

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

ORDER WR 2021-0002-EXEC

In the Matter of

Loren and Dolores Ohm (succeeded by Roncone Properties, LLC)

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 or Board) following the Delta Watermaster's issuance of an Amended Draft Cease-and-Desist Order (Amended Draft CDO) to Loren and Dolores Ohm (Respondent) on June 12, 2020. In accordance with the attached settlement agreement, the Delta Watermaster and Roncone Properties, LLC (Roncone), as successor in ownership to the Respondent, have agreed to settle this matter in lieu of proceeding to a hearing. The issuance of a decision or order pursuant to a settlement agreement is authorized under Government Code section 11415.60.

2.0 BACKGROUND

The Ohm Property is an approximately 112-acre irrigated agricultural property on Roberts Island in the Delta that was owned by Respondent until September 1, 2020, when it was purchased by Roncone. In 2009, Respondent filed an Initial Statement of Water Diversion and Use for diversions of water for use on the Ohm Property. The Board's Division of Water Rights (Division) numbered this statement S016193. In this statement, Respondent claimed rights to divert and use water on the Ohm Property under riparian and pre-1914 appropriative rights.

On January 13, 2010, the Division issued a Draft Cease-and-Desist Order (Draft CDO) to Respondent.² The Draft CDO concerned diversions and use of water on the Ohm

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 settlement agreement states that the Division issued the Draft CDO on May 11, 2011. This date appears to be in error as the cover letter for the Draft CDO is dated January 13, 2010.

Property. Respondent timely requested a hearing on the Draft CDO. The Board did not schedule the hearing because of pending litigation concerning other Delta properties owned by other parties that involved similar issues.

On February 7, 2020, the Board's Executive Director assigned proceedings regarding the Draft CDO to the Administrative Hearings Office (AHO).

On June 12, 2020, the Delta Watermaster, acting pursuant to Water Code section 85230, issued the Amended Draft CDO to Respondent.

On August 27, 2020, the AHO issued a Notice of Public Hearing, which set a hearing to consider the issues raised by the Amended Draft CDO. The AHO scheduled the hearing for January 14 and 15, 2021.

3.0 SETTLEMENT AGREEMENT

After the AHO issued its Notice of Public Hearing, representatives of the Delta Watermaster, the Respondent, and, upon purchase of the property, Roncone, continued to meet and confer to discuss the relevant documents and issues. On December 14, 2020, Roncone and the Delta Watermaster executed a Settlement Agreement with respect to the Ohm Property issues. A copy of this Settlement Agreement is attached hereto as Exhibit A.

After execution of the Settlement Agreement, Roncone and the Delta Watermaