such diversions if there is no alleged, much less actual, injury to any such lands or to any other riparian or overlying water user with rights to that common underground/surface water supply, which is the case in the instant proceedings. As will be explained, the answer should be yes, it *can* lawfully make such diversions. Such a determination is entirely consistent with, and in furtherance of, *Anaheim*, *Hudson v. Dailey* (1909) 156 Cal. 617, *Turner v. James Canal Co.* (1909) 155 Cal. 82, and the well-established "no-injury rules" set forth in case law and statutory law with regard to changing points of diversion from a common supply.

A. The Shallow Groundwater Is In "Immediate Connection" With The Surface Streams And, Hence, The Landowners Overlying That Groundwater Are Riparian To Those Streams.

In *Hudson v. Dailey* (1909) 156 Cal. 617 (*Hudson*), the Court held:

> If the water in the underground strata is in such *immediate connection* with the surface stream as to make it a part of the stream, as the plaintiff seems to contend, *then the defendants' lands overlying such water must be considered as also riparian to the stream*, and, under the law of riparian rights, they have a common right with the plaintiff to the use of the water.

(*Id.*, pp. 626-627, emphasis added.) In such an "immediate connection" situation, being "riparian to the stream" means the landowner has "a right to take its share of the water from the main river at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land." (*Turner v. James Canal Co.* (1909) 155 Cal. 82, 91-92.)

Respondents submit that the shallow groundwater underlying Mussi and Pak & Young's lands is indeed "in such immediate connection with the surface stream[s] as to make it a part of the stream[s] . . . ." (*Hudson*, pp. 626-627.) Civil Engineer, Christopher H. Neudeck, for example, explains this immediate connection as follows:

> For the area of concern [the California Department of Water Resources] has a recent study [see Mussi/Pak & Young Exhibit 3V, "pdf" pp. 46-92, "Reclamation District 544 Seepage Monitoring Study 2000-2001] which . . . confirms my prior conclusions that due to the subsurface soils, there is a direct connection between the shallow groundwater and the waters in the neighboring channels. When the river goes up, the groundwater goes up and vice-a-versa.
>
> This hydrologic conductivity is important to understand the local water supplies. The entire Delta is one big pool of water; some in the channel and some in the soils. There is no net difference in the amount of water in the Delta channels when local diverters take from neighboring channels, pump from shallow groundwater, or farm crops which draw from the shallow groundwater. Taking water from one place is virtually the same as from another. . . .
>
> I therefore conclude that if these four diverters which are the subject of [the *Phelps* WRO 2004-0004] hearing were forced to shift to shallow wells for irrigation, or farm crops which had root zones reaching to the shallow groundwater, there would be no difference in the amount of water available in the surrounding channels.

(Mussi/Pak & Young Exhibit 3V, pp. 4-5.)

In addition to Mr. Neudeck's testimony and the DWR study referenced therein, there is considerable additional evidence supporting the immediacy of the connection between the shallow groundwater underlying Mussi and Pak & Young's lands (and within the entire Delta for that matter) and the surface streams. See for example, the Testimony of Dante J. Nomellini, Sr. (Mussi/Pak & Young Exhibit 9) and the following exhibits: Mussi/Pak & Young Exhibit 9E, "Estimation of Delta Island Diversions and Return Flows, DWR, February 1995"; Mussi/Pak & Young Exhibit 9F, "DWR's January 30, 2009, letter to MWD, et al. re proposed Delta Wetlands water transfer"; Mussi/Pak & Young Exhibit 9G, "Excerpts from DWR's 2009 Webb Tract Transfer Pilot Study and Office Memos"; and Mussi/Pak & Young Exhibit 9H, "Investigation of the Sacramento-San Joaquin Delta Report No. 4, Quantity and Quality of Waters Applied to and Drained From the Delta Lowlands, Department of Water Resources, July 1956."

While it is difficult to imagine a more immediate connection, as well as one that is more well-recognized, if the SWRCB does not believe the requisite "immediate connection" within the meaning of *Hudson* exists between the shallow groundwater and the surface streams, then the SWRCB must thoroughly explain the basis for that belief and, unlike its decision in WRO 2004-0004, it should meaningfully define what it believes would constitute such an "immediate connection" and the authority it is relying on to so define such a connection. If the SWRCB

equates "immediate connection" with so-called "underflow" or "underground flow," then the SWRCB must thoroughly define "underflow" and "underground flow" (which it failed to do in WRO 2004-0004) and explain why the immediate connection *Hudson* is referring to should be equated with those definitions.

It should be noted that in WRO 2004-0004 (at page 13) the SWRCB stated that "[t]he difference in quality of the groundwater and the surface water does not support, and actually tends to contradict, the assertion that the groundwater is the underground flow of the Middle River or the San Joaquin River." That statement is misplaced. It is common knowledge that the farming operations taking place on Delta lands (and on all farmlands throughout the world for that matter) concentrate the salt content of the applied water in the soils and groundwater (where shallow groundwater exists as it does under Mussi and Pak & Young's lands) underlying the crops as a result of evaporation and the crops' consumptive use of the water which leaves the salts behind in the soils and groundwater. The suggestion that such a water quality difference detracts from the immediacy of the groundwater/surface water connection is misplaced. Under that logic, a slough which flows into a river would not be immediately connected to that river if the water in the slough has a higher concentration of salts than the water in the river, which is clearly not the case.

B. Assuming *Arguendo* That The Shallow Groundwater Is *Not* In "Immediate Connection" With The Surface Streams, The Landowners Overlying That Groundwater Still Have The Right To Divert Directly From Those Streams Within The Scope Of Their "Overlying Rights."

In *Hudson*, supra, 156 Cal. 617, the court went on to address the situation where it is assumed that "the underground strata is [not] in such immediate connection with the surface stream as to make it a part of the stream" (*id.*, pp. 626-627) and, thus, where it is assumed that the landowner overlying that underground strata is not technically considered a "riparian" to the surface stream. Whether Mussi and Pak & Young's right to divert from the surface streams in such a situation is deemed a "riparian" right or part of their "overlying" rights, the result is the same. In either case Mussi and Pak & Young *do* have the right to divert from the surface streams at least to the extent they can obtain access to the surface streams and can divert from those streams without injuring any other overlying or riparian right holder with "correlative" rights to that "common

[underground/surface] supply." (*Id.*, p. 628.) In the instant case, Mussi and Pak and Young do have access to the surface streams and there is no allegation that their diversions from those streams injure any other correlative water right holder with rights to that common underground/surface supply.

As *Hudson* explains:

> [The underground percolating waters] together with the surface stream supplied by them, *should be considered a common supply*, in which all who by their natural situation have access to it have a common right, and of which *they may each make a reasonable use upon the land so situated, taking it either from the surface flow, or directly from the percolations beneath their lands*. The natural rights of these defendants and the plaintiff in this common supply of water *would therefore be coequal, except as to quantity, and correlative*.

(*Id.*, p. 628, emphasis added.) As can be seen, *Hudson* not only plainly states that overlying landowners "may . . . take either from the surface flow, or . . . from the percolations . . . ," but also plainly declares that such rights are "coequal, except as to quantity . . . ." *Hudson* does not state, for example, that such rights are coequal "except as to quantity [*and source*] . . . ." (*Ibid.*) Instead, they are limited only as to quantity since the potential quantity which any riparian or overlying user may put to reasonable and beneficial use will vary depending on the nature of, and reasonableness and non-wastefulness of, the various uses taking place on their respective lands.

Accordingly, even in this "less immediate connection" situation, *Hudson* confirms that it is indeed within the scope of the overlying landowner's "overlying rights" to divert its fair share of that common underground/surface supply "either from the surface flow, or . . . from the percolations . . . ." (*Id.*)

C. In A Common Underground/Surface Supply Situation It Should Be Deemed To Be Within The Scope Of A Landowner's Coequal And Correlative Rights To That Common Supply To Divert From The Surface Component Of That Supply In The Absence Of Injury To Others With Rights To That Supply.

In the event the SWRCB does not find an "immediate connection" between the shallow groundwater and surface waters where *Hudson* makes it clear the "overlying" landowner is also "riparian to the stream," and, hence, the SWRCB finds that the situation involves the "less immediate connection" situation, then to the extent the SWRCB determines *Hudson*, for whatever reason, should not be read to say that it is within the scope of an overlying user's "overlying rights"

to take its fair share of the common underground/surface supply directly from the surface stream, it is clear that *Hudson* does not say such a user cannot, and Respondents respectfully request that the SWRCB make a determination that such a user can indeed lawfully change its point of diversion to the banks of such surface streams so long as it can do so without causing injury to any other overlying or riparian water right holder with coequal and correlative relative rights to that common supply. Such a determination would be fully consistent with, and in furtherance of, *Anaheim*, *Hudson*, *Turner* and the well-established "no-injury rules" set forth in case law and statutory law with regard to changing points of diversion from a common supply.

With respect to *Anaheim*, it is important to note that *Anaheim* could have very easily said that such an overlying user could *never* take its fair share directly from the surface stream. It, of course, clearly did not and, instead, merely stated that such an overlying user could not do so *if* it resulted in "injury [to the] lands which abut upon the proper banks of the surface stream . . . ." (*Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, 323.) The Court specifically left the issue open for further development by the courts or even the SWRCB:

> It is not necessary here to [definitively] decide what rights to the use of the underground flow [or percolations] of a stream may, by virtue of its position, attach to land which abuts upon, or extends into or over such waters, but does not extend to the surface stream.

(*Ibid.*)

The principle urged by Respondents would also be fully consistent with, and in furtherance of, the principles set forth in *Turner v. James Canal Co.* (1909) 155 Cal. 82. *Turner* addressed the question to what extent can a landowner whose lands are riparian to a slough that is hydrologically connected to a main river change its point of extraction of its correlative share of that common surface supply from the four corners of its land that is riparian to the slough to another location along the main river or slough that is outside the four corners of his riparian land. (See *id.*, pp. 84-85.) The answer was that it was indeed within the scope of the correlative right holder's rights to extract its share of that common surface supply "at any convenient point" from either the slough or even "from the main river" which the slough is hydrologically connected to, regardless of whether it was in or outside the boundaries of the correlative right holder's riparian lands. (*Id.*, pp. 91-92.)

The only caveat was that the diversion from any such "convenient point" could "not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the [landowner's] riparian land." (*Ibid.*)[11]

Turner and *Hudson* are similar in that they each recognize that when two bodies of water, either a slough and a main river (*Turner*) or groundwater and surface water (*Hudson*), are hydrologically connected and, hence, form a single common supply, then those with water rights entitling them to extract their fair share of that common supply have coequal, except as to quantity, and correlative rights to that common supply. And it is precisely because of the coequal and correlative nature of those rights that it should be deemed properly "within the scope" of those rights for the holders of those rights to extract their fair share of that common supply from any convenient access point to that supply so long as such extractions do not injure the coequal and correlative relative rights of all of the other water right holders possessing the same coequal and correlative rights to that common supply.

To the extent *Hudson* has not already established (for over a hundred years) that the same principles set forth in *Turner,* regarding the ability of a correlative right holder to a common supply to change its point of extraction of that common supply, likewise apply to the situation where the common supply is between groundwater and surface water, as opposed to a slough and a main river, then Respondents respectfully submit that the SWRCB should determine that such is the case.

D. The Requested Determination Would Be Fully Consistent With The Well-Established "No-injury Rules" Set Forth In Case Law And Statutory Law With Regard To Changing Points Of Diversion From A Common Supply.

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[11] "Inasmuch as the J. G. James Company's lands are riparian to Fresno slough, and the slough is, for a considerable period each year, connected with, and properly a part of, the San Joaquin river, it follows that, for the irrigation of such lands, it has, during such periods, *a right to take its share of the water from the main river at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does not injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land.*" (*Turner*, *supra*, p. 91-92, emphasis added.)

The ability of a water right holder to change its point of diversion from one point on a hydrologically connected water supply to another point on that same supply so long as others are not injured by the change is well-established in the law. For "appropriative" water rights other than those acquired under the "Water Commission Act or [the Water] Code," this ability is codified in Water Code section 1706. For appropriative rights acquired under said act and code, this ability is codified in Water Code section 1701 and 1702. (See also, Wat. Code, §§ 1725 & 1735-1736 [changes in points of division involving the transfer of water].)

As discussed above, since at least the 1909 *Turner* case, it has also been well-established that riparians could also freely change their point of diversion from one point on a hydrologically connected surface supply to another point on that same supply so long as no other riparians with similar coequal and correlative rights between the point of diversion and the diverter's riparian land were injured thereby.

With regard to overlying users, the same was true at least as far back as 1911. As the Court explains in *Burr v. Maclay Rancho Water Co.* (1911) 160 Cal. 268, so long as an overlying landowner is not "taking the water to distant lands *not overlying the common supply*," the landowner may lawfully take the water from underneath one tract and apply it to a separate tract that overlies that same common supply. (*Id.* at 273, emphasis added.) (See also, *Fryer v. Fryer* (1944) 63 Cal.App.2d 343 [such a taking is "within [such a landowners'] rights" as a correlative right holder to that common supply].) Such a taking, of course, is still subject to the requirements that it be reasonable and non-wasteful under the correlative rights' doctrine.

Moreover, it is not uncommon and is allowable, as has been allowable since at least 1903, for water right holders with rights to a common source to share a particular point of diversion from that common source:

> Where a number of persons owning land are each entitled to take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners [or overlying owners], . . . [t]he owners of such water-rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds . . . ."

(*Hildreth v. Montecito Creek Water Co.* (1903) 139 Cal. 22, 29; see also, *Samuel Edwards Associates v. Railroad Commission of State of California* (1925) 196 Cal. 62, 72 ["There is no doubt [the type of joint diversion and arrangement in *Hildreth*] may be done "].)

As has been said, the position Respondents are advocating is fully consistent with the foregoing well-established "no injury" rules with regard to changes in places of diversion. Pursuant to the correlative rights doctrine it does not makes sense to allow a landowner overlying a common underground/surface water supply whose land is not contiguous to the surface stream to take water from the groundwater immediately adjacent to a surface stream, but not take the water directly from the surface stream, especially when noone with coequal and correlative rights to that common supply is injured by such takings. In a common underground/surface water supply situation, by definition, groundwater extractions adversely affect the volume of water in the stream and surface water extractions adversely affect the volume of water in the underground. In the instant proceedings, as Engineer Neudeck explains, "Taking water from [the surface streams] is virtually the same as [taking it from the underground]," and in either case "there would be no difference in the amount of water available in the surrounding channels." (Mussi/Pak & Young Exhibit 3V, pp. 4-5.)

Any particular common underground/surface common supply situation will involve its own unique circumstances and conditions. In the instant proceedings, those correlative right holders, such as the farmers within Roberts Island, tend to find it more economical and more convenient to extract their fair share of the common supply from the surface component of that supply rather than from the groundwater. In this same common underground/surface common supply situation, however, it may very well be preferable for some landowners, depending on what purpose they intend to use the water, e.g., domestic or otherwise, to extract their share of the common supply from the groundwater.

While the reasonableness or potential wastefulness of any particular correlative use of water in a common underground/surface water supply setting will vary greatly among different settings and be influenced by a host of site-specific factors, the reasonableness or potential

wastefulness of Mussi or Pak & Young's surface diversions are not being challenged or at issue in the instant CDO proceedings.

For the foregoing reasons, Respondents respectfully submit that the SWRCB should determine, at a minimum, that it is indeed properly within the scope of Mussi and Pak & Young's coequal and correlative rights to the common underground/surface water supply to divert their fair share of that supply from the banks of the surface component of that supply so long as they can do so without causing injury to any other overlying or riparian water right holder with coequal and correlative rights to that supply. If and when there is a challenge by any such coequal and correlative right holder alleging injury from such surface diversions, then, at that time, the SWRCB (or rather a court) could address the substance of the alleged injury and curtail those diversions as necessary to avoid that injury.

XIV. WHEN WHITNEY SEPARATED HIS LANDS FROM THE BANKS OF VARIOUS WATERWAYS HE RETAINED THE MUSSI PARCEL'S RIPARIAN RIGHTS TO THOSE WATERWAYS.

Mussi Exhibit 3B contains a copy of the patent from the State of California to J. P. Whitney ("Whitney"), dated November 24, 1876, and includes a map of the conveyed lands prepared by KSN, Inc. Mussi's parcel at issue herein, i.e., APN 131-170-03, was part of the lands conveyed in that patent, and at the time of the patent, abutted the banks of numerous waterways including, but not limited to, the San Joaquin River, Burns Cut-Off, Duck Slough, Middle River, Trapper Slough, Whiskey Slough, Black Slough, etc. As Whitney subdivided and sold parts of this patented land, the land which Whitney retained after such sales began to lose its surface connections to the banks of various waterways.

In *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, the court discussed the situation where the grantor loses its surface connection to the banks of a waterway as a result of a deed of conveyance and held as follows:

> Even if the trial court had concluded that the deed conveyed a fee interest to the grantee, it seems clear to us such a conveyance would have no effect on the riparian rights of the grantors' remaining lands not included in the conveyance, *absent some expression to the contrary.* [Citations.]

(*Id.*, p. 658, emphasis added; see also, *id.*, p. 657 ["Absent some expression of intent to convey or sever rights in lands not included in the conveyance, the grant must be deemed inapposite to a consideration of the riparian status of the excluded land"].)

In situations where the deed fails to include the requisite expression of intent to sever the grantor's riparian rights to the banks of a particular waterway and, hence, the grantor retains such riparian rights, those lands could never lose those rights through future subdivisions of those lands because those lands could never be further separated from the banks of those waterways–such separation is a one time event. As the court explains in *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 539, "If the grant deed conveys [or in this case, preserves] the riparian rights to the noncontiguous parcel, that parcel retains its riparian status." Having retained its riparian status, the grantor's riparian rights to the separated waterways, from those separations forward, remain "vested right[s] inherent in and a part of the land[s] [citations] and [forever] pass[] by a grant of land to the grantee even though the instrument is silent concerning the riparian right [citations]." (*Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 655-656; see also, *Strong v. Baldwin* (1908) 154 Cal. 150, 157 [the effect of retention of riparian rights at the time of separation from a waterway was "to make the riparian right 'parcel of the land' conveyed, and it passed as such in all subsequent conveyances of such land"].)

While the examination of the separations of Whitney's lands from the banks of various waterways could and should, if necessary, be performed in relation to *all* "natural" waterways, including all interior sloughs, etc., for purposes of determining Mussi's riparian rights in connection with the instant CDO proceedings, it is sufficient to merely examine the separation from the banks of the San Joaquin River, Trapper Slough, Whiskey Slough and Black Slough. (Though, again, if this instant examination, for whatever reason, proves insufficient to resolve the matters at issue herein, then further examinations should be performed once the SWRCB makes findings as to what "natural" waterways were in existence during the time periods when Whitney's patented lands were subdivided into their present dimensions.)

A. Whitney Retained The Mussi Parcel's Riparian Rights To The San Joaquin River, Trapper Slough, Whiskey Slough And Black Slough.

As noted above, the land within the Mussi parcel was within the lands in the patent from the State of California to Whitney and, hence, was at one time part of a considerably larger parcel that abutted the banks of the San Joaquin River, Trapper Slough, Whiskey Slough and Black Slough. (See deed and map at Mussi Exhibit 3B.)

Via Whitney's December 12, 1876 conveyance to M. C. Fisher, Whitney separated his lands to the east of Duck Slough (which include the Mussi parcel) from the banks of the San Joaquin River, Trapper Slough, Whiskey Slough and Black Slough. (See Mussi Exhibit R-37.) (Thereafter, on January 15, 1877, Whitney transferred all or most of its lands to the east of Duck Slough [including the Mussi parcel] to M. C. Fisher [see Mussi Exhibit R-38].)

