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18 **BEFORE THE STATE OF CALIFORNIA**
19 **STATE WATER RESOURCES CONTROL BOARD**

20 In the Matter of Draft Cease and Desist) **(Consolidated)**
21 Order No. 2009-00XX DWR Enforcement)
22 Action Against Yong Pak and Sun Young) **CLOSING BRIEF**
(Pak/Young))
)

23
24 In the Matter of Draft Cease and Desist)
25 Order No. 2009-00XX DWR Enforcement)
26 Action Against Rudy Mussi, Toni Mussi)
and Lory C. Mussi Investment LP (Mussi,)
et al.))
)

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11 *Kidd v. Laird* (1860)
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13 *McDonald v. Bear River & Auburn Water & Min. Co.* (1859)
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14 *McKissik Cattle Company v. Alsaga* (1919)
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17 *North Kern Water Storage District v. Kern Delta Water District* (2007)
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18 *People v. Shirokow* (1980)
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19 *Phelps v. State Water Board* (2007)
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1 **TABLE OF AUTHORITIES**

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4 *Rancho Santa Margarita v. Vail* (1938)
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6 *Rindge v. Crags Land Co.* (1922)
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1 **I. INTRODUCTION**

2 This closing brief concerns two enforcement proceedings the State Water Resources Control
3 Board conducted: one against Rudy Mussi, Toni Mussi and Lory C. Mussi Investment LP (Mussi),
4 and a second against Yong Pak and Sun Young (Pak/Young). In the two proceedings, Mussi and
5 Pak/Young theorize that they currently receive water under riparian and pre-1914 water rights.
6 Mussi and Pak/Young posit that their parcels maintain valid riparian water rights to water in Duck
7 Slough, hypothesizing that their parcels received water directly from Duck Slough through at least
8 1911; that, in 1911, the then owners of the Mussi and Pak/Young parcels exercised their riparian
9 water rights through Woods Irrigation Company (WIC), which appropriated water from Middle
10 River; and that in the early 1920's, the then owners of the Mussi and Pak/Young parcels exercised
11 their riparian water rights using diversion facilities on Middle River operating under a Woods-
12 Robinson-Vasquez agreement.¹ Mussi and Pak/Young also posit that their parcels hold valid
13 riparian water rights to any water in the Sacramento-San Joaquin Delta because the Delta is in
14 essence a pool. Finally, Mussi and Pak/Young assert pre-1914 appropriative water rights, claiming
15 the Mussi and Pak/Young parcels have been receiving water appropriated from Middle River and/or
16 Burns Cutoff since some time prior to 1914. In this brief, Modesto Irrigation District, the San Luis
17 & Delta-Mendota Water Authority, and the State Water Contractors demonstrate that Mussi and
18 Pak/Young provide nothing that proves their theory. Mussi and Pak/Young rely on general
19 principles, expressions of belief, and speculation.

20 As explained in more detail below, there is no reliable evidence before the State Water
21 Board that could support a finding that Mussi and Pak/Young parcels were riparian to Duck Slough.
22 Mussi and Pak/Young allege, since Roberts Islands was reclaimed, Duck Slough existed on Roberts
23 Islands from Middle River to Burns Cutoff.² To support their allegation, Mussi and Pak/Young
24 present the testimony of Kenneth R. Lajoie, Donald W. Moore, Chris Neudeck, and Michael
25

26 ¹ In places, testimony references a Woods-Robinson-Vasquez Irrigation District, but testimony was not provided to
demonstrate that it is more than a recorded agreement providing for water deliveries.

27 ² To distinguish the portion of Duck Slough that was supported with evidence from the extended portion alleged, but
28 unsubstantiated by Mussi and Pak/Young, the unsupported portion is referred to as "Extended Duck Slough" from
hereon.

1 Robinson, among others. Their testimony manipulated and relied upon tortured interpretations of
2 geological reports, maps, and title documents.

3 The geologic-based testimony of Lajoie and Moore was not based upon standard practices
4 (no evidence based on use of stereo pairs) and relied extensively on hearsay. In the end, their
5 testimony only supports a conclusion that, at some time during the past 15,000 years, Duck Slough
6 existed from Burns Cutoff to at least the Mussi and Pak/Young parcels. Mr. Jack Meyer refined the
7 Lajoie and Moore conclusions, testifying that it has been at least 1,000 years since Duck Slough
8 existed in that manner. Mr. Neudeck attempted to add a level of specificity beyond that offered by
9 Lajoie and Moore and contradict the testimony of Meyer. Mr. Neudeck testified that Duck Slough
10 extended to the Mussi and Pak/Young parcels during late 1800s and early 1900s. To render that
11 conclusion, Mr. Neudeck ignores all but one of the San Joaquin County Assessor's maps that depict
12 Roberts Island, (relies upon Exhibit Mussi 3I, while ignoring all other maps in Exhibit Mussi 3H),
13 and is forced to indentify Duck Slough as a feature exclusively labeled as a levee. Mussi and
14 Pak/Young also seek support from a title document that references Duck Slough. (Exhibits Mussi
15 R37, R38.) The reference is part of a general description. More specific references make plain
16 Duck Slough exited on Roberts Island but did not extend to the Mussi and Pak/Young parcels.
17 (Reporter's Transcript (RT), at 881:24 to 884:4.) In the end, these and other manipulations and
18 creative readings of otherwise clear information (all of which are discussed below) cannot support a
19 finding that the Mussi and Pak/Young parcels were contiguous to Duck Slough and thus cannot
20 support a conclusion that they have riparian rights to water in Duck Slough.

21 Also, Mussi and Pak/Young assert riparian rights to the "Delta Pool." Mussi and
22 Pak/Young assert that the groundwater underlying their property is connected to surface water from
23 which they divert, therefore, providing them with riparian water rights. In the *Phelps* matter, some
24 of the same parties put forward the same argument. (State Water Board Order 2004-004, at 12-13.)
25 At that time, the argument was unsupported and the State Water Board rejected it. (*Id.*) The
26 argument has not changed and thus, once again, must be rejected.

27 Mussi and Pak/Young have also failed to present reliable evidence to support their claim of
28 pre-1914 water rights. Mussi and Pak/Young do not address whether their parcels were ever

1 irrigated with surface water from Duck Slough. (Exhibit Mussi 5.) Instead, they only state that “at
2 some point in time water was available to these lands from Duck Slough.” (Exhibit Mussi 5, at 2.)
3 Instead, Mussi and Pak/Young seem to allege Woods Irrigation Company appropriated water from
4 Middle River to the Mussi and Pak/Young parcels starting around 1911. In support of this
5 allegation, Mussi and Pak/Young offer the hearsay testimony of Michael Robinson. (Exhibit Pak 8,
6 at 2; Exhibit Mussi 5, at 2.) However, even Mr. Robinson was told WIC did not appropriate water
7 for the benefit of the Mussi and Pak/Young parcels, but instead the Mussi and Pak/Young parcels
8 were simply receiving water drained from other lands on Robert’s Island. (RT, at 483:15-22.)
9 Consistent with what Mr. Robinson may have been told, there is no direct evidence WIC
10 appropriated water for the Mussi and Pak/Young parcels. No one offered water orders, outstanding
11 bills, record of payments, agreements or minutes that would support the assertion by Mussi and
12 Pak/Young that WIC appropriated water for the benefit of the land they now own. Equally lacking
13 is evidence that could support a finding that prior to 1914, the Mussi and Pak/Young parcels
14 diverted water through the Woods Robinson Vasquez facilities. Indeed, Mussi and Pak/Young
15 concede that their lands did not receive water from the Woods, Robinson, Vasquez facilities until
16 after 1925. (RT, at 400:22-24; 463:16-20.) Simply put, in the end, Mussi and Pak/Young have
17 provided the State Water Board with no evidence to support their claim of pre-1914 water rights.

18 As a result, the State Water Board must conclude that Mussi and Pak/Young lack water
19 rights that support diversions to their parcels and that cease and desist orders should issue against
20 them.

21 **II. APPLICABLE LAW**

22 **A. Burden of Proof**

23 When a party alleges it possesses a water right, that party has the burden to prove such right
24 exists. (*California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 224 Cal.App.2d
25 715, 737.) Thus, the burden requires the party to establish by evidence a requisite degree of belief in
26 the mind of the trier of fact or the court that the party possesses a water right. (*See* Cal. Evid. Code,
27 § 115.) In doing so, the party must prove each fact essential to establish the water right that it is
28 asserting. (*See* Cal. Evid. Code, § 500.)

1 Riparian rights confer upon an owner of certain property the right to reasonably and
2 beneficially use water on his property. (*Lux v. Haggin* (1886) 69 Cal. 255, 390-391 (*Lux*); *People v.*
3 *Shirokow* (1980) 26 Cal.3d 301, 307.) This right of use is part and parcel of the land. (*Lux*, at 391.)
4 And, as a general matter, to be considered riparian, a parcel of land must satisfy three criteria. First,
5 the property must be contiguous to a watercourse. (*Rancho Santa Margarita v. Vail* (1938) 11
6 Cal.2d 501, 528 (*Rancho Santa Margarita*.) Second, it must be the smallest tract held under one
7 chain of title. (*Id.*, at 529.) Thus, a portion of a riparian parcel that is severed, and then reunited
8 under ownership with the original riparian parcel, will not regain riparian status. (*Miller & Lux v.*
9 *James* (1919) 180 Cal. 38, 51-52; see *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327,
10 331.) Third, the property must be located within the watershed of the watercourse to which it is
11 contiguous. (*Rancho Santa Margarita*, at 528-529).

12 A landowner contiguous to a slough has a riparian right to the main channel of the
13 watercourse. (*Turner v James Canal Co.* (1909) 155 Cal 82, 90.) However, such right is limited to
14 the natural flow in the slough. Further, the right is limited to the water in the slough that originated
15 from the main channel; the riparian right does not extend to waters from other sources. (*Id.*, at 90-
16 91) Because a riparian right is limited to the natural flow that passes by riparian lands, if a slough
17 no longer has natural flow, the riparian right no longer exists. (*McKissik Cattle Company v. Alsaga*
18 (1919) 41 Cal App 380, 387-389.)

19 For a party to establish an appropriative water right, the burden is on that party to prove “(1)
20 an intent to apply it to some existing or contemplated beneficial use; (2) an actual diversion from
21 the natural channel by some mode sufficient for the purpose; and (3) an application of the water
22 within a reasonable time to some beneficial use.” (*Simons v. Inyo Cerro Gordo Min. & Power Co.*
23 (1920) 48 Cal.App. 524, 537; *Thompson v. Lee* (1857) 8 Cal. 275, 280.) A pre-1914 right may be
24 established either through statutory filing or non-statutory water use. (Civil Code, § 1418; *Haight v.*
25 *Constanich* (1920) 184 Cal. 426, 433.) Additionally, the party must demonstrate the quantity of
26 water appropriated, the beneficial use to which that water is put, and that the water is not diverted
27 pursuant to a riparian right. (*Crane v. Stevinson* (1936) 5 Cal.2d 387, 398.)
28

1 **III. THE EVIDENCE DOES NOT SUPPORT A FINDING THAT MUSSI OR**
2 **PAK/YOUNG HAS A RIPARAIN WATER RIGHT**

3 In the most general manner, Mussi and Pak/Young theorize their current diversions are
4 supported by riparian water rights. They appear to assert their parcels maintain riparian water rights
5 associated with Duck Slough, arguing: (1) the parcels were riparian to the Extended Duck Slough,
6 and (2) before the Extended Duck Slough went dry, they moved their point of diversion to Middle
7 River and received water under their riparian water rights from WIC and thence the Woods,
8 Robinson, Vasquez facilities. The MSS parties address this theory and demonstrate nothing
9 supports a conclusion that the Mussi and Pak/Young hold any riparian water rights.

10 **A. Mussi And Pak/Young Cannot Hold Riparian Water Rights To Water In**
11 **Duck Slough**

12 Mussi and Pak/Young allege they have riparian rights because their lands were once
13 contiguous to an Extended Duck Slough. (Exhibit Pak 3, at 3.) In an effort to support this
14 allegation, Mussi and Pak/Young entered mapping, title documents, and geologic evidence into the
15 record. Most of that evidence was discredited at the hearing. In the end, the evidentiary record
16 supports findings that, for at least the last 1,000 years, an Extended Duck Slough has not existed
17 and Duck Slough was not contiguous to the Mussi or Pak/Young parcels. As a result, the State
18 Water Board must find that Mussi and Pak/Young cannot hold riparian water rights to water in
19 Duck Slough.

20 1. Mapping Evidence

21 Mapping evidence in the record does not support Mussi and Pak/Young's contention that
22 Duck Slough was contiguous to their parcels. The maps in evidence indicate that Duck Slough was
23 a short slough off of Burns Cutoff that headed inland for a mile or two and stopped at Honker
24 Mound; it did not extend to where the Mussi and Pak/Young parcels are located.

25 First, evidence in the record proves Duck Slough originated from Burns Cutoff; Mussi and
26 Pak/Young do not provide evidence to support their allegation that an Extended Duck Slough
27 originated from Middle River. Pre-reclamation maps show clearly that before Roberts Island was
28 leveed, Duck Slough came off Burns Cutoff and continued a short distance inland. (Exhibits MSS

1 R17-19.) These maps do not show any feature coming off Middle River in the area of the Extended
2 Duck Slough. Notes from a reclamation survey performed in 1875 are consistent with the maps.
3 (Exhibit MSS R21.) These notes describe all sloughs on Roberts Island in detail, including sloughs
4 coming off Middle River.³ (*Id.*) The notes do not describe a slough running from Middle River in
5 the location of an Extended Duck Slough, but in fact identify a “natural levee” in this location. (*Id.*)
6 Even further, evidence concerning the attempt to dredge Duck Slough describes the effort as one
7 that began at the mouth of Duck Slough – which was located at Burns Cutoff.⁴ (Exhibit MSS R28.)
8 If that were not enough, soils mapping supports a conclusion that Duck Slough originated at Burns
9 Cutoff. Specifically, Columbian soils – those that have mineral content from mining runoff – were
10 present off of Burns Cutoff, but were not present off Middle River. (Exhibit MSS R9.) This proves
11 Duck Slough could not have started at Middle River; if the mouth of Duck Slough were at Middle
12 River, mineral soils would exist as Extended Duck Slough extended from Middle River.

13 Mussi and Pak/Young did not provide evidence that an Extended Duck Slough originated
14 from Middle River. Mussi and Pak/Young did not enter any pre-reclamation maps into evidence.
15 Nor did Mussi and Pak/Young enter any post-reclamation maps that showed an Extended Duck
16 Slough originating at Middle River. Mussi and Pak/Young’s best evidence that Extended Duck
17 Slough originated from Middle River was presented by Mr. Nomellini, who identified a slough off
18 of Middle River that “could be” Duck Slough. (RT, at 375:8 to 377:22.) The slough identified by
19 Mr. Nomellini is no where near where Mussi and Pak/Young alleged Extended Duck Slough flows
20 from Middle River. In fact, the slough is miles away from such location, and not even on Roberts
21 Island. The reason Mussi and Pak/Young were unable to provide evidence Extended Duck Slough
22 originated from Middle River is plain – it did not.

23 Second, evidence in the record proves Duck Slough is a short slough only a mile or two off
24 Burns Cutoff; no evidence supports Mussi and Pak/Young’s allegation that Duck Slough ran from
25

26 ³ The survey identified even very small sloughs on Middle River, such as one measuring 25 feet wide and 6 feet deep.

27 ⁴ Testimony from Mr. Nuedeck corroborates this evidence – which was offered by Mr. Wee. The only difference
28 between the analysis of Mr. Nuedeck and Mr. Wee on this issue is that Mr. Wee provided evidence that the dredge was
removed after a short distance and Mr. Nuedeck believes it was possible, but provides no evidence in furtherance of the
possibility, that the Dredge traveled to Middle River.

1 Middle River to Burns Cutoff. Pre-reclamation maps show Duck Slough came off Burns Cutoff
2 inland a mile or two and ended at Honker Lake Mound. (Exhibits MSS R17-19.) Mussi and
3 Pak/Young do offer post-reclamation maps that only identify a levee (not a waterway) running from
4 Burns Cutoff to Middle River. (Exhibits Mussi 1, Figures 1, 6-12, Mussi 3H, 3M-T.) In fact,
5 Mussi and Pak/Young produced over fifty post-Reclamation maps in an effort to prove the existence
6 of an Extended Duck Slough. (*Id.*) None of these maps provide such support. In fact, only two of
7 the fifty plus maps contain a feature labeled Duck Slough.⁵ (Exhibits Mussi 3N-O.) Both of these
8 maps identify Duck Slough immediately adjacent to Burns Cutoff and do not support the allegation
9 that Extended Duck Slough extended to Middle River and was contiguous to the Mussi and
10 Pak/Young parcels. (*Id.*)

11 In an apparent attempt to rewrite history, Mussi and Pak/Young pointed to map features
12 labeled levee and claim they represented an Extended Duck Slough. For example, Mr. Nuedeck
13 provided assessor's maps from 1876 to 1914. (Exhibit Mussi 3H.) Although all of the maps
14 depicted a feature running from Burns Cutoff to Middle River, on cross examination, Mr. Nuedeck
15 conceded that none of the maps labeled the feature as Duck Slough and most maps identified it as a
16 levee. (RT, 608:17-23; Exhibit MSS R-16 (index of assessor maps indicates that the feature is
17 referred to as a levee 14 times and never identified as Duck Slough in the 1876 to 1897 assessor
18 maps).) In an effort to find some support for the Mussi and Pak/Young position, Mr. Nuedeck
19 relied primarily on the 1876 San Joaquin County assessor's parcel map, stating that a blue line
20 (identified in most other maps as a levee) supported his conclusion in 1876 an Extended Duck
21 Slough existed and carried water. (Exhibits Mussi 3, at 1-2; RT, at 510:2-17, 609:20 to 610:5.)
22 However, Mr. Nuedeck failed to explain (1) why the other known watercourses on that map were
23 drawn in black; and (2) why the alleged watercourse (the Extended Duck Slough) drawn on the map
24 was located such that it would not touch either the Mussi or Pak/Young parcel. Mr. Lajoie went a
25 step further and entered exhibits in which he relabeled the levee feature as Duck Slough. On cross

26 _____
27 ⁵ On rebuttal, Mussi and Pak/Young entered Exhibit Mussi DJN R16 into evidence. However, as identified by the
28 explanation in the exhibit titled "Scope and Contents Note", this map was an unpublished draft or part of the
"supporting data compiled for inclusion or use in Hall's irrigation studies." The final irrigation study was already
entered into evidence on direct as Exhibit Mussi 3N and identified Duck Slough near Burns Cutoff.

1 examination, Mr. Lajoie conceded he renamed features, explaining he did so “in order to avoid
2 confusion.” (RT, at 234:1-5.) Manipulation of this sort was common during the hearing and must
3 affect the credibility and weight to which the State Water Board gives Mussi and Pak/Young’s
4 testimony.

5 In a further attempt to alter history, Mussi and Pak/Young’s witnesses interpret maps
6 inconsistently. Originally, Mussi and Pak/Young asserted Extended Duck Slough ran on the east
7 side of the “High Ridge Levee.” (WIC RT, at 272:15-19.) However, Mussi and Pak/Young may
8 have realized, such circumstance would separate the Pak/Young parcel from Extended Duck
9 Slough. As a result, its witnesses’ testimony changed to accommodate the rights of both parcels.
10 Mr. Moore identified Extended Duck Slough as running in a northeast direction, on the east of side
11 of the levee.⁶ (WIC RT, at 273:25 to 274:8.) Mr. Nuedeck testified that Extended Duck Slough ran
12 between two levees. (RT, at 615:4-6.) Mr. Nuedeck further testified that at some point a canal was
13 constructed between the levees and Extended Duck Slough – on the bank of the levee. (RT, at
14 580:7-21.) Mr. Nomellini stated Duck Slough runs down from Burns Cutoff, intersects the levee at
15 some point and two levees result from the intersection.⁷ (RT, at 358:19 to 359:5 (“when you come
16 down from Burns Cutoff with Duck Slough and you intersect – I’ll call it High Ridge Levee or the
17 Honker Lake Levee – you end up with two levees”).) Mr. Lajoie believes the levee and the slough
18 occupied the same space. (RT, at 235:1 to 235:13 (“Duck Slough on some maps is called High
19 Ridge Levee. On other maps its called Cross Levee”).) While Mr. Blake testified the levee is the
20 bank of Extended Duck Slough. (RT, at 791:13-15.) This attempt to accommodate both parcels
21 demonstrates the absurdity of the Mussi and Pak/Young position.

22 The State Water Board must accord Mussi and Pak/Young’s testimony interpreting historic
23 maps little, if any, weight. Simply put, the evidence presented by their witnesses lack credibility.

24 _____
25 ⁶ However, Mr. Moore’s testimony suggests that water flowed from Burns Cutoff to Middle River, not the other way.
(RT, at 774:8-11.)

26 ⁷ It is noteworthy that Mr. Nomellini still believes Duck Slough exists today. (RT, at 808:23 to 809:2.) This opinion is
27 contradicted by all of Mussi and Pak/Young other witnesses who recognize Duck Slough no longer exists. (RT, at
28 485:25 to 486:2 (Mr. Robinson: “Duck Slough did not become a canal. The irrigation canal was to replace Duck
Slough which as some point was filled in”); id., at 786:23 to 787:3 (Mr. Blake state Duck Slough has been “filled in”);
WIC RT, at 618:11-22, 716:22 to 717:2 (Mr. Nuedeck states that presently there is no Duck Slough and he does not
know when it was “filled in”); RT, at 282:12-16 (Mr. Lajoie states Duck Slough was filled and is now Inland Road).)

1 Duck Slough did not extend to the Mussi or Pak/Young parcels. The convoluted nature of the
2 testimony offered by Mussi and Pak/Young reflects their attempt to find a watercourse where, post-
3 reclamation, none existed.

4 2. Chain of Title Evidence

5 Similar to the mapping evidence, the chain of title evidence is consistent with the maps and
6 reflects the fact that Duck Slough existed only off of Burns Cutoff, for a mile or two inland. Mr.
7 Thurl Pankey presented the results of search for title documents related to the Mussi and Pak/Young
8 parcels. (Exhibits Mussi 6 and 6A; Exhibits Pak/Young 6 and 6A.) Mr. Wee performed the same
9 research. (Exhibit MSS R1-76.) In his testimony in both proceedings, Mr. Neudeck discusses the
10 title documents. In the Mussi proceeding, Mr. Neudeck correctly identifies a March 15, 1877, deed
11 as including Duck Slough in a general reference to a number of sections within Roberts Island,
12 including those sections within which the Mussi and Pak/Young parcels exist today. (Exhibit MSS
13 R 1-4.) However, he neglects to provide critical, additional information. A prior, more detailed
14 deed describes land as:

15 The fractional parts of sections one (1) and twelve (12) lying West of
16 the San Joaquin River, Burns Cutoff and Duck Slough and the
17 fractional parts of sections thirteen (13), fourteen (14), twenty-two
 (22), and twenty-seven (27) lying West of High Ridge Levee, which
 extends from Burns Cutoff to Middle River.

18 (Exhibit MSS R1-5.) Of great importance is that the above description references Duck Slough
19 only when referring to sections one (1) and twelve (12) and not when describing section (22) and
20 (27) – the latter two sections being the sections where the Mussi and Pak/Young parcels are located.
21 Further, Mr. Neudeck fails to explain that in all other deeds within the chain of titles related to the
22 Mussi and Pak/Young parcels, there are no calls to Duck Slough. The calls are to the same levee
23 depicted in each of the San Joaquin County assessor parcel maps, discussed above. (*See, e.g.*,
24 Exhibits MSS R 1-6 (April 28, 1891), MSS R 1-11 (Nov. 6, 1930); RT, at 871:25 to 874:21.)

25 On rebuttal, Mr. Blake testified an Extended Duck Slough must have existed due to the calls
26 to the Duck Slough feature. Mr. Blake's conclusion was based on the single general reference to
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28

1 Duck Slough.⁸ (Exhibits Mussi R37, R38.) The reference only appeared in the description of large
2 parcels that abutted Burns Cutoff - the descriptions of smaller parcels, no longer near Burns Cutoff,
3 no longer include a reference to Duck Slough. (*Id.*; RT, at 588:10 to 592:25.) Indeed, a plain
4 reading of the deeds is consistent with Mr. Wee’s testimony that Duck Slough exists only for a short
5 distance off of Burns Cutoff and contradicts Mr. Blake’s allegation that Extended Duck Slough
6 continued to meet Middle River.⁹

7 3. Geologic Evidence

8 The geologic evidence in the record shows that the watercourse identified by Mussi and
9 Pak/Young as an Extended Duck Slough has not existed for at least the past 1,000 years. Mussi
10 and Pak/Young witnesses Mr. Lajoie and Mr. Moore reviewed soils analyses performed by Atwater
11 and concluded that a slough ran from Burns Cutoff to Middle River at some point in the last 15,000
12 years. (RT, at 830:25 to 831:7.) On cross examination, both witnesses concede the soils data they
13 presented cannot be used to determine if an Extended Duck Slough existed since reclamation of
14 Roberts Island. Specifically, Mr. Moore conceded that geologic information can only establish that
15 an Extended Duck Slough existed at some point during the last 15,000 years and cannot provide
16 information as to whether it existed more recently. (WIC RT, at 286:2-24 (explaining that the soil
17 data indicate Extended Duck Slough had water in it in the last 15,000 years, but he could not tell
18 you more precisely if it was 6,000 or 9,000 years).)

19 Mr. Meyer presented rebuttal testimony that confirmed Mr. Lajoie and Mr. Moore’s
20 testimony. All agree that portions of the Mussi and Pak/Young parcels were within the tidal zone in
21 1850, based on the Atwater study, consistent with those parcels being classified as “swamp and
22 overflowed lands.” (RT, at 901:19-23.) However, Mr. Meyer provided additional evidence which
23 showed that the Extended Duck Slough did not exist after 1850.

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25 _____
26 ⁸ As the plain language of the deed reflects - “lying south and east of the levee constructed along High Ridge and Duck
27 Slough” – the reference is not a call to Duck Slough, but a call to the levee, whose location is described by a reference
28 to Duck Slough.

⁹ Mr. Nuedeck concedes this point, stating that he thought this deed established that Duck Slough existed, but he
understood it could not support the conclusion that Duck Slough ran all the way to Middle River. (WIC RT, at 713:11
to 714:5.)

1 First, Mr. Meyer analyzed the rise in sea level over the past 2,000 years, and showed that the
2 Mussi and Pak/Young parcels would have been submerged about 1,000 years ago.¹⁰ From the time
3 those lands were submerged to when they were reclaimed in the late 1800s, there would not be
4 active channels for the deposition of mineral soils. (RT, at 906:21 to 903:14.) This evidence
5 indicates that an Extended Duck Slough was not a watercourse to which riparian rights would
6 attach.

7 Second, the soils in the area Mussi and Pak/Young assert the Extended Duck Slough existed
8 were largely deposited before 1850. The Egbert Muck soils described by Lajoie are from about
9 5,000 to 15,000 years old. (RT, at 902:1-20.) Mr. Meyer described the more recent Columbian
10 soils, which date from about 1850, and their distribution in the area. (RT, at 902:21 to 903:14.)
11 The Columbian soils occur along waterways that were active in 1850 and appear along the San
12 Joaquin River, Middle River and off of Burns Cutoff where Duck Slough existed. However, those
13 soils do not occur in the Extended Duck Slough channel. (RT, at 902:2-14; 905:11-13.) The
14 absence of those soils near Extended Duck Slough indicates that it was not an active waterway
15 around 1850.

16 Riparian water rights for the Mussi and Pak/Young parcels must be determined based on the
17 topography at the time the right is asserted or used, and not on past configuration of the land. (State
18 Water Board Order 2004-0004, at 12 (“Past configurations of the land are not the basis of riparian
19 rights; instead, riparian rights are determined from the current topography”); *Rancho Santa*
20 *Margarita v. Vail*, at 549 (“riparian rights are not determined by past geologic formations but by the
21 present natural topography”).) Because an Extended Duck Slough has not existed for at least the
22 past 1,000 years, it could not have been a watercourse to which Mussi or Pak/Young could establish
23 riparian water rights.

24 **B. Riparian Rights To Extended Duck Slough Would Have Been Severed**
25 **During Reclamation**

26 Riparian rights are limited to the natural flow that flows past the riparian land. (*Vernon Irr.*
27 *Co. v. Los Angeles* (1895) 106 Cal. 237, 256; *Duckworth v. Watsonville Wter & Light Co.* (1907)

28 ¹⁰ This is also supported by the finding of archeological remains on top of the levee, but the lack of any similar remains
in the area that was submerged 1,000 years ago. (RT, at 910:7 to 911:23.)

1 150 Cal. 520, 526; *Huffner v. Sawday* (1908) 153 Cal. 86, 91; *Fall River Valley Irr. Dist. v. Mt.*
2 *Shasta Power Corp.* (1927) 202 Cal. 56, 65.) Thus, when a watercourse is dammed or leveed,
3 riparian rights to the portion of the watercourse no longer in existence terminate unless the right-
4 holder restores flow to the channel in a reasonable period of time. (*McKissik Cattle Company v.*
5 *Alsaga* (1919) 41 Cal App 380, 387-389 (riparian water rights can be lost by avulsion from natural
6 or man made forces); *State of Calif. ex. rel. State Lands Comm. v. Superior Court* (1995) 11 Cal.4th
7 50, 79 (avulsion can result from either natural or man-caused changes in the course of a stream).)
8 All parties agree that at some point levees were constructed that would have seperated Duck Slough
9 from Burns Cutoff. (RT, at 360:5-9 (Mr. Nomellini agrees severed at some time by a levee); RT, at
10 594:7-16 (Mr. Neudeck agrees leveed off).)¹¹ As found in a previous analysis of water rights on
11 Roberts Island, filling sloughs and cutting off their connection to waterways results in loss of
12 riparian water rights for lands contiguous with such sloughs. (State Water Board Order 2004-0004,
13 at 11-12.)

14 Mussi and Pak/Young made general allegations that when the levees were built, floodgates
15 were installed, and equipped to ditch water from Burns Cutoff and Middle River back into the
16 slough that was cut off. However, Mussi and Pak/Young conceded that they “assumed” and
17 “believed” the gates were installed and could not provide actual evidence of such installation. (RT,
18 at 634:18 to 635:23 (Mr. Nuedeck stated his belief that tide gates were installed was based on “a
19 gentleman that lives near it on that and has indicated remnants of old tide gates that exist currently
20 up there”).) Mussi and Pak/Young make no other attempt to enter evidence into the record that
21 proves Mussi and Pak/Young restored flow to Extended Duck Slough after it was leveed off.
22 Without such evidence, the Mussi and Pak/Young parcels would have lost riparian rights to the
23 Extended Duck Slough, if such a feature existed.

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28 ¹¹ Similarly, even if the Extended Duck Slough were found to exist and extend to the Middle River, it would have been
leveed off from Middle River as part of the reclamation process. (RT, at 593:18 to 594:16.)

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C. Mussi And Pak/Young Cannot Establish Riparian Water Rights To Middle River Or Burns Cutoff As Their Parcels Lost Contiguity Without Any Clear Intent To Preserve The Rights

Both the Mussi and Pak/Young parcels severed their contiguity to Middle River and Burns Cutoff in the 1890s. The Pak/Young parcel’s contiguity was severed in the 1896 conveyance from Morton C. Fisher to E.W.S. Woods. (Exhibit MSS 1.) The Mussi parcel severed contiguity in the 1891 conveyance to Joseph Vasquez. (Exhibit MSS 1.) Neither of these conveyances contained an express preservation of riparian rights to either Middle River or Burns Cutoff.

Mussi and Pak/Young assert that standard deed language that transfers all “tenements, hereditaments and appurtenances” is sufficient to preserve a riparian right. As a matter of law, Mussi and Pak/Young are incorrect. A riparian right ceases to exist when land is severed from contiguity with a watercourse unless such right is expressed preserved. The form language that includes the word “hereditaments” does not amount to an express preservation. (*Murphy Slough Assn. v Avila* (1972) 27 Cal App 3d 649, 655 (conveyance which included language as to tenements, hereditaments and appurtenances was found to be silent as to riparian rights.)) As a result, neither the Mussi nor Pak/Young Parcel has a riparian right to Middle River or Burns Cutoff.

D. Riparian Rights To Extended Duck Slough Cannot Support Mussi And Pak/Young’s Current Middle River Diversions

Mussi and Pak/Young allege that riparian rights to an Extended Duck Slough support current appropriations from Middle River. Specifically, Mussi and Pak/Young contend that an Extended Duck Slough is interconnected to Middle River and this provides Mussi and Pak/Young with riparian rights to an Extended Duck Slough as well as Middle River. This contention is not supported by the facts in evidence or by the rules of law.

