

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

DIVISION OF WATER RIGHTS

ORDER WR 2009 –00XX-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion of Water by

Nelly Mussi and Rudy M Mussi Investment LP

SOURCE: Whiskey Slough

COUNTY: San Joaquin County

YOU ARE HEREBY GIVEN NOTICE THAT:

The State Water Resources Control Board (State Water Board or Board) is authorized under California Water Code section 1831 to issue a Cease and Desist Order (CDO) requiring Nelly Mussi (Mussi) and Rudy M Mussi Investment LP (Mussi Investment) to cease and desist the unauthorized diversion, collection and use of water in violation of section 1052 of the Water code.

Mussi and Mussi Investment are alleged to have violated or are threatening to violate Water Code section 1831, which provides:

The State Water Board is authorized to issue a Cease and Desist Order (CDO) when it determines that any person is violating or threatening to violate any of the following:

- (1) The prohibition set forth in section 1052 against the diversion or use of water subject to division 2 (commencing with section 1000) of the Water Code other than as authorized by division 2.
- (2) Any term or condition of a permit, license, certification, or registration issued under division 2 of the Water Code.
- (3) Any decision or order of the board issued under part 2 (commencing with section 1200) of division 2 of the Water Code, section 275, or article 7 (commencing with section 13550) of chapter 7 of division 7 of the Water Code, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

On {DATE}, and in accordance with the provisions of section 1834 of the California Water Code, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against Mussi and Mussi Investment for the violation and threatened violation of the prohibition against unauthorized diversion and use of water. Pursuant to State Water Board Resolution 2007-0057, the Deputy Director for Water Rights is authorized to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a Cease and Desist Order in accordance with Water Code section 1831 et seq. State Water Board Resolution 2007-0057 also authorizes redelegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights. This authority has been redelegated.

FACTS AND INFORMATION

The facts and information upon which this CDO is based are as follows:

1. 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 basis of water rights of existing diverters within the Delta. The Workplan also identified that, if and when illegal diversions were found, those diversions would be subject to enforcement action and directed to cease diversions, obtain a legal water right, or pursue a contract for water supplies with the Department of Water Resources, United States Bureau of Reclamation, or another party.
2. On February 18, 2009, the Division mailed letters to property owners on Roberts and Union Islands within the Delta. Based on reviews of U.S. Geological Survey maps, aerial photography, and San Joaquin County Assessors Maps, the Division sent letters to each property owner that was determined to have been irrigating in the last few years, and for whom the Division has no record of any basis of right for water diversion. The Division requested that each property owner either: inform the Division within 60 days as to the basis of their right by filing a Statement of Water Diversion and Use with appropriate evidence; define a contractual basis for diversion of water; or cease diversion of water until a basis of right is secured. The letter also informed the contacted property owners that a failure to respond may result in enforcement action.
3. The Division mailed a copy of the February 18, 2009 letter to Mussi, as owners of San Joaquin County Assessor Parcel Nos. 131-400-08, 131-070-02, 131-070-12 and 131-070-13. Mussi Investment filed a Statement of Water Diversion and Use (Statement) on April 20, 2009 for all four parcels. The Statement claims riparian and pre-1914 appropriative rights to irrigate various crops on the subject properties from Whiskey Slough. The Statement identifies a year-round diversion season with the 1800's being the year of first use. The Statement also identifies that water is applied based on crops and climate but the amounts diverted is listed as "unknown."
4. License 6208 (Application 17592) issued by the State Water Board authorizes the diversion of 4.69 cubic-feet per second from April 1 to December 31 of each year from Whiskey Slough to irrigate 375.4 acres within Roberts Island. Mussi's Parcel 131-400-08 contains approximately 40 acres within the place of use of License 6208, but the Mussi's are not shown as an owner of this license. Mussi Investment also did not identify use of this license in its Statement. Parcel 131-400-08 appears contiguous to Whiskey Slough and may have a riparian claim of right when natural flow exists in Whiskey Slough.
5. On September 23, 2009, the Division mailed a certified letter to Mussi at 7217 Howard Road, Stockton, CA 95206-9682 requesting the necessary documentation supporting the rights claimed on the Statement. U.S. Postal Service confirmed delivery of the letter to Mussi on September 24, 2009. The letter advised that the San Joaquin County Assessor's Parcel maps show that these parcels do not have continuity to a surface stream. This lack of continuity indicates that a riparian basis of right typically would not exist. The letter requested that Mussi provide additional evidence to support that a riparian claim for these parcels has been preserved and/or documentation supporting initiation and continuous use of water under the pre-1914 claim of right. The letter warns of potential enforcement if an adequate response is not received.

