

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

DIVISION OF WATER RIGHTS

ORDER WR 2021-0088-EXEC

In the Matter of

Yong Kil Pak and Young Sun Pak

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 Yong Kil Pak and Young Sun Pak (Pak or Respondents)³. In accordance with the attached Settlement Agreement (Exhibit A), the State Water Board 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 Pak Property is an approximately 40-acre irrigated agricultural property on Roberts Island in the Sacramento-San Joaquin River Delta (Delta) that is owned or controlled by Respondents.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 Pak Property. On December 30, 2009, Respondents timely requested a hearing on the Draft CDO.

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 "Yong Pak and Sun Young."

⁴ Public records indicate that title to the Pak Property may now be held by ykilp0880 LLC, a limited liability corporation associated with Respondents.

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.

In 2017, Celli Ranches, Inc. filed an Initial Statement of Water Diversion and Use for diversion of water for use on the Pak Property. The State Water Board's Division of Water Rights (Division) numbered this statement S026436.⁵ In Statement S026436, Celli Ranches, Inc. claimed rights to divert and use water from the Middle River on the Pak Property under riparian and pre-1914 appropriative rights, via the Woods Robinson Vasquez pump and ditch.⁶

3.0 SETTLEMENT AGREEMENT

On April 14, 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 Pak 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 Pak Property.
- (3) Respondents will report diversion of water to be used on the Pak 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) 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.

⁵ Although Respondents claimed riparian, pre-1914 appropriative, and other rights to divert during the Draft CDO hearing proceedings, the record does not support the statement in the Settlement Agreement that Respondents filed an Initial Statement of Diversion and Use in 2009.

⁶ 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.

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

YONG KIL PAK & YOUNG SUN PAK

This Settlement Agreement is made this 14 day of April 2021, by and between YONG KIL PAK and YOUNG SUN PAK (Pak) and the State Water Resources Control Board (State Water Board), acting by and through the Delta Watermaster (Watermaster) and the Assistant Deputy Director of the Planning and Enforcement Branch of the Division of Water Rights (together, Prosecution Team). Pak and the State Water Board will sometimes hereinafter be referred to individually as (Party) and collectively as the (Parties).

RECITALS

1. Pak is the owner of that certain real property comprised of approximately forty (40) acres located along Inland Drive on Roberts Island in the Delta and identified as San Joaquin County Assessor's Parcel Number (APN) 131-180-07, (the Pak Property).
2. The Pak 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 SO17907. Pak diverts water from the Woods Robinson Vasquez ditch to the Pak Property through a gate which is assigned SO26436. Drainage for the Pak Property is mostly provided by Woods Irrigation Company.
3. Pursuant to State Water Board Resolution 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 (CDO) to Pak on December 14, 2009. Pak timely requested a hearing.
4. The State Water Board conducted proceedings on the CDO on May 5, June 9, July 9 and July 15, 2010 (the Proceedings). The Parties put forth multiple witnesses and filed closing briefs 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 CDO alleges that Pak 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 office of Delta 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 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 Assessor's Maps, in or about February 2009, the Division sent a letter to Pak as owner the Pak Property requesting that Pak file a Statement of Water Diversion and Use or otherwise substantiate the lawful basis for diversion of water to the Pak Property.
11. Pak filed an Initial Statement of Water Diversion and Use in 2009. The Initial Statement was assigned identification number SO26436. Following review of the Initial Statement, and an exchange of information between the Parties, the Division had remaining questions about whether information provided by Pak supported a riparian right for the Pak Property. Those questions resulted in the issuance of the CDO.
12. Pertinent to issues in the 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 Pak Property is located in a similar area of Roberts Island, was subject to reclamation development and marketing during the relevant time period and involves similar extrinsic evidence related to the deeds that separated the parcel which includes the current Pak Property from the larger 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, Pak and the Prosecution Team (together, Settling Parties) hereby agree to settle the 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 Pak Property.
16. **Request to Issue Settlement Order.** The Prosecution Team and Pak 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 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 Pak Property was part of a much larger parcel of land on Roberts Island in San Joaquin County acquired by Glasgow California Land Company (Glasgow) on June 20, 1877; 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 Pak Property from Natural Watercourses.** The Settling Parties have mutually identified the transaction which separated the land which is now the Pak Property from the San Joaquin River, Burns Cutoff, and Middle River. The severing transaction is evidenced by a deed from Glasgow to Woods dated November 6, 1896 (however, like the property at issue in *Tanaka*, the severed parcel continued to be contiguous to Duck Slough, a natural watercourse that was later filled and no longer exists as a natural watercourse). The deed from Glasgow to Woods was part of a larger plan to divide the land to facilitate agricultural development on Roberts Island. All the

relevant deeds in the Pak Property's chain of title, including the deed to Woods, contain the 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 Prosecution Team agrees that the evidence Pak put forth in the Proceedings, in light of the later *Tanaka* decision, supports Pak's contention that the parties to the relevant deeds, including the 1896 deed to Woods, intended that the separated parcel, which encompassed what is now the Pak Property, would retain proportional and undivided riparian rights theretofore attaching to Glasgow's larger parcel under common law.
20. **Pak Property's Access to Middle River.** At all times relevant to the CDO, the Pak 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 Pak during the Proceedings is sufficient to support the riparian claim by Pak for the Pak Property but contends that Pak's claim of pre-1914 appropriative rights is inconsistent with the riparian claim and unnecessary in light of the conclusion regarding the riparian claim. Pak 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 Pak Property. With regard to the pre-1914 claim, the Settling Parties agree that (i) Pak 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 Pak Property covered by S026436, 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 Pak does not, either generally or by this Settlement Agreement, waive or forego its claim of pre-1914 rights to serve the Pak Property or any other colorable claim to divert and use water on the Pak Property that may be

allowed by law. Pak's agreement not to assert a claim of a pre-1914 right on any Statement of Diversion and Use for the Pak 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 Pak's ownership or use of the Pak 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, Pak 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 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 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 Pak from applicable legislation, regulation, order or any other requirements or restrictions imposed by the State Water Board.

Dated: April 14, 2021



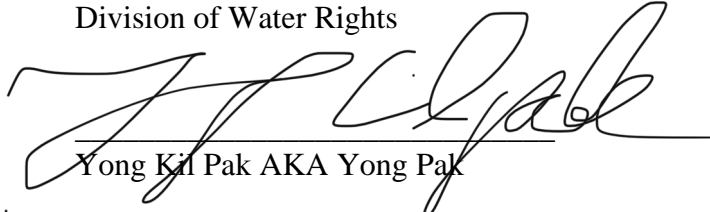
Michael Patrick George
Delta Watermaster

Dated: April 14, 2021



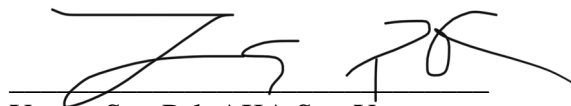
Julie A. Rizzardo
Assistant Deputy Director of the
Permitting and Enforcement Branch of the
Division of Water Rights

Dated: April 14, 2021



Yong Kil Pak AKA Yong Pak

Dated: April 14, 2021



Young Sun Pak AKA Sun Young