First, Mussi and Pak/Young did not enter any evidence into the record to support the conclusion that Extended Duck Slough was interconnected with Middle River.¹² In fact, as detailed above, evidence in the record contradicts Mussi and Pak/Young’s assertion that Extended Duck Slough reached Middle River, let alone originated from Middle River and flowed to Burns Cutoff.

¹² Mussi and Pak/Young allegation that all Delta waterways are tidally influenced and come from the same source is nothing more than a re-packaged “Delta Pool” argument that is addressed in section VI.

1 Second, even if Mussi and Pak/Young had established (1) a riparian right to Extended Duck
2 Slough, and (2) an Extended Duck Slough was interconnected to Middle River – which they have
3 not – current diversions from Middle River remain unlawful. The rule of law is that a landowner
4 owning land riparian to a slough may move its point of diversion to the main channel while the
5 slough exists. Mussi and Pak/Young may allege they moved their point of diversion to Middle
6 River around 1911, when WIC began delivering water. If true, Mussi and Pak/Young would be
7 prohibited from moving the point of diversion, since the move would have been well after Duck
8 Slough was leveed around 1875 and ceased to exist.

9 Third, no party may change its point of diversion if such a change results in injury to other
10 legal water users. (Water Code, § 1706; *Kidd v. Laird* (1860) 15 Cal. 161, 179-81.) Mussi and
11 Pak/Young did not and cannot prove that its alleged change in the point of diversion from an
12 Extended Duck Slough to Middle River did not injure a legal water user.

13 Fourth, even if Mussi and Pak/Young could establish the change in point of diversion was
14 valid – which it cannot – the right to divert from Middle River would not be unlimited. Quite the
15 opposite: such right would be limited to the natural flow in the slough at the location of the riparian
16 land. (*Turner v James Canal Co.* (1909) 155 Cal 82, 90-91 (right to divert from Middle River
17 should reflect “the quantity of water in the slough” and “the quantity the slough is capable of
18 naturally diverting from the river.”) Mussi and Pak/Young did not enter any evidence regarding the
19 natural flow in Duck Slough. (RT, at 385:18-21 (Mr. Nomellini does not know the carrying
20 capacity of Duck Slough prior to 1914); RT, at 601:15-18 (Mr. Neudeck does not know the rate or
21 quantity of water in Duck Slough).) Further, there is no evidence in the record that establishes the
22 width of the Slough, the depth of the Slough, the Mannings n, the gradient, the invert elevations, or
23 the capacity from which the natural flow of Duck Slough could be estimated.¹³ (RT, at 600:1 to
24 601:11 (Neudeck does not know factors); 256:19 to 257:5 (Mr. Lajoie does not know the factors);
25 284:1-15 (Mr. Moore does not know the factors); 437:6 to 439:17 (Nomellini does not know the
26 factors); RT, at 469:5-25 (Mr. Mussi does not know what happened in 1914).) The right would also

27 _____
28 ¹³ Mussi and Pak/Young’s best evidence on the attributes of Duck Slough is that a dredger measuring 30 feet wide and 7 feet deep started from Burns Cutoff down the Slough and was removed after being stuck. (RT, at 356:7-10.)

1 be limited to the natural flow from Middle River and would prohibit diversion of water from other
2 sources. Without the above evidence, Mussi and Pak/Young have not established riparian water
3 rights to Middle River or Burns Cutoff.

4 **IV. MUSSI AND PAK/YOUNG HAVE NOT DEMONSTRATED VALID PRE-1914**
5 **APPROPRIATIVE WATER RIGHTS**

6 Mussi and Pak/Young appear to claim pre-1914 water rights to an Extended Duck Slough
7 and Middle River. Mussi and Pak/Young concede they did not make a statutory filing pursuant to
8 California Civil Code section 1418. Therefore, Mussi and Pak/Young are required to prove actual
9 and beneficial use of water prior to 1914 in order to establish a pre-1914 appropriate water right.
10 (*Haight v. Costanich* (1920) 184 Cal 426; *Town of Antioch v. Williams Irr. Dist.* (1922) 188 Cal
11 451.) The elements of actual use – such as the quantity, rate, season, place of use and point of
12 diversion of water used prior to 1914 will define the pre-1914 water right. (State Water Board
13 Order 2009-0061, at 9; *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.
14 App. 4th 555; *Pleasant Valley Cana v. Borrer* (1998) 61 Cal.App.4th 742, 778-779.) There is not
15 evidence in the record to establish Mussi and Pak/Young diverted water from Duck Slough or
16 Middle River prior to 1914 and virtually no evidence that prove the specific elements of such rights.

17 **A. There Is No Evidence Mussi And Pak/Young Diverted Water From**
18 **Duck Slough Prior To 1914**

19 Mussi and Pak/Young submitted little to no evidence in support of the claim it has a pre-
20 1914 water right to Extended Duck Slough. Mussi and Pak/Young's best evidence of a pre-1914
21 water right to an Extended Duck Slough is the Gateway Map, which portrays alfalfa being grown in
22 the general area of the Mussi and Pak/Young lands. This is hand-drawn map, dated 1915, and was
23 allegedly prepared for an exhibit in the World's Fair. (Exhibit Mussi R39.) This type of evidence is
24 not sufficient to establish Mussi and Pak/Young parcels were farmed prior to 1914. (Govt. Code,
25 § 11513 (it is not the sort of evidence on which responsible persons are accustomed to rely in the
26 conduct of serious affairs).) However, even if the State Water Board were to consider the Gateway
27 Map, it does not support a finding that any lands on Roberts Island, no less the Mussi Pak/Young
28 parcels, were irrigated with surface water. To the extent crops grown on the Mussi and Pak/Young

1 parcels, those crops could have been supported by the naturally high groundwater table. And
2 possibly most important, nothing in the record supports the conclusion that water was ever diverted
3 from Duck Slough to the Mussi and Pak/Young parcels. (RT, at 469:20-25 (Mussi concedes
4 property could have been subirrigated); 501:20-22 (Mr. Robinson concedes the property could have
5 been subirrigated).)

6 **B. There Is No Evidence Mussi And Pak/Young Diverted Water From**
7 **Middle River Prior To 1914**

8 The Woods, Robinson, Vasquez facilities have been used to provide water to the Mussi and
9 Pak/Young parcels from Middle River since approximately 1925. (RT, at 400:22-25, 709:14-15.)
10 Before 1925, Mussi and Pak/Young allege their parcels “may have been irrigated for a time”
11 through the Woods Irrigation Company. (RT, at 846:1-4.) Mussi and Pak/Young provide no
12 evidence in support of this allegation, and, in fact, provide contrary evidence. (Exhibits Mussi 3R,
13 PT 15.) Attached to the 1911 Agreement to Furnish Water between E.W.S. Woods and Woods
14 Irrigation Company is a map specifically designating the Mussi and Pak/Young parcels as lands to
15 which Woods Irrigation Company could not be provided water due to the location of the lands and
16 limits of the system. (Exhibits WIC 6O, 6P; RT, at 813:21-23.) Mussi and Pak/Young entered no
17 evidence that this designation had been lifted or otherwise altered.¹⁴ On cross examination, Mussi
18 and Pak/Young acknowledged that the Mussi and Pak/Young parcels were included in the “drainage
19 only” designation. (RT, at 846:1-24.) Thus, nothing in the record supports the claimed pre-1914
20 appropriate water right to Middle River water.

21 **C. Even If Pre-1914 Appropriate Water Rights Were Established, Mussi**
22 **And Pak/Young Have Not Shown They Were Transferred To Mussi And**
23 **Pak/Young**

24 Pre-1914 rights are appropriative and do not run with the land. (*Santa Paula Water Works v.*
Peralta (1896) 113 Cal. 38, 43; *McDonald v. Bear River & Auburn Water & Min. Co.* (1859) 13

25 ¹⁴ In the recently completed Woods Irrigation Company hearing, WIC submitted its 1957 *Complaint to Quiet Title to*
26 *Corporate Stock and for Declaratory Relief*. (Exhibit WIC 4G.) Exhibit A to that complaint shows the WIC service
27 area, that WIC asserted included lands that had been irrigated since 1911, which do not include either the Mussi or the
28 Pak/Young parcels. (Exhibit WIC 4G, at 5). The complaint also asserts that all of WIC’s expenses for operations and
purchases (except those associated with drainage services) have been paid for by the lands in the WIC service area
shown in Exhibit A. (*Id.*) Therefore, this complaint shows that the Mussi and Pak/Young parcels did not receive water
from WIC, were not charged for deliveries of water from WIC, and were not granted shares from WIC.

1 Cal. 220, 232.) Therefore, if a pre-1914 water right holder conveyed a parcel of land to which it
2 diverted water prior to 1914, such conveyance, without an express intent to do otherwise, would not
3 include a transfer of a pre-1914 appropriative right. (*Wright v. Best* (1942) 19 Cal.2d 368, 382.)
4 Mussi and Pak/Young have conceded they did not own and were not farming the Mussi and
5 Pak/Young parcels in 1914. (RT, at 383:19-24, 461:16-17, 466:14-17.) Mussi and Pak/Young have
6 attempted to show that the landowners that owned their respective parcels in 1914 established pre-
7 1914 rights. However, if such rights were proven, there is no evidence in the record that supports
8 the conclusion they were ever transferred to Mussi or Pak/Young. Without such evidence, the
9 Mussi and Pak/Young's claim to pre-1914 rights must be denied.

10 **D. Receipt Of Water From WIC Prior To 1914 Cannot Support Mussi And**
11 **Pak/Young's Current Middle River Diversions**

12 If Mussi and Pak/Young were able to establish the Mussi and Pak/Young parcels received
13 water from WIC prior to 1914 – which they have not – such receipt would not make Mussi and
14 Pak/Young's current diversions lawful. First, Mussi and Pak/Young did not provide any evidence
15 which would establish that such deliveries were made pursuant to Mussi and Pak/Young's intent to
16 appropriate water. Further, to the extent that the State Water Board finds, in the concurrent Woods
17 Irrigation Company proceeding, that Woods Irrigation Company holds its own pre-1914 water right,
18 any delivery of water found in this matter to have occurred through facilities owned by Woods
19 Irrigation Company must be under right of WIC rather than of Mussi or Pak/Young. Finally, in the
20 unlikely event that the State Water Board determines that Mussi and Pak/Young hold pre-1914
21 water rights resulting from alleged appropriations by WIC, Mussi and Pak/Young have not proven
22 that they changed the point of diversion from the location where WIC diverts to the location of the
23 Woods, Robinson, Vasquez facilities, or that the changes were made without harm to any other
24 legal water user. Without such findings, a point of diversion may not be moved. (*Kidd v. Laird*
25 (1860) 15 Cal. 161, 179.)

1 **V. RIPARIAN DIVERSIONS MADE PRIOR TO 1914 CANNOT ESTABLISH PRE-**
2 **1914 WATER RIGHTS**

3 Mussi and Pak/Young allege they have both a riparian and pre-1914 water rights. That
4 allegation is premised upon a belief by Mussi and Pak/Young that diversion of a single molecule of
5 water, if made prior to 1914 and used on riparian land, can give rise to two rights -- a riparian water
6 right and a pre-1914 water right. The allegation is based on a misunderstanding of law.¹⁵ Although
7 a single diverter may hold both riparian and appropriative rights, riparian diversions made before
8 1914 do not result in the establishment of a pre-1914 water right. (*Rindge v. Crags Land Co.*,
9 (1922) 56 Cal. App. 247, 252; Cal. Water Code, § 1201.) The exception to that rule is if a riparian
10 water user can demonstrate it used water inconsistent with its riparian water rights. Neither Mussi
11 or Pak/Young provided evidence such use occurred prior to 1914. (RT, at 1035:6 to 1036:4.) Thus,
12 Mussi and Pak/Young provide no basis for the State Water Board to find Mussi or Pak/Young hold
13 both riparian and pre-1914 water rights.

14 **VI. DELTA POOL THEORY**

15 Mussi and Pak/Young attempted to establish riparian rights based upon the theory that the
16 groundwater they overlie is connected to the surface waters from which they are diverting, also
17 known as the "Delta Pool" theory. The State Water Board rejected this theory in its Phelps Order,
18 which was upheld on judicial review. (*See Phelps et al. v. State Water Board* (Super. Ct.
19 Sacramento County, 2006, No. 04CS00368); *Phelps v. State Water Board* (2007) 157 Cal.App.4th
20 89.) In the pending enforcement proceeding against WIC, the State Water Board again rejected this
21 theory. The hearing officers disposing of an evidentiary objection wrote:

22 The portions of Mr. Neudeck's testimony that MID objects to in the
23 current proceeding are copies of Mr. Neudeck's testimony in a prior
24 enforcement hearing regarding Robert's Island properties, State Water
25 Board Order WR 2004-0004 (hereinafter "Phelps"). This evidence
26 is presented solely to support the theory that lands in the area have
27 riparian water rights because the groundwater they overlie is
28 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. Ct. Sacramento County, 2006,
No. 04CS00368); *Phelps v. SWRCB* (2007) 157 Cal.App.4th 89.)

15 This misunderstanding seems to be shared by the prosecution team as well. (WIC RT, at 92:14-20.)

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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.

