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Arnold Schwarzenegger
Governor

CLOSING BRIEF OF DIVISION OF WATER RIGHTS PROSECUTION TEAM IN THE MATTER OF HEARING ON DRAFT CEASE AND DESIST ORDERS –

RUDY MUSSI, TONI MUSSI AND LORI C. MUSSI INVESTMENT LP,

AND

YONG PAK AND SUN YOUNG¹

I. INTRODUCTION

These matters come before the State Water Resources Control Board (State Water Board or Board) based on the Notices of Public Hearing for the separately issued draft Cease and Desist Orders (Draft CDO) against Rudi Mussi, Toni Mussi and Lori C. Mussi Investment LP (Mussi) and against Yong Pak and Sun Young (Pak and Young) pursuant to Water Code section 1831. Water Code section 1831, subdivision (d) allows the Board to “issue a cease and desist order in response to a violation or threatened violation of... [t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division....” The Draft CDOs were issued to Mussi and Pak and Young based on the threat of unauthorized diversion and use of water.

The Division of Water Rights (Division) Prosecution Team (Prosecution Team) presented evidence at the public hearings for these matters on May 5, June 9, and July 9 and 15, 2010. The evidence showed that both the Mussi and Pak and Young parcels

that are the subjects of these hearings were at one time contiguous to Duck Slough, a natural watercourse, but eventually lost that connection to Duck Slough. (Mussi PT-01, p. 2; Pak & Young PT-01, p. 3.) Duck Slough was filled in sometime between 1911 and 1925. (*Ibid.*) In approximately 1925, the parcels began receiving water from Middle River via artificial canals that follow a similar course to the former Duck Slough. (*Ibid.*) The parcels have subsequently received water in largely the same manner since 1925.

The Mussi and Pak and Young parcels do not currently abut a natural watercourse. Mussi and Pak and Young also do not have water right permits or licenses issued by the Board. They did not present sufficient evidence at the hearings of having retained a riparian right to divert and use water from either Middle River or the former Duck Slough on the subject parcel or verifying irrigation on the parcel prior to 1914 and subsequent continuous use of water. Without any indication that Mussi or Pak and Young intend to voluntarily cease diverting and using water on their parcels, there exists a threat of unauthorized diversion and use. For the clear and strong public policy reasons outlined in the Board's Strategic Workplan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, the Board should issue the Draft CDOs as written. If Mussi or Pak and Young wish to continue to divert and use water on their properties, they must either submit to the Division sufficient evidence establishing a valid basis of right or a water supply contract with someone with a valid

¹ Because the general issues in both of these hearings are the same, and much of the evidence was presented for both proceedings, this closing brief is being submitted by the Prosecution Team for both proceedings.

basis of right to serve their property, or else comply with the provisions of the Water Code regarding appropriations of water after 1914 like everyone else.

II. FACTS

On July 16, 2008, the State Water Board adopted a Strategic Workplan for Activities within the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Workplan). (Mussi PT-01, p. 1; Pak & Young PT-01, p. 1.) The Workplan emphasized the State Water Board's responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the Delta. (*Ibid.*) As described in the Workplan, the Division initiated an investigation of the basis of water rights of existing diverters within the Delta. (*Ibid.*)

On February 18, 2009, the Division mailed letters to owners of property on Roberts and Union Islands within the Delta for which the Division had evidence of possible recent irrigation but whose names "[did] not appear in the Division's records establishing any claim of right for existing diversions of water." (Mussi PT-06 (corrected).) In those letters the Division requested each property owner inform the Division within 60 days as to the basis of his or her right to divert water by filing a Statement of Water Diversion and Use with appropriate evidence, "secure a contract from a water purveyor having legal water rights and submit a copy of the contract to the Division," or else cease diversion of water until a basis of right is secured. (*Id.*) The

Division's letter informed the contacted property owners that a failure to respond might result in enforcement action. (*Id.*)

