

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2021-0087-EXEC

In the Matter of

Rudy M. Mussi Investment L.P., Rudy M. Mussi, Toni Mussi and Lory C. Mussi,
Victoria M. Mussi, Lory C. Mussi Investment L.P.

ORDER APPROVING SETTLEMENT AGREEMENT

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

This matter comes before the Executive Director of the State Water Resources Control Board (State Water Board) following the State Water Board Prosecution Team's² issuance of a Draft Cease and Desist Order (CDO) to Rudy M. Mussi Investment L.P., Rudy M. Mussi, Toni Mussi and Lory C. Mussi, Victoria M. Mussi, Lory C. Mussi Investment L.P. (Respondents)³. In accordance with the attached Settlement Agreement (Exhibit A), the Prosecution Team and the Respondents have agreed to settle this matter following a hearing and prior to the State Water Board's issuance of a decision or order. The issuance of a decision or order pursuant to a settlement agreement is authorized under Government Code section 11415.60.

2.0 BACKGROUND

The Mussi Property is an approximately 70-acre irrigated agricultural property on Roberts Island in the Sacramento-San Joaquin River Delta (Delta) that is owned by Respondents.

On April 20, 2009, on behalf of Respondents ("LORY C MUSSI INVESTMENT LP et al"), Lory C. Mussi filed an Initial Statement of Water Diversion and Use for diversions of water for use on the Mussi property. The State Water Board's Division of Water Rights (Division) numbered this statement S016197. In Statement S016197, Respondents claimed rights to divert and use water from the Middle River on the Mussi Property under riparian, pre-1914 appropriative, and other rights, via irrigation gates from a ditch along Inland Drive,

¹ State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to issue a decision or order by settlement of the parties under Government Code section 11415.60.

² The Prosecution Team includes designated enforcement staff from the Division of Water Rights, Office of Chief Counsel, and Office of the Delta Watermaster.

³ The Draft CDO originally identified Respondents as "Rudy Mussi, Toni Mussi and Lory C. Mussi Investment LP."

identified elsewhere as the Woods Robinson Vasquez ditch.⁴

On December 14, 2009, the Prosecution Team issued the Draft CDO to Respondents. The Draft CDO concerned diversions and use of water on the Mussi Property. On December 30, 2009, Respondents timely requested a hearing on the Draft CDO.

The State Water Board conducted the hearing on May 5, June 9, July 9, and July 15, 2010. The State Water Board did not issue an order ruling on the matters raised during the hearing because of pending litigation concerning Delta properties owned by other parties that involved similar issues.

While the hearing was pending, on June 17, 2010, also on behalf of Respondents (“RUDY M MUSSI INVEST LP ETAL”), Rudy M. Mussi filed an Initial Statement of Water Diversion and Use for diversions of water for use on the Mussi Property. The Division numbered this statement S017911. In Statement S017911, Respondents claimed rights to divert and use water from the Middle River on the Mussi Property under riparian, pre-1914 appropriative, and other rights.⁵

3.0 SETTLEMENT AGREEMENT

On March 5, 2021, Respondents and the Prosecution Team, represented by both the Delta Watermaster and the Assistant Deputy Director of the Division’s Permitting and Enforcement Branch, executed a Settlement Agreement with respect to the Mussi Property, attached hereto as Exhibit A.

The general terms of the Settlement Agreement are:

- (1) Respondents waive their right to petition the State Water Board for reconsideration of this Order and agree to the terms and conditions of the Settlement Agreement.
- (2) The Prosecution Team agrees, for purposes of settlement, that the evidence submitted by Respondents is sufficient to support the riparian right claim for the Mussi Property.
- (3) Respondents will report diversion of water to be used on the Mussi Property pursuant to their riparian right claim. Respondents will not report diversions pursuant to their pre-1914 appropriative right claim unless Respondents first present evidence supporting the claim to the Delta Watermaster, which the Delta Watermaster reserves the right to contest, as set forth in the Settlement Agreement.

⁴ Based on the Initial Statement of Water Diversion and Use filed on behalf of Jerry Robinson and Heather Tanaka on June 30, 2010, diversion and use from the Woods Robinson Vasquez pump is also reported under Statement S017907.

⁵ Regarding “other” water rights, Statement S017911 refers to the Woods Robinson Vasquez claimed pre-1914 appropriative water right and the diversion and distribution system discussed above.

- (4) The settling parties agree that this Order approving the Settlement Agreement shall constitute a cease and desist order under Water Code section 1831, which shall be enforceable by the Delta Watermaster pursuant to Water Code sections 1845 and 85230.

ORDER

IT IS HEREBY ORDERED THAT the attached Settlement Agreement between the Prosecution Team and the Respondents is approved. This Order shall constitute a cease and desist order pursuant to Water Code section 1831 for purposes of any subsequent violations of the Settlement Agreement.

STATE WATER RESOURCES CONTROL BOARD

October 11, 2021

Date



Eileen Sobeck
Executive Director

Exhibit A

SETTLEMENT AGREEMENT – MUSSI INVESTMENT LP

This Settlement Agreement is made this 4th day of March 2021, by and between Rudy M. Mussi Investment L.P., Rudy M. Mussi, Toni Mussi and Lory C. Mussi, Victoria M. Mussi, Lory C. Mussi Investment LP (Mussi) and the State Water Resources Control Board (State Water Board) acting by and through the Delta Watermaster (Watermaster). Mussi and the State Water Board will sometimes hereinafter be referred to individually as (a Party) and collectively as (the Parties).

RECITALS

1. Mussi is the owner of that certain real property comprised of approximately seventy (70) acres located along Inland Drive on Roberts Island in the Delta and identified as APN: 131-170-030, (the Mussi Property). The Mussi Property is also commonly known as the Welser Ranch.
2. The Mussi Property is irrigated from the Woods Robinson Vasquez pump on Middle River. The Woods Robinson Vasquez pump is assigned Statement of Water Diversion and Use (Statement) number S017907. Mussi diverts water from the Woods Robinson Vasquez ditch to the Mussi Property through a gate which is assigned Statement number S017911. Drainage for the Mussi Property is provided by Woods Irrigation Company.
3. Pursuant to State Water Board Resolution No. 2007-0057 and a subsequent re-delegation memo from the Deputy Director for Water Rights, which were in effect at the time, the Assistant Deputy Director for Water Rights issued a draft Cease and Desist Order (the Mussi CDO) to Mussi on December 14, 2009. Mussi timely requested a hearing.
4. The State Water Board conducted proceedings on the Mussi CDO on May 5, June 9, July 9 and July 15, 2010, (the Proceedings). The Parties put forth multiple witnesses and closing briefs were filed on August 30, 2010. The matter was deemed submitted and has since been pending.
5. Water Code section 1831, subdivision (d) provides “the [State Water Board] may 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 [division 2 of the Water Code].” The Mussi CDO alleges that Mussi violated or threatened to violate Water Code section 1052, which provides that, “The diversion or use of water subject to this division other than as authorized in this division is a trespass.”

6. Water Code section 85230 established the independent, appointed Watermaster with authority, among other things, “to issue a notice of a proposed cease and desist order ... limited to diversions in the Delta.”
7. On August 7, 2018, the State Water Board adopted Resolution No. 2018-0037 delegating to the Watermaster additional authority related to diversions within the Delta, including authority to settle cease and desist orders prior to notice of a hearing.
8. On January 4, 2021 the State Water Board issued a Post-Hearing Status Update inviting parties to address and/or clarify several issues by March 5, 2021.

BACKGROUND

9. 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). The Workplan emphasized the State Water Board’s responsibility to vigorously enforce water rights by preventing unauthorized diversions of water, violations of the terms of water right permits and licenses, and violations of the prohibition against waste or unreasonable use of water in the Delta. As described in the Workplan, the Division of Water Rights (Division) initiated an investigation of the bases of water rights of existing diverters within the Central and South Delta. The Workplan also specified that, if and when unauthorized diversions were found, those diversions would be subject to enforcement action to cease unlawful diversions, obtain a legal water right, or secure a contract for water supplies.

10. Pursuant to the Workplan, and based on reviews of U.S. Geological Survey maps, aerial photographs, and San Joaquin County Assessors Maps, in or about February 2009, the Division sent a letter to Mussi as owner the Mussi Property requesting that Mussi file a Statement of Water Diversion and Use or otherwise substantiate the lawful basis for diversion of water to the Mussi Property.
11. Mussi filed an Initial Statement of Water Diversion and Use in 2009. The Initial Statement was assigned Statement number S017911. Following review of the Initial Statement and an exchange of information between the Parties, the Division had remaining questions about whether or not the information provided by Mussi supported a right for diversion of water from Middle River for beneficial use on the Mussi Property. Inability to resolve those questions to the satisfaction of the Division resulted in the issuance of the Mussi CDO.
12. Pertinent to issues in the Mussi CDO and the Proceedings, on May 7, 2020, the Third District Court of Appeal (Court) issued its decision in *Modesto Irrigation District v. Heather Robinson Tanaka*, 48 Cal.App.5th 898 (2020) (*Tanaka*). On August 18, 2020, the California Supreme Court denied Modesto Irrigation District's petition for review and its request to "depublish" the Court's decision (Case S262781). Thus, the Court's decision has become the final, precedential resolution of the *Tanaka* case.
13. The *Tanaka* case has significant parallel facts and circumstances to this case in that the Mussi Property is located in a similar area of Roberts Island, is irrigated from the Woods Robinson Vasquez diversion and distribution system, was subject to reclamation development and marketing by the same people during the relevant time period and involves the same or very similar extrinsic evidence related to the deeds that separated the Mussi Property from the original larger patented tract of land, which was riparian to several Delta channels.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, Mussi and the Division Prosecution Team (together, Settling Parties) hereby agree to settle the Mussi CDO, on the bases identified below.

14. **Recitals Incorporated.** The preceding Recitals are hereby incorporated herein.

15. **Settlement Conditionally Confidential.** Unless and until the State Water Board issues an order approving this Settlement Agreement (Settlement Order), this Settlement Agreement is a confidential settlement document subject to all the limitations on admissibility set forth in California Evidence Code sections 1152 and 1154. Furthermore, pursuant to Government Code section 11415.60, this Settlement Agreement is not admissible in an adjudicative proceeding or civil action for any purpose. Notwithstanding the conditional nature of this Settlement Agreement, the Settlement Order shall be binding on the Settling Parties and settles any and all challenges by the State Water Board regarding the sufficiency of the riparian water right for the Mussi Property.

16. **Request to Issue Settlement Order.** The Prosecution Team and Mussi agree to jointly request that the State Water Board adopt a proposed Settlement Order to effectuate this Settlement Agreement and finally resolve all issues raised by the Mussi CDO and considered in the Proceedings.

17. **Heritage Riparian Parcel.** It is undisputed between the Settling Parties that (i) the land now known as the Mussi Property was part of a much larger parcel of land on Roberts Island in San Joaquin County acquired by Stewart, Burton and King in 1878; and (ii) this larger parcel was contiguous to several natural watercourses existing at the time, including the San Joaquin River, Burns Cutoff, Duck Slough, and Middle River.

18. **Separation of the Mussi Property from Natural Watercourses.** The Settling Parties have mutually identified the transactions which separated the land which is now the Mussi Property from the San Joaquin River, Burns Cutoff, and Middle River. These transactions include a deed from Stewart, et al. to Vasquez in 1891 for the property that is now the Mussi Property. The deed from Stewart et. al. to Vasquez was part of a larger plan to divide the land to facilitate agricultural development on Robert's Island. All of the relevant deeds in the Mussi Property's chain of title, including the deed to Vasquez, include the then standard language conveying the real property along with "tenements, hereditaments and appurtenances" thereto. This is the same as the language involved in the deeds analyzed in the *Tanaka* decision.

19. **Extrinsic Evidence of Intent to Convey Riparian Rights.** The Division Prosecution Team agrees that the evidence Mussi put forth in the Proceedings, in light of the later *Tanaka* decision, supports Mussi's contention that the parties to the relevant deed intended that the separated parcel, now the Mussi Property, would retain proportional and undivided riparian rights theretofore attaching to Stewart et al.'s larger parcel under common law.

20. **Mussi Property's Access to Middle River.** At all times relevant to the Mussi CDO the Mussi Property has accessed irrigation water from Middle River via the Woods Robinson Vasquez diversion and distribution system.

21. **No Determination of Pre-1914 Claim.** The Prosecution Team agrees for purposes of this Settlement Agreement that the evidence submitted by Mussi during the Proceedings is sufficient to support the riparian claim for the Mussi Property but contends that Mussi's claim of pre-1914 appropriative rights is inconsistent with the riparian claim and unnecessary in light of the conclusion regarding the riparian claim. Mussi disputes the Prosecutions Team's position regarding the pre-1914 claim and does not waive and continues to claim a pre-1914 appropriative right to serve the Mussi Property. With regard to the pre-1914 claim, the Settling Parties agree that (i) Mussi shall, without prejudice to otherwise asserting the pre-1914 claim, not indicate diversion or use

pursuant to a claim of a pre-1914 right when filing a Statement of Diversion and Use for the Mussi Property covered by Statement number S017911, without first providing supporting evidence of such claim to the Watermaster; (ii) the Watermaster reserves the right to contest and take any appropriate action challenging such claimed pre-1914 right; and (iii) the Settling Parties acknowledge and agree that Mussi does not, either generally or by this Settlement, waive or forego its claim of pre-1914 rights to serve the Mussi Property or any other colorable claim to divert and use water on the Mussi Property that may be allowed by law. Mussi's agreement not to assert a claim of a pre-1914 right on any Statement of Diversion and Use for the Mussi Property shall not be construed by the State Water Board, or any reviewing court, as a prejudice, forfeiture, waiver or relinquishment, nor shall it be considered evidence of non-use of that right.

22. **Enforcement of this Settlement Agreement.** The Settlement Order approving this Settlement Agreement shall constitute a cease and desist order pursuant to Water Code section 1831 for purposes of any subsequent violations of this Settlement Agreement, which would, accordingly, be enforceable by the Watermaster pursuant to Water Code section 1845.
23. **Waiver of Reconsideration of Settlement Order.** The Settling Parties waive their respective rights to request reconsideration of the Settlement Order approving this Settlement Agreement, provided no material modifications to this Settlement Agreement or additional requirements beyond the requirements of this Settlement Agreement are included in the Settlement Order approving it.
24. **Successors Bound.** This Settlement Agreement is binding on the successors or assigns of Mussi's ownership of the Mussi Property.
25. **Independent Judgment.** Each Settling Party represents and declares that in executing this Settlement Agreement it is relying solely on its own judgment, knowledge and belief concerning the nature, extent and duration of its rights and claims, and that it has not been influenced to any extent whatsoever in the execution of this Settlement Agreement by any representations or statements regarding any matters made by other parties hereto

or by any person representing them. In exercising its independent judgment to enter into this Settlement Agreement, Mussi has engaged qualified counsel to represent it in the confidential settlement negotiations leading to this Settlement Agreement.

26. **No Precedent.** This Settlement Agreement involved unique facts and legal issues and a Settlement Order adopting this Settlement Agreement shall not be used as a precedent decision of the State Water Board.
27. **Additional Documents.** Each Settling Party agrees that it will cooperate fully in executing any additional documents necessary to give full effect to this Settlement Agreement.
28. **Entire Agreement.** This Settlement Agreement reflects and represents the entire agreement between the Settling Parties and supersedes any and all prior understandings, representations, and agreements whether written or unwritten. Each of the Settling Parties represents that it has not relied on any inducements, promises or representations made by the other party other than those contained in this Settlement Agreement.
29. **Mutual Agreement.** The Settling Parties have agreed to the particular language in this Settlement Agreement, and this Settlement Agreement shall not be construed against the party that drafted this Settlement Agreement or any portion of this Settlement Agreement.
30. **Counterparts.** This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed as an original, but all of which, together, shall constitute one and the same instrument.
31. **Reasonableness of Settlement.** The Settling Parties represent and warrant that this Settlement Agreement is made in good faith and in full recognition of the implications of such agreement.

32. **Section Headings.** The Settling Parties intend that the paragraph headings of this Settlement Agreement be used solely as a convenient reference and that they shall not in any manner amplify, limit, modify or otherwise aid in the interpretation of this Settlement Agreement.
33. **Effective Date.** This Settlement Agreement shall become effective immediately upon issuance of the State Water Board's Settlement Order.
34. **Choice of Law.** This Settlement Agreement shall be interpreted and governed by the law of the State of California.
35. **Authorization.** Each Settling Party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.
36. **No Waiver of Other Requirements.** Nothing in this Settlement Agreement or the Settlement Order approving it shall excuse Mussi from applicable legislation, regulation, order or any other requirements or restrictions imposed by the State Water Board.

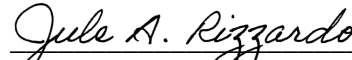
[signatures on the following page]



Dated: March 5, 2021

Michael Patrick George
Delta Watermaster

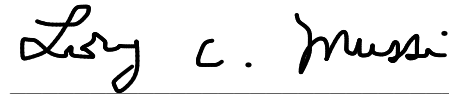
Dated: March 4, 2021



Julie A. Rizzardo
Assistant Deputy Director of the Permitting
and Enforcement Branch of the Division
of Water Rights

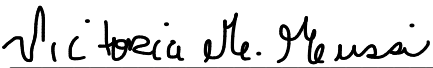
LORY C. MUSSI INVESTMENT L.P.

Dated: March 2021



Lory C. Mussi

Dated: March 2021



Victoria M. Mussi

RUDY M. MUSSI INVESTMENT L.P.

Dated: March 2021

Rudy M. Mussi

Dated: March 2021

Toni A. Mussi

Michael Patrick George

Dated: March 5, 2021

Michael Patrick George
Delta Watermaster

Dated: March 4, 2021

Jule A. Rizzardo

Jule A. Rizzardo
Assistant Deputy Director of the Permitting
and Enforcement Branch of the Division
of Water Rights

LORY C. MUSSI INVESTMENT L.P.

Dated: March 2021

Lory C. Mussi

Dated: March 2021

Victoria M. Mussi

RUDY M. MUSSI INVESTMENT L.P.

Dated: March 5, 2021

Rudy M. Mussi

Rudy M. Mussi

Dated: March 5, 2021

Toni A. Mussi

Toni A. Mussi