(July 19, 2010 Hearing Officer’s Ruling on the evidentiary objections and motions raised concerning the submission of exhibits by Woods Irrigation Company, and Modesto Irrigation District, at 3.)

VII. CONCLUSION

There is not sufficient evidence in the record to conclude that Mussi or Pak/Young has either riparian or pre-1914 water rights. Mussi and Pak/Young have the burden to prove such rights exist and have not done so.

VIII. PROPOSED MUSSI FINDINGS AND ORDER

The evidence presented at the hearing supports the following findings of fact, upon which revised orders should be based: Mussi and Pak/Young have not provided evidence sufficient to establish they hold either riparian or pre-1914 water rights. Based on these findings, individual orders should be issued to Mussi and to Pak/Young that read as follows:

IT IS HEREBY ORDERED THAT:

- 1. Without producing further evidence, Mussi and Pak/Young must cease and desist diverting water pursuant to any claim that they hold riparian or pre-1914 water rights.
- 2. Mussi and Pak/Young may continue to be provided water either through the Woods, Robinson, Vasquez facilities, to the extent such diversions are made pursuant to valid water rights

Dated: August 30, 2010

O’LAUGHLIN & PARIS LLP

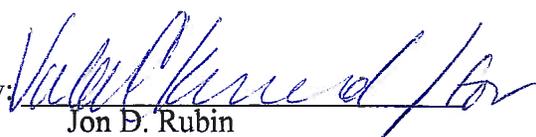
By: 
 Tim O’Laughlin
 Attorneys for Plaintiff
 MODESTO IRRIGATION DISTRICT

(signatures continue)

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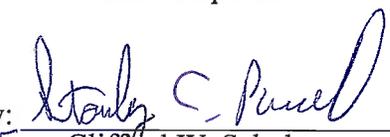
Dated: August 30, 2010

DIEPENBROCK HARRISON
A Professional Corporation

By: 
Jon B. Rubin
Attorneys for Plaintiff
SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY

Dated: August 30, 2010

KRONICK MOSKOVITZ TIEDEMANN & GIRARD
A Professional Corporation

By: 
For Clifford W. Schulz
Attorneys for Plaintiff
STATE WATER CONTRACTORS

PROOF OF SERVICE

1 I, Jolanthe V. Onishi, declare as follows:

2 I am over 18 years of age and not a party to the within action; my business address is 400
3 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

4 On August 30, 2010, I served a copy of the foregoing document entitled: **CLOSING**
5 **BRIEF** on the following interested parties in the above-referenced case number to the following:

6 See attached Service List

7 **BY MAIL**
8 By following ordinary business practice, placing a true copy thereof enclosed in a sealed envelope,
9 for collection and mailing with the United States Postal Service where it would be deposited for
10 first class delivery, postage fully prepaid, in the United States Postal Service that same day in the
11 ordinary course of business as indicated above.

12 **ELECTRONIC MAIL**
13 I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail
14 transfer system in place at Diepenbrock Harrison, originating from the undersigned at 400 Capitol
15 Mall, Suite 1800, Sacramento, California, to the e-mail address(es) indicated above.”

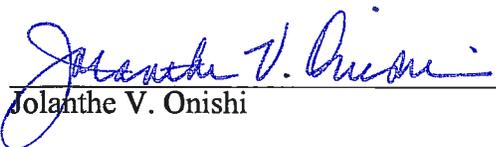
16 **BY FACSIMILE** at _____ a.m./p.m. to the fax number(s) listed above.
17 The facsimile machine I used complied with California Rules of Court, rule 2003 and no error was
18 reported by the machine. Pursuant to California Rules of Court, rule 2006(d), I caused the
19 machine to print a transmission record of the transmission, a copy of which is attached to this
20 declaration.

21 A true and correct copy was also forwarded by regular U.S. Mail by following ordinary business
22 practice, placing a true copy thereof enclosed in a sealed envelope, for collection and mailing with the United
23 States Postal Service where it would be deposited for first-class delivery, postage fully prepaid, in the United
24 States Postal Service that same day in the ordinary course of business.

25 **BY OVERNIGHT DELIVERY**
26 Federal Express Golden State Overnight
27 Depositing copies of the above documents in a box or other facility regularly maintained by
28 Federal Express, or Golden State Overnight, in an envelope or package designated by Federal
Express or Golden State Overnight with delivery fees paid or provided for.

PERSONAL SERVICE
 via process server via hand by:

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



Jolanthe V. Onishi

1 HEARING REGARDING ADOPTION OF CEASE AND DESIST ORDER AGAINST RUDY
2 MUSSI, TONI MUSSI, LORY C. MUSSI INVESTMENT LP (MIDDLE RIVER) – SAN JOAQUIN
3 COUNTY – SCHEDULED COMMENCE ON MAY 5, 2010

4 SERVICE LIST OF PARTICIPANTS
5 (VIA ELECTRONIC MAIL)

6 PARTICIPANTS TO BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER
7 DOCUMENTS (The participants listed below AGREED TO ACCEPT electronic service,
8 pursuant to the rules specified in the hearing notice.)

9 10 11 12 13 14 15 16 17 18	DIVISION OF WATER RIGHTS PROSECUTION TEAM c/o David Rose State Water Resources Control Board 1001 I Street Sacramento, CA 95814 DRose@waterboards.ca.gov	YONG PAK AND SUN YOUNG c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com
19 20 21 22 23 24	RUDY MUSSI, TONI MUSSI AND LORY C. MUSSI INVESTMENT LP c/o John Herrick, Esq. 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com	CENTRAL DELTA WATER AGENCY c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com
25 26 27 28	SOUTH DELTA WATER AGENCY c/o John Herrick Attorney at Law 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 jherrlaw@aol.com c/o Dean Ruiz, Esq. Harris, Perisho & Ruiz 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hpllp.com	MODESTO IRRIGATION DISTRICT c/o Tim O'Laughlin Ken Petruzzelli O'Laughlin & Paris LLP 117 Meyers Street, Suite 110 P.O. Box 9259 Chico, CA 95927-9259 towater@olaughlinparis.com kpetruzzelli@olaughlinparis.com
	STATE WATER CONTRACTORS c/o Stanley C. Powell Kronick, Moskovitz, Tiedemann & Girard 400 Capitol Mall, 27 th Floor Sacramento, CA 95814 spowell@kmtg.com	SAN JOAQUIN FARM BUREAU c/o Bruce Blodgett 3290 North Ad Art Road Stockton, CA 95215-2296 director@sfb.org

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<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 dgillick@neumiller.com tshephard@neumiller.com</p>	<p>CALIFORNIA DEPARTMENT OF WATER RESOURCES c/o Erick Soderlund 1416 Ninth Street, Room 1118 Sacramento, CA 95814 esoderlu@water.ca.gov</p>
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