The Division mailed Mussi and Pak and Young copies of the February 18, 2009 letter as owners of Assessor Parcels 131-17-003 and 131-180-07, respectively. (Mussi PT-01, p. 2; Pak & Young PT-01, p. 2.) The Division followed up with a second letter to both parties. (*ibid.*) The letters advised that, based on the Division's evaluation of aerial photographs and crop information for the properties, Mussi and Pak and Young have diverted water during recent years to irrigate crops on their parcels located on Roberts Island. (Mussi PT-01, pp. 1-2; Pak & Young PT-01, p. 2.) The San Joaquin County Assessor's Parcel maps and aerial photographs both show that the parcels have no continuity to a surface stream. (Mussi PT-08 (corrected), PT-14; Pak & Young PT-08, PT-12.) This lack of continuity indicates that a riparian basis of right typically does not exist.

The Division, having determined that the property currently lacked any continuity to surface streams, and having no evidence supporting any other basis for any right to divert and use water on the property, concluded that a threat of unauthorized diversion existed. On December 14, 2009, in accordance with Water Code sections 1831-1836, the Division issued Notices of Draft CDO to Mussi and Pak and Young. (Mussi PT-07; Pak & Young PT-07.) The Draft CDOs require Mussi and Pak and Young to cease and desist the diversion and use of water on the subject parcels until sufficient evidence establishing a valid basis of right or an existing water supply contract to serve the

property has been approved. On December 30, 2009, counsel for Mussi and Pak and Young requested hearings on both Draft CDOs.

Following submission of the December 30, 2009 requests for hearing, evidence was provided to the Division indicating that both Mussi and Pak and Young receive water from the Woods-Robinson-Vasquez delivery system, through a cement-lined irrigation ditch abutting the properties. The water is conveyed from a diversion point on Middle River. These materials indicate: the properties are currently severed from any natural water course (Mussi PT-08; Pak & Young PT-08); the properties were contiguous to Duck Slough, a natural channel, in 1870 (Mussi PT-09; Pak & Young PT-09); the properties were shown abutting a natural channel on the 1911 United States Geological Survey Map entitled Holt Quadrangle, California (Mussi PT-10; Pak & Young PT-10); the Woods-Robinson-Vasquez system was created and began serving water to the properties in approximately 1925 through a point of diversion on Middle River (Mussi PT-01, p. 2; Pak & Young PT-01, p. 3.) . This additional information did not support a conclusion that either Mussi or Pak and Young irrigated pursuant to a pre-1914 right continuously up to the present, or irrigated from a source to which the parcels are riparian after Duck Slough ceased to exist as a natural watercourse.

As explained at the hearing by the Division's witnesses, Division staff found that neither Mussi nor Pak and Young have substantiated their claims of riparian rights for their respective properties. Division staff found wanting sufficient evidence of a) language expressly preserving riparian rights to the parcels in the deeds that severed them from their connection to Middle River or the San Joaquin River/Burns Cutoff, b)

any intent indicating an implied reservation of riparian rights to Middle River or the San Joaquin River/Burns Cutoff in spite of the lack of express language, or c) the initiation of water use prior to 1914 and subsequent continuous beneficial use. Division staff did consider the possibility that the parcels retained riparian rights to Duck Slough under the concept of avulsion, but could not conclude that the criteria for retention of a riparian right were met in these cases. Specifically, the Division did not have competent evidence that Duck Slough was replaced by the irrigation ditch currently abutting the Mussi and Pak and Young properties in a manner sufficient to preserve a riparian right.²

III. ANALYSIS AND ARGUMENT

Board's Jurisdiction Over Pre-1914 and Riparian Claims of Right

As a threshold matter, Mussi and Pak and Young claim that this process is "beyond the authority of the Board." (Mussi Request for Hearing, December 30, 2009, p. 1; Pak & Young Request for Hearing, December 30, 2009, p. 1.)

Since this matter does not involve a permit or license issued by the Board and there is no allegation of 'waste' or 'unreasonable use,' the Board lacks authority and jurisdiction with regard to the threatened CDO. Outside of a statutory stream system adjudication, the Board has no authority to make any determinations regarding riparian or pre-1914 rights to property.

(*Ibid.*) This proposition is without merit.

² Analogous to a property owner restoring an avulsed stream back to its original channel and thereby reestablishing the property's contiguity with that stream, Division staff considered whether the man-made irrigation channels following the High Ridge Levee were intended to have replaced Duck Slough so as to retain the riparian character of the lands formerly abutting Duck Slough. As with restoring an avulsed stream to its original channel, the work must have been prosecuted within a reasonable time to show the requisite intent to maintain a riparian right.

A conclusion that the Board is without jurisdiction to determine the validity of riparian rights or the validity and extent of pre-1914 claims of right would be inconsistent with the Board's statutory duties and mission and would render superfluous a number of specific provisions of the Water Code.³ For example, Water Code section 1202⁴ declares to be unappropriated water,

all water which has never been appropriated, [and] all water appropriated prior to December 19, 1914, which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation; or which has not been put, or which has ceased to be put to useful or beneficial purpose.

In order to determine whether there exists any unappropriated water pursuant to section 1202, the Board may investigate and "ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State."

(Wat. Code, § 1051.) Section 1051 does not identify any limitation regarding the type of claim of right the Board may investigate. "Water heretofore filed upon or attempted to be appropriated," by any reasonable interpretation, logically includes both pre-1914 appropriative and post-1914 appropriative claims. Any other interpretation would make section 1202 unnecessary. Were the Board limited to only investigating post-1914

³ As Mussi and Pak and Young recognize, the Board has the authority to "determine all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." (Wat. Code, § 2501.) While the Board is not currently undertaking a streamwide statutory adjudication pursuant to Water Code section 2500, et seq., on balance, the Water Code sections described herein point inexorably to the conclusion that the Board has been empowered by the Legislature to investigate and determine the bases of right for diversions, and take appropriate action when a claim cannot be supported.

⁴ Unless otherwise specified, all references are to the Water Code.

appropriative water rights, it would be unable to ever make any conclusive determination whether there exists unappropriated water available for appropriation. As discussed below, the consequence of this view would be serious disruptions to the orderly administration of water rights statewide.

It is well settled that, "with the exception of riparian rights or appropriative rights *perfected*⁵ prior to December 19, 1914, all water use is conditioned upon compliance with the statutory appropriation procedures set forth in division 2 of the Water Code (commencing with section 1000)." (State Water Board Order (Order) 2001-22 at p. 25-26, citing Wat. Code, §§ 1225, 1201, italics added.) Because any water not diligently put to beneficial use pursuant to a pre-1914 claim of right constitutes unappropriated water, any appropriation of water in excess of that amount constitutes a new appropriation, requiring compliance with division 2 of the Water Code. Any new appropriation of water not undertaken in compliance with division 2 of the Water Code constitutes an unauthorized diversion or use of water.

The Legislature has specifically vested the Board with the authority to prevent the unauthorized diversion and use of water. The Water Code provides that "the diversion or use of water subject to [Division 2 of the Water Code] other than as authorized in this division is a trespass," and authorizes the Board to pursue enforcement action against violators of this proscription. (Wat. Code, § 1052; see also Wat. Code, §§ 1055, 1831.)

⁵ The California Supreme Court noted as early as 1869 that a water right is acquired by the actual appropriation and use of the water, and not merely by an intent to take the water. (*Nevada County & Sacramento Canal Co. v. Kiddbut* (1869) 37 Cal. 282, 310-14, italics added.)

The Board has also been instructed that "it is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits, licenses, certifications and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water." (Wat. Code, § 1825; see also Wat. Code, § 183 [authorizing the State Water Board to hold any hearings and conduct any investigations necessary to carry out the powers vested in it].)

Because the Board has been instructed to vigorously prevent the unlawful diversion of water, it follows that the Board may and must first determine the nature, validity and extent of a claimed right. This is true not only because that is the logical conclusion of the Board's express legal authorities, but also because any other conclusion would be unworkable. The Board would be effectively impotent in administering the statewide system of water rights if the mere claim of a pre-1914 or riparian water right, without evidence of initiation prior to 1914 and continuous beneficial use, or contiguity with a natural watercourse or express or implied reservation of a riparian right upon severance, as the case may be, were sufficient to divest the Board of all its statutory authority and responsibilities. Without being able to determine the validity and extent of claimed rights, the Board could never determine whether there exists unappropriated water, and likewise could do nothing to prevent the unlawful diversion of water. The Board would be unable to approve any new applications to appropriate water and would be powerless to protect the rights of lawful appropriators, two of the Board's significant legislatively proscribed roles.

It should be noted that this is not an issue of first impression for the Board. In Order WR 2001-22, the Board determined that it has jurisdiction to ascertain whether water use is covered by a valid pre-1914 appropriative water right. (*Id.*, pp. 25-26.) The Board held that “the assertion that a prima facie showing of a pre-1914 water right ends the [State Water Board’s] jurisdiction lacks legal support and is inconsistent with the [State Water Board’s] statutory mandate to ensure that unauthorized diversions do not take place.” (*Ibid.*) The Board’s rationale likewise applies to claims of riparian right. The parties and the facts of these particular cases do not provide any new rationale supporting the Board’s departure from this relatively recent view of its authority.

Retention of a Riparian Right

Basically, the riparian doctrine acts so as to accord “to the owner of land contiguous to a watercourse a right to the use of the water on [that] land.” (Hutchins, *The California Law of Water Rights* (1956) p. 40 (hereafter Hutchins).) According to Hutchins, “[i]n law ... only the tracts which border upon the stream are endued with riparian rights.” (*Id.*, p. 197, citations omitted.) In addition to the requirement that the land be contiguous to the watercourse, “water may be used only on that portion of the riparian parcel which is within the watershed of the source stream,” and “unless the right is reserved, a parcel severed from contiguity by conveyance loses the riparian right and it cannot thereafter be reestablished.” (Attwater & Markle, *Overview of California Water Rights and Water Quality Law* (1988) 19 Pac. L.J. 957, 971.)

The California Supreme Court has expressed the "well settled 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. (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 538 [81 P.2d 533], citing *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 331.) The court in *Rancho Santa Margarita v. Vail* went on to explain that, "in a grant, the grantor has title to the land subject to the grant. The proposed grantee has nothing, and therefore the grantee secures only such title as is granted.... If the grant deed conveys the riparian rights to the noncontiguous parcel, that parcel retains its riparian status." (*Rancho Santa Margarita v. Vail*, supra, 11 Cal.2d. at p. 539.) From this it is clear that a grant deed must provide some clear indication that riparian rights to a parcel not abutting a watercourse are in fact being transferred with the parcel. (See *Strong v. Baldwin* (1908) 154 Cal. 150, 157 [97 P. 178]. Here the court found riparian rights to have been retained where the grantor included in the deeds either of two specific references to "the same rights to the use of water that appertained to said land," or to "the water rights and privileges...." These specific terms of the grant, together with the fact that the parcels "ha[d] always been dependent for irrigation on the waters of said river, and ha[d] always been irrigated by means of said waters....," led the court to conclude that the parcels no longer abutting the watercourse had retained riparian rights.) Otherwise a parcel no longer abutting the watercourse has no riparian right to the diversion or use of those waters.

As described by Hutchins, the courts have stated a more liberal rule since *Rancho Santa Margarita v. Vail*, “enlarging the exceptions from the rule to include some circumstances other than express mention in the deed of conveyance.” (Hutchins, *supra*, p. 195.) Under this “more liberal rule” courts have looked for “circumstances [that] were such to show that the parties so intended” to retain the riparian right to parcels severed from contact with a stream by grant or transfer. (See *Hudson v. Dailey* (1909) 156 Cal. 617, 624-625 [105 P. 748].) To date, no court has recognized the general language included in the deeds severing the Mussi and Pak and Young parcels from Middle River and the San Joaquin River/Burns Cutoff as either an express reservation of a riparian right or as alone sufficient to imply a reservation of a riparian right upon severance.⁶

The special rules regarding retention of riparian rights upon partition of lands also do not apply to the Mussi or Pak and Young parcels. The rules for partitions provide a narrow exception based on the specific intricacies of partition law, whereby lands that are subdivided by a court so as to effectuate separate ownership of a collectively owned parcel are treated differently from traditional grants conveying property from one party to another. (See Hutchins, pp. 190-191.) The facts do not support application of this unique rule in either of these cases.

⁶ The specific language included in several of the deeds at issue here refers to the transfer of the lands “...together with all the singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.” (Reporters Transcript, p. 123.) As explained by Stephen Wee at the hearings, this language is fairly commonplace in deeds. (*Ibid.*)

The timing of when Duck Slough was filled in relative to when the Mussi and Pak and Young parcels began receiving water from the man-made irrigation canals is important to whether Mussi or Pak and Young can validly claim diversions from the irrigation canals pursuant to riparian claims to the former Duck Slough. It has been recognized that a landowner may “restore to its original channel a stream that has naturally changed its course... ‘if he does not delay doing so beyond a reasonable time....’” (Hutchins, p. 31, quoting *McKissick Cattle Co. v. Alsaga* (1919) 41 Cal.App. 380, 388-389 [182 P. 793].) This rule seems to require a finding as to three things to apply here – whether Duck Slough “naturally changed its course,” whether the currently existing irrigation channels can be considered a restoration of the original channel, and whether the irrigation channels were in fact put in place without “delay beyond a reasonable time.”

Although there was no evidence presented at the hearings to support a conclusion that Duck Slough “naturally changed its course,” the irrigation channels do follow essentially the same path as the former Duck Slough. For this reason, the Division focused its attention on the last question - whether the currently existing irrigation channels were in fact put in place within a reasonable time. Importantly, there is a gap between 1911, when there was evidence that Duck Slough was still in existence, and 1925, when the Mussi and Pak and Young properties began receiving water through the man-made irrigation channels. This was the period Division staff highlighted as being of primary concern. (See Mussi PT-01, p. 3; Pak & Young PT-01, p. 3.)

Swamp and Overflow Lands and "Delta Pool" Theories

Mussi and Pak and Young suggest that all lands in the Delta retain riparian water rights, regardless of physical severance from a surface stream or channel, for two general reasons: 1) because the lands in the Delta were historically "swamp and overflow lands," reclamation of those lands was and is dependent on agriculture, and therefore intent to preserve riparian water rights should be presumed for all these lands; and 2) the Delta is one great pool of water attached to the Pacific Ocean, from which parcels can never really be physically severed. (Mussi-9; Pak/Young-9.)

There are several fatal flaws with both of these propositions. Even were the Board to agree that lands in the Delta were and remain riparian to a "Delta pool," it does not follow that the owners of those lands would have the right to divert surface water pursuant to those riparian claims, as the two sources are different. Just as a landowner whose parcel abuts the Pacific Ocean may not lawfully divert water from a stream flowing into the ocean without an independent valid right to divert water from that stream, a landowner in the Delta may not legally take water from a surface stream under a claim that his or her parcel is riparian to a Pacific Ocean-influenced "Delta pool." Although water quality issues do not generally prevent a riparian landowner from moving his or her point of diversion as necessary to maintain access to the best quality water that their particular source has to offer, the water quality problems with the water underlying the lands in the Delta leads inexorably to the conclusion that any "Delta pool"

and the surface water bodies that run through the Delta are different sources of water.⁷

The Board and courts have already declared that, "lands that are severed from the surface stream or do not abut the surface stream do not have riparian rights to the surface flow even though they are overlying the underground flow of the stream."