Because the December 12, 1876 conveyance to M. C. Fisher contains no expression whatsoever that Whitney intended to eliminate his riparian rights to divert from the banks of the San Joaquin River, Trapper Slough, Whiskey Slough and Black Slough, all of Whitney's retained lands to the east of Duck Slough, including the Mussi parcel, retained and preserved their riparian rights to divert from those banks at the time those lands were separated from those banks. (See *Murphy Slough*, *supra*.) Accordingly, from the time of that conveyance forward, those rights remained "part and parcel" of those lands and could not be severed via any further subdivisions of those lands. (See *Rancho Santa Margarita*, *Murphy Slough Assn.* and *Strong* discussed above.)

XV. WHEN WHITNEY SEPARATED HIS LANDS FROM THE BANKS OF VARIOUS WATERWAYS HE RETAINED THE PAK AND YOUNG PARCEL'S RIPARIAN RIGHTS TO THOSE WATERWAYS.

Pak & Young Exhibit 3B contains a copy of the patent from the State of California to J. P. Whitney ("Whitney"), dated November 24, 1876, and includes a map of the conveyed lands prepared by KSN, Inc. Pak & Young's parcel at issue herein, i.e., APN 131-180-07, was part of the lands conveyed in that patent and, at the time of the patent, abutted the banks of numerous waterways including, but not limited to, the San Joaquin River, Burns Cut-Off, Duck Slough, Middle River, Trapper Slough, Whiskey Slough, Black Slough, etc. As Whitney subdivided and sold parts of this patented land, the land which Whitney retained after such sales began to lose its surface connections to the banks of various waterways.

In *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, the court discussed the situation where the grantor loses its surface connection to the banks of a waterway as a result of a deed of conveyance and held as follows:

> Even if the trial court had concluded that the deed conveyed a fee interest to the grantee, it seems clear to us such a conveyance would have no effect on the riparian rights of the grantors' remaining lands not included in the conveyance, *absent some expression to the contrary.* [Citations.]

(*Id.*, p. 658, emphasis added; see also, *id.*, p. 657 ["Absent some expression of intent to convey or sever rights in lands not included in the conveyance, the grant must be deemed inapposite to a consideration of the riparian status of the excluded land"].)

In situations where the deed fails to include the requisite expression of intent to sever the grantor's riparian rights to the banks of a particular waterway and, hence, the grantor retains such riparian rights, those lands could never lose those rights through future subdivisions because those lands could never be further separated from the banks of that waterway–such separation is a one time event. As the court explains in *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 539, "If the grant deed conveys [or in this case, preserves] the riparian rights to the noncontiguous parcel, that parcel retains its riparian status." Having retained its riparian status, the grantor's riparian rights to the separated waterways, from those separations forward, remain "vested right[s] inherent in and a part of the land[s] [citations] and [forever] pass[] by a grant of land to the grantee even though the instrument is silent concerning the riparian right [citations]." (*Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649, 655-656; see also, *Strong v. Baldwin* (1908) 154 Cal. 150, 157 [the effect of retention of riparian rights at the time of separation from a waterway was "to make the riparian right 'parcel of the land' conveyed, and it passed as such in all subsequent conveyances of such land"].)

While the examination of the separations of Whitney's lands from the banks of various waterways could and should, if necessary, be performed in relation to *all* "natural" waterways, including all interior sloughs, etc., for purposes of determining Pak/Young's riparian rights in connection with the instant CDO proceedings, it is sufficient to merely examine the separation from the banks of Middle River. (Though, again, if this instant examination, for whatever reason,

proves insufficient to resolve the matters at issue herein, then further examinations should be performed once the SWRCB makes findings as to what "natural" waterways were in existence during the time periods when Whitney's patented lands were subdivided into their present dimensions.)

A. Whitney Retained The Pak And Young Parcel's Riparian Rights To Middle River.

As noted above, the land within the Pak & Young parcel was within the lands in the patent from the State of California to Whitney and, hence, was at one time part of a considerably larger parcel that abutted the banks of Middle River. (See deed and map at Pak & Young Exhibit 3B.) By reviewing the County Assessor maps from 1876 through 1896, one can see at a glance how the land within the Pak & Young parcel was initially separated from the banks of Middle River. (See Pak & Young Exhibit 3H.)

The chain of conveyances leading to such separation begins as follows:

–State of California to Whitney, 11/24/1876 (Pak & Young Exhibit 3B);

–Whitney to M.C. Fisher, 12/12/1876 (Pak & Young Exhibit 3C);

–M.C. Fisher to The Glasgow California Land Company (Limited), 6/20/1877 (Pak & Young Exhibit 3D.)

Thereafter, The Glasgow California Land Company, Limited ("Glasgow") began to separate its lands from the banks of Middle River. As can be seen by reviewing the County Assessor maps from 1892 through 1896 (see Pak & Young Exhibit 3H), this separation began with the conveyance of the lands to the west of the Honker Lake Cross Levee Slough to "Witter" and ended with the conveyance of the lands to east of that slough and to the west of Duck Slough, to Frank E. Lane on March 7, 1896. (Certified copies of the two deeds to Witter and the one deed to Frank E. Lane which effectuated said separation are included as Exhibits to Pak & Young's Request for Official Notice being submitted concurrently herewith).

Because Glasgow's March 7, 1896 conveyance to Frank E. Lane contains no expression whatsoever that Glasgow intended to eliminate its riparian rights to divert from the banks of Middle River, all of Glasgow's retained lands, which included the Pak & Young parcel, retained and preserved their riparian rights to divert from the banks of Middle River at the time those lands

were separated from those banks. (See *Murphy Slough*, *supra*.) Accordingly, from the time of that conveyance forward, those rights remained "part and parcel" of those lands and could not be severed via any further subdivisions of those lands. (See *Rancho Santa Margarita*, *Murphy Slough Assn.* and *Strong* discussed above.)

XVI. THE SWRCB'S GRANT OF THE MOTION TO STRIKE PORTIONS OF CHRISTOPHER NEUDECK'S TESTIMONY IS INCORRECT.

A. All Of Christopher Neudeck's Testimony Is Relevant To The Instant Proceedings.

In the Hearing Officer's ruling on evidentiary objections in the contemporaneous *Woods Irrigation Company* CDO proceedings, dated July 19, 2010, entitled, "Woods Irrigation Company Hearing Motions and Evidentiary Objections," the Hearing Officer ruled that the following portions of Christopher Neudeck's testimony should be stricken from the record: (1) Attachment Exhibit 3V to WIC Exhibit 4A (which is the same testimony included as part of Mussi Exhibit 3V and Pak & Young Exhibit 3V); and (2) WIC Exhibit 4D (which is also the same testimony included as part of Mussi Exhibit 3V and Pak & Young Exhibit 3V). The Hearing Officer's basis for striking those portions is as follows:

> The portions of Mr. Neudeck's testimony that MID objects to in the current proceeding are copies of Mr. Neudeck's testimony in a prior enforcement hearing regarding Roberts Island properties, State Water Board Order WRO 2004-0004 (hereinafter "Phelps"). This evidence is presented solely to support the theory that lands in the area have riparian water rights because the groundwater they overlie is connected to the surface waters from which they are diverting, also known as the "Delta Pool" theory. This theory was rejected in State Water Board's Phelps Order, which was upheld on judicial review. (See *Phelps et. al. v. SWRCB* (Super. Cl. Sacramento County, 2006, No. 04CS00368); *Phelps v. SWRCB* (2007) 157 Cal. App. 4th 89.) Because a riparian water right cannot attach through groundwater, this evidence is not relevant to the proceeding, and the motion to strike is granted on that ground.

(*Id.* p. 3.) While it is Respondents' understanding that the Hearing Officers in the Mussi and Pak & Young CDO proceedings did *not* strike any portions of Mr. Neudeck's testimony, Respondents will nevertheless briefly explain the relevance to the instant proceedings of the portions of Mr. Neudeck's testimony which were stricken in the Woods IC CDO proceedings, and which are cited to herein, and what the Superior and Appellate courts did and did not do in the *Phelps* litigation on issues pertaining to that testimony.

1. Neudeck's Testimony Regarding The Connection Between The Groundwater And Surface Water Is *Not* Presented Solely To Support The So-Called "Delta Pool Theory."

At the outset, it should be noted that the theory addressed in the *Phelps* litigation is *not* the so-called "Delta Pool" theory that Mr. Nomellini, Sr. has testified to at length in these proceedings. Instead, the theory addressed in the *Phelps* litigation is the theory discussed at length herein that, on account of the hydrological connection between the groundwater underlying the lands within the Mussi and Pak & Young parcels and the nearby surface streams, the owner of such lands should have the right to divert its fair share of that common supply directly from the surface streams even if its lands do not abut those streams.

In any event, Mr. Neudeck's testimony regarding the connection between the groundwater and surface waters is relevant to many issues raised in the instant proceedings, in addition to the "common underground/surface supply theory" that was raised in the *Phelps* litigation. Those other issues include the following:

(1) The so-called "Delta Pool" theory that Mr. Nomellini, Sr. has testified to at length.

(2) The intent of the grantor and grantee, i.e., it is relevant to demonstrate that a grantor could not physically cut off the grantee's ability to receive surface water from the nearby surface channels even if it wanted to, since those surface waters continuously reach the grantee's land from below the surface.

(3) In a similar vein, that connection is also relevant to demonstrate that the grantee's parcels are continuously *consuming* surface water from the surface channels, via evapotransporation from natural vegetation (weeds, trees, etc.) or even via evaporation from bare soil, even if a grantee's parcel is separated on the surface from a surface channel–as discussed above, it is effectively impossible to terminate that continuous consumption of surface water. As such, that continuous consumption provides support to show that the parties to a grant did not intend to terminate that consumption of surface water after said separation, and that the parties had an understanding that such consumption would continue to occur following any particular separation. The situation is analogous to having hundreds

of underground pipelines feeding surface water to the grantee's lands 24 hours a day, 365 days a year.

(4) This connection is also relevant, as it was in the *Phelps* case, to the determination of "harm" caused by any alleged unlawful diversions. For example, as Mr. Neudeck explains in his testimony: "Taking water from [the surface streams] is virtually the same as [taking it from the underground]," and in either case "there would be no difference in the amount of water available in the surrounding channels." (Pak & Young Exhibit 3V, pp. 4-5; Mussi Exhibit 3V, pp. 4-5.)

(5) A final example is the relevance to the contention that, because of the direct groundwater/surface water connection, more water would be consumptively used via natural vegetation and evaporation in the absence of farming than with farming, which goes to the issue of harm as well as to the wisdom of the SWRCB's focus on aggressively scrutinizing the water rights in the Delta in lieu of focusing on areas where curtailing water diversions would actually result in water savings.

2. Respondents' "Common Underground/Surface Supply Theory" Was *Not* Rejected By The Appellate Court.

While it is seemingly true that the SWRCB and the *Superior* Court rejected the *Phelps* Respondents' "common underground/surface supply theory," it is very clear that the *Appellate* Court did not. The Appellate Court did not reach the merits of the issue and, instead, simply stated that it deferred to the Superior Court's factual findings on the issue. (See *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 116-118.) The real tragedy, however, is that it is clear that the Superior Court did not make any factual findings at all on this issue and ruled on the merits of the issue as a question of law. The Appellate Court therefore mistakenly deferred to the Superior Court's factual findings on the issue when there were no such factual findings.[12]

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[12] The entirety of the Trial Court's ruling on this theory is as follows: "Petitioners do not overcome the lack of solid, credible evidence to establish retained and preserved riparian rights by their assertion of a riparian rights theory based on connections between groundwater flowing under their parcels and the San Joaquin or Middle Rivers. By settled case law, any connections between

The "common underground/surface supply theory" which Respondents raised in the *Phelps* litigation and are rasing herein raises the following issue:

> In *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, this Court held that a landowner with lands that overlie groundwater that is hydrologically connected to a surface stream but whose lands are separated from the surface stream on the surface does not have "the right to divert water from the surface stream, conduct or transport it across intervening land to the tract thus separated from the surface stream, and there apply it to use on the latter, to the injury of lands which abut upon the proper banks of the surface stream . . . ." (Id., p. 332, emphasis added.) Does such a landowner have such a right if there is no alleged, much less actual, injury to any such lands or to any other water user with rights to that common underground/surface water supply?

If the SWRCB or anyone else can point to where in the Appellate Court's *Phelps* decision the Appellate Court answered that question, then it is respectfully requested that they do so and that they provide direct quotes. That issue is as alive and well now as it was during the *Phelps* litigation. While the parties to the *Phelps* litigation are bound by the SWRCB and *Superior* Court's rulings via doctrines of collateral estoppel, res judicata and/or law of the case, etc., neither Mussi nor Pak & Young were parties to those proceedings and are not so bound.

However, even if the Appellate Court did answer the above-referenced question, that would still not be a valid basis to bar Mussi or Pak & Young from raising the issue in the instant proceedings and providing evidentiary testimony in support thereof. All courts, even the Supreme Court, and especially administrative tribunals such as the SWRCB, have the power to revisit prior rulings, especially when there are different facts as there are in the instant case, but, even when the

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the groundwater and the rivers do not establish the contiguity between the parcels and the rivers necessary to confer riparian rights to divert water from the river surfaces. (*Anaheim Union Water co. v. Fuller* (1907) 150 Cal. 327, 332.) The cases on which petitioners rely for their theory, *Hudson v. Daily* (1909) 156 Cal. 617 and *Turner v. James Canal* (1909) 155 Cal. 326, do not depart from this holding of *Anaheim*. *Turner* does not involve an underground flow at all, and *Hudson* merely recognizes that when groundwater flow underlying one property and a surface stream abutting another property have a common water supply, the property owners have correlative rights to the supply and must share it. (156 Cal. at 628.) *Hudson* does not hold that the common water supply confers a riparian right to divert from the surface stream upon the property overlying the groundwater flow." (See "Ruling on Submitted Matter," filed February 14, 2006, Sacramento Superior Court, Case No. 04CS00368, pp. 9-10.) Where does the Superior Court state that it rejects this theory because the Petitioners did not adequately establish the connection between the groundwater and surface water or did not establish any other factual support for this theory?

facts are the same, and overturn, modify or otherwise extend or curtail those prior rulings as appropriate. The California Rules of Professional Conduct, for example, amply recognize this essential ability to test the validity of various laws. (See e.g., Rule 3-210 ["A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal"]; and Rule 3-200, with emphasis added ["A member shall not . . . present a claim or defense in litigation that is not warranted under existing law, *unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law*"].)

While the Appellate Court in the *Phelps* case did not answer the above-referenced question, and it is Respondents' contention that other cases *have* sufficiently answered it in Respondents' favor, the most the Appellate Court in the *Phelps* case could be said to have done is defer to the Superior Court's *factual determinations* with respect to that issue. Sadly, as noted above, the Superior Court did not make any such determinations. In any event, in the instant proceedings, Respondents have submitted considerable additional evidence attesting to the well-recognized connection between the groundwater and surface waters in the vicinity of the Mussi and Pak & Young parcels and throughout the entire Delta and, therefore, to the extent the Appellate Court, Superior Court and/or the SWRCB found that connection to be lacking in the *Phelps* case, Respondents have attempted to correct any such deficiency in the instant proceedings and should by no means be deprived of the opportunity to do so.[13] [14]

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[13] See for example, the Testimony of Dante J. Nomellini, Sr. (Mussi Exhibit 9) and the following exhibits: Mussi Exhibit 9E, "Estimation of Delta Island Diversions and Return Flows, DWR, February 1995"; Mussi Exhibit 9F, "DWR's January 30, 2009, letter to MWD, et al. re proposed Delta Wetlands water transfer"; Mussi Exhibit 9G, "Excerpts from DWR's 2009 Webb Tract Transfer Pilot Study and Office Memos"; and Mussi Exhibit 9H, "Investigation of the Sacramento-San Joaquin Delta Report No. 4, Quantity and Quality of Waters Applied to and Drained From the Delta Lowlands, Department of Water Resources, July 1956."

[14] The SWRCB did indeed challenge the sufficiency of the evidence regarding that connection in the *Phelps* case. (See e.g., WRO 2004-0004, at p. 13, with emphasis added ["*In the absence of other evidence*, the respondents' factual contention [regarding so-called "underflow," which the SWRCB mistakenly assumed the instant theory relies on] is unfounded and provides no support to the legal contention"].)

For all of these reasons, *all* of Mr. Neudeck's testimony is directly relevant and important to the instant proceedings.

XVIII CONCLUSION

The evidence presented shows that the Mussi and Pak properties were originally swamp and overflowed lands, which abutted Duck Slough both before and after reclamation of the surrounding lands. This connection to Duck Slough continued on until at least 1928 (the date a court case references the filling in a slough). Later evidence shows that portions of the slough were still in existence until at least 1937 (the date of aerial photographs). During the relevant times (up through 1925) the record shows not only the connection to Duck Slough, but other interconnected water sources which could only have been jointly used by local farmers to provide water to their crops. Clearly the Pak property was riparian to Duck Slough up until it was benefitted by an agreement to furnish water, and thereafter it established a new diversion point via the Woods Robinson Vasquez system; all indicating the intent and actual preservation of a riparian right. The Mussi property was also riparian to Duck Slough, and transitioned from use of that source, to Woods Irrigation Company, finally to the Woods Robinson Vasquez system; all indicating the intent and actual preservation of a riparian right.

Further, the relevant deeds preserved the riparian status of the lands, and use of water since 1914, indicating a prima facie case of pre-1914 rights have been shown. For these, the other argument and legal citations set forth hereinabove, no CDO should issue against Mussi or Pak.

Dated: August 30, 2010

By: John Herrick
John Herrick, Esq.

PROOF OF SERVICE BY E-MAIL

I declare as follows:

I am over eighteen years or age and not a party to the within entitled action. My business address is the Law Office of John Herrick, 4255 Pacific Avenue, Suite 2, Stockton, California, 95207. I am employed in San Joaquin County, California. Based on an agreement of the parties to accept service by e-mail or electronic transmission, on August 18, 2010, at approximately 3:30 p.m., I sent the **RUDY MUSSI, TONI MUSSI, AND LORY C. MUSSI INVESTMENT LP/YONG PAK AND SUN YOUNG/SOUTH DELTA WATER AGENCY/CENTRAL DELTA WATER AGENCY JOINT CLOSING BRIEF** and Proofs of Service by e-mail regarding the Hearing Regarding Adoption of Draft Cease and Desist Order Against Woods Irrigation Company, Middle River in San Joaquin County, to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SWRCB	wrhearing@waterboards.ca.gov
Dean Ruiz	dean@hpllp.com
Donald Geiger	dgeiger@bgrn.com
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Robert Donlan	RED@eslawfirm.com
Clifford Schulz	cschulz@kmtg.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on August 30, 2010, at Stockton, California.

Dayle Daniels

PROOF OF PERSONAL SERVICE

STATE OF CALIFORNIA)
) ss.
County of San Joaquin)

I am a citizen of the United States and a resident of the County of San Joaquin. My business name is Service First, and my business address is Post Office Box 2257, Stockton, California, 95212. I am over the age of eighteen years and not a party to the within entitled action.

On August 30, 2010, I hand delivered the original and five copies of **RUDY MUSSI, TONI MUSSI, AND LORY C. MUSSI INVESTMENT LP/YONG PAK AND SUN YOUNG/SOUTH DELTA WATER AGENCY/CENTRAL DELTA WATER AGENCY JOINT CLOSING BRIEF** to the State Water Resources Control Board, by hand delivering true copies thereof to the person at the front desk of the SWRCB for delivery on the SWRCB at approximately 4:15 p.m.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED on August 30, 2010, at Stockton, California.

Patrick Burnett