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DIVISION OF WATER RIGHTS  
SACRAMENTO

18330-35919

509 WEST WEBER AVENUE  
FIFTH FLOOR  
STOCKTON, CA 95203

January 15, 2010

POST OFFICE BOX 20  
STOCKTON, CA 95201-3020

VIA E-MAIL & U.S. MAIL

(209) 948-8200  
(209) 948-4910 FAX

Mr. James Kassel  
Asst. Deputy Director for Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000

FROM MODESTO:  
(209) 577-8200  
(209) 577-4910 FAX

Re: **MLS: Enforcement Action 77 (Draft Cease and Desist Order for Eni Menconi Trust, APN #s 189-220-17 and 189-220-18)**

Dear Mr. Kassel:

Our office represents Ann DelBarba, Trustee of the Eni Menconi Trust ("Client"). Our Client is in receipt of your letter and Draft Cease and Desist Order, dated December 28, 2009. Pursuant to that letter, the Eni Menconi Trust must request a hearing on the matter within twenty days of receipt of said letter and Cease and Desist Order. Without prejudice, and without waiver of any of our Client's other rights or alternative remedies at law, we hereby request such a hearing. We respectfully request that the hearing be coordinated and scheduled for the mutual convenience of both sides.

We are continuing our investigation and gathering additional information to support the existence of riparian, pre-1914, overlying, and other water rights for the affected property to satisfy the Board's inquiry. We intend to voluntarily submit this additional information as soon as possible.

We would like to point out, however, that in our October 14, 2009 letter which accompanied our original submittal of supporting materials, we explicitly requested that in the event the Board required any additional information, our office be informed of such fact and be allowed ninety (90) days in which to perform the necessary research. At no time did the Board request additional supporting materials, and it appears that this request was either overlooked or ignored by the Board. As such, we take particular issue with the statement in your December 28, 2009 letter "[T]o date, the Division has not received any additional evidence." The Division did not receive any additional evidence, because there was no indication from the Division that such additional evidence was necessary. As a result, we reiterate our request for an additional ninety (90) days in which to perform historical research and obtain corresponding title documents. Therefore, we respectfully



request that any hearing scheduled on this matter occur no sooner than ninety (90) days from the Board's receipt of this letter. This is so that the ongoing research efforts of our office and our client regarding historic water rights for the affected property can be accommodated, so that we may adequately respond to the Board's inquiry.

Additionally, we would like to bring several general concerns to your attention. As a preliminary matter, it appears that Board staff has relied on assertions in its underlying decision to issue the Draft Cease and Desist Order with respect to our Client's property which are contrary to law.

First, the Board continues to assert that the existence or severance of riparian rights occur by virtue of the issuance of a Certificate of Purchase. There is no basis for this assertion in state or federal law. Quite the contrary, Certificates of Purchase only allowed claimants of public lands to be *in lawful possession* of land until they had perfected their rights under the requirements of the various State Acts<sup>1</sup> concerning the sale of Swamp and Overflowed and other public lands. *Fee title* did not pass to a claimant until these requirements were met in full, and a patent issued from the State. Riparian rights, likewise, remained vested in the State and did not pass to a private land owner until a patent was issued. Certificates of Purchase were frequently assigned or annulled due to the fact that the original claimant was unable to perfect title to the lands they encompassed, and as such, any "boundaries" of the land encompassed therein ceased to exist. Legal parcels, and the boundaries thereof, were determined by the property description in the patent, not any pre-existing Certificate(s) of Purchase. Therefore, the *patent*, not the Certificates of Purchase, are the proper, and legal, commencement point of any inquiry into the existence of riparian rights, particularly with respect to contiguity with or severance from a watercourse. As a result, any reliance by the Board or Staff on Certificates of Purchase to demonstrate the existence of riparian rights, or the lack thereof for a particular parcel, is legally unsupportable and therefore, incorrect.

Secondly, we object to this process as being beyond the authority of the Board, and hereby demand that the draft CDO be withdrawn. This matter does not involve a permit or license issued by the Board, and there is no allegation with regard to "waste" or "unreasonable use," and as such, the Board is not vested with the requisite authority and jurisdiction to proceed with the threatened CDO. The Board has no legal authority to make any determinations regarding riparian or pre-1914 rights other than in the context of a statutory stream wide adjudication, as such rights are rights in real property. Jurisdiction for such determination rests solely in the courts, not the Board. If you assert that the Board indeed possesses such authority, we believe the matter should be submitted to the courts for resolution. Until such

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<sup>1</sup> see Stats. of Cal. (April 28, 1855); Stats. of Cal. (March 13, 1858); Stats. of Cal., Ch. 193 (April 28, 1858); Stats. of Cal. (April 18, 1859); Stats. of Cal. (May 13, 1861); Stats. of Cal., Ch. 415 (March 28, 1886).

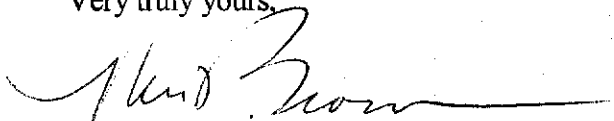
Mr. James Kassel  
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time, no further efforts at enforcement against these riparian or pre-1914 right holders should proceed.

Third, we maintain that the current efforts by the Division on behalf of the Board are unfairly focusing solely on the senior water right holders located in the southern Delta region. We firmly believe this is evidence of a coordinated effort to enhance exports at the expense of prior and senior water rights of in-Delta users. Proceeding with the enforcement proceedings in the existing manner potentially infringe upon, devalue, or extinguish vested rights in real property, which violates State and Federal constitutional prohibitions against takings without just compensation.

Very truly yours,



MIA S. BROWN  
Attorney at Law  
*on behalf of Ann Del Barba, Trustee, Eni Menconi Trust*

MSB/ect  
cc: Ann Del Barba