(Order WR 2004-0004, p. 12; see also *Phelps v. State Water Resources Control Bd.* (Super. Ct., Sacramento County 2006 NO. 04CS00368).) This relatively recent proposition would seemingly apply to a "Delta pool" no less than to the underground flow of a stream.

Mussi and Pak and Young's other contention is that the lands in the Delta, because they are reclaimed from swamp and overflowed land, retain riparian rights to the channels of the Delta even if physically severed from the channels because those lands were covered with water prior to reclamation. (Mussi-9; Pak/Young-9.) This argument has likewise been raised and addressed fully by both the Board and the courts. (See Order WR 2004-0004, p. 11; see also *Phelps v. State Water Resources Control Bd.*, supra NO. 04CS00368 at pp. 9-10.) The Board, in addressing this issue, stated that

If a parcel of land is reclaimed from swamp and overflowed land and is not severed from the adjacent watercourse, it will include a riparian right because it is adjacent to the watercourse. If the parcel has been severed from the watercourse, however, its history of having been flooded does

⁷ The Board has previously addressed this same point and reached this same conclusion. "The 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. In the absence of other evidence, the respondents' factual contention is unfounded and provides no support to the legal contention." (Order WR 2004-0004, p. 13.)

not make it riparian, because it could not have exercised riparian water rights when it was under water.

(Order WR 2004-0004, p. 11, citing Hutchins, *The California Law of Water Rights* (1956) p. 210.) The Board goes on to cite the California Supreme Court in stating that “an owner of swamp and overflow land would not have a riparian right if either there was no watercourse (i.e., no channel) to which a riparian right could attach, or the land was on the bottom of, not adjacent to, the stream.” (Order WR 2004-0004, p. 11, citing *Lux v. Haggin* (1886) 69 Cal. 255, 413 [10 P. 674].) Lands on the bottom of the stream, by definition, could not afford the owner a riparian right. (Order WR 2004-0004, p. 10.)

Existence and Extent of Pre-1914 Right

The Mussi and Pak and Young parcels have been receiving water through the Woods-Robinson-Vasquez system since approximately 1925. No competent evidence was presented at the hearings to demonstrate the initiation of an appropriative right prior to that time, and so there is no basis for a pre-1914 appropriative water right claim by these parties or for these parcels.

There Exists the Threat of Unauthorized Diversion

Mussi and Pak and Young are currently using water diverted by the Woods-Robinson-Vasquez system from Middle River. Because the Woods-Robinson-Vasquez system did not exist prior to 1914, it cannot claim to hold its own pre-1914 appropriative water rights. It likewise does not appear to hold a water rights permit or license from the State Water Board. Therefore, unless the Woods-Robinson-Vasquez system can be

shown to be delivering water to the Mussi and Pak and Young parcels pursuant to those parcels' own rights, the diversion of water and subsequent use on those parcels is unauthorized, and the threat of continued unauthorized diversion and use exists. Because there has been no adequate showing that the Mussi and Pak and Young parcels are receiving water pursuant to their own valid rights, the Board should immediately issue the Draft CDOs to Mussi and Pak and Young.

IV. CONCLUSION

The State has a policy to apply water to beneficial use to the fullest extent possible. This holds true particularly in watersheds where there is heavy demand for water and supply is limited. The Delta is unquestionably such a watershed, where competition for limited water resources is intense, and where it is well documented that there is often insufficient water of adequate quality to meet all demands.

The State Water Board recently adopted a Strategic Workplan for Activities within the Delta Estuary. The Workplan emphasized the Board's responsibility to vigorously enforce water rights, in part by preventing unauthorized diversions of water. In order to prevent the unauthorized diversion of water, the Board must first determine what diversions are authorized. Allowing diversion of water without satisfactory evidence supporting a basis of right would further fuel the uncertainty that currently exists regarding water diversions in and through the Delta as well as throughout the state. The Board has a strong interest in a well-functioning water rights system, and should not condone the diversion and use of water without substantiation of a valid water right.

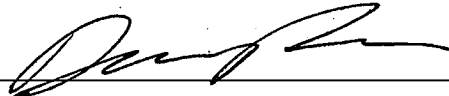
Neither Mussi nor Pak and Young have showed that they have, by express reservation in a deed, retained riparian rights to Middle River or the San Joaquin River/Burns Cutoff. There is also scant evidence to support that the parcels impliedly retained riparian rights to Middle River or the San Joaquin River/Burns Cutoff; that the parties to the deeds severing the parcels from a connection to those watercourses intended the parcels retain riparian rights despite the lack of express language to that effect. And finally, the only way the Mussi and Pak and Young parcels could have retained riparian rights to the former Duck Slough is if the current man-made irrigation ditches are considered to constitute the "restoration" of Duck Slough and were done within a reasonable time from when Duck Slough was filled in. There is likewise very little evidence to support such a conclusion.

Mussi and Pak and Young have also not substantiated the initiation of diversion and use of water on their parcels prior to 1914 and the continuous beneficial use of a particular amount of water to the present day. The parcels currently receive water from the Woods-Robinson-Vasquez diversion system. This system was put in place in approximately 1925. Unlike the Woods Irrigation Company system that was the subject of a separate proceeding and which was shown to have initiated diversions as early as 1911, the Woods-Robinson-Vasquez system cannot claim or show diversions to the subject parcels prior to 1914.

Because Mussi and Pak and Young have not substantiated a valid basis of right to divert and use water from the Middle River or the San Joaquin River/Burns Cutoff,

and Duck Slough no longer exists as a natural watercourse to which riparian rights could attach, the Board should immediately issue the CDOs as drafted.

Respectfully submitted this 30th day of August 2010, at Sacramento, California.

A handwritten signature in black ink, appearing to read "David Rose", is written over a solid horizontal line.

David Rose
Staff Counsel
STATE WATER RESOURCES CONTROL BOARD

PROOF OF SERVICE

I, Joanne Griffin, declare that I am over 18 years of age and not a party to the within action. I am employed in Sacramento County at 1001 I Street, 22nd Floor, Sacramento, California 95814. My mailing address is P.O. Box 100, Sacramento, CA 95812-0100. On this date, August 30, 2010 I served the within documents:

CLOSING BRIEF OF DIVISION OF WATER PROSECUTION TEAM IN THE MATTER OF
HEARING ON DRAFT CEASE AND DESIST ORDERS – RUDY MUSSI, TONI MUSSI
AND LORI C. MUSSI INVESTMENT LP,
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X	BY FACSIMILE/COMPUTER EMAIL: I caused a true and correct copy of the document to be transmitted by a facsimile/computer machine compliant with rule 2003 of the California Rules of Court to the offices of the email addresses shown on the service list.
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<p>State Water Contractors c/o Stanley C. Powell Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 <u>spowell@kmtg.com</u></p>	<p>YONG PAK AND SUN YOUNG c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 <u>jherrlaw@aol.com</u></p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <u>dean@hpllp.com</u></p>	<p>RUDY MUSSI, TONI MUSSI AND LORY C. MUSSI INVESTMENT, LP c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 <u>jherrlaw@aol.com</u></p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <u>dean@hpllp.com</u></p>
<p>San Joaquin County and the San Joaquin County Flood Control & Water Conservation District c/o DeeAnne M. Gillick Neumiller & Beardslee P.O. Box 20 Stockton, CA 95201-3020 <u>dgillick@neumiller.com</u> <u>tshepard@neumiller.com</u></p>	<p>CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <u>dean@hpllp.com</u></p>	<p>SOUTH DELTA WATER AGENCY c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 <u>jherrlaw@aol.com</u></p> <p>c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 <u>dean@hpllp.com</u></p>

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on August 30, 2010 at Sacramento, California.


Joanne Griffin
Legal Support Supervisor I