6. Crop data published by the San Joaquin County Agricultural Commission for 2006 and 2007 and aerial photographs indicate that approximately 217 acres of mixed row and field crops have been cultivated on parcels 131-070-02, 131-070-12 and 131-070-13. Division staff estimates an average 2.5 acre-feet/acre per year is reasonable for the row crops grown in 2006 and 2007. Mussi's calculated water diversion is approximately 543 acre-feet per year using this estimate.
7. By letter dated November 2, 2009, the State Water Board received a letter from Dante J. Nomellini, Jr. stating that his firm was working on providing responses to our letter for additional information. Mr. Nomellini stated he anticipated being able to provide a meaningful response over the course of the next 30 days for Mussi and others. As of December 22, 2009, the State Water Board has not received a response for additional information supporting a basis of right. Acceptable information would include, but is not limited to: a chain of title supporting riparian status for the parcel, any evidence which supports an existing or implied preservation of the riparian right established prior to severance of the parcel from the stream or other riparian parcels, evidence which verifies the first year of irrigation on the parcel prior to 1914 and documents the subsequent continuous use of water, or statements which provide an alternative valid basis of right for diversions of water to the parcel.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the Water Code, Mussi and Mussi Investment shall immediately cease and desist from diverting water to parcels 131-070-02, 131-070-12 and 131-070-13 until the following are satisfied:

- (1) Mussi and/or Mussi Investment shall submit to the Division sufficient evidence establishing a basis of right or a water supply contract to serve parcels 131-070-02, 131-070-12 and 131-070-13. No diversions shall be made to these parcels until Mussi and/or Mussi Investment receives approval from the Assistant Deputy Director for Water Rights to exercise the water right or contract.
- (2) Within 90 days of the date of this Order if no basis of right can be established, Mussi and/or Mussi Investment shall submit a plan showing how and when it will permanently remove the diversion works serving parcels 131-070-02, 131-070-12 and 131-070-13. Mussi and/or Mussi Investment shall diligently take the actions identified in the approved plan.
- (3) Because the portion of the diversions from Whiskey Slough serves Mussi's parcels 131-070-02, 131-070-12 and parcel 131-040-08, and other lands held by other owners, Mussi and/or Mussi Investment shall install an inline flow meter or other device satisfactory to the Division within 90 days of the date of this Order. The inline flow meter or other device shall be capable of registering instantaneous flow and total cumulative flow. Immediately after installation of the meter, Mussi and/or Mussi Investment shall maintain monthly records of the total amount of water diverted at the point of diversion and records of the crop type and acreage served on Parcel 131-040-08 and any other of its parcels served by the pumping facility. Mussi and/or Mussi Investment shall submit these records annually using the new Online Reporting System available online at: <http://www.waterboards.ca.gov/waterrights/>.

Upon the failure of any person to comply with a CDO issued by the State Water Board pursuant to chapter 12 of the Water Code (commencing with section 1825), the Attorney General, upon the request of the State Water Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction. (Wat. Code, § 1845 subd. (a).) Any person or entity that violates a CDO issued pursuant to chapter 12 may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs. (Wat. Code, § 1845, subd. (b).) Civil liability may be imposed by the superior court or administratively by the State Water Board pursuant to Water Code section 1055.

STATE WATER RESOURCES CONTROL BOARD

James W. Kassel
Assistant Deputy Director for Water Rights

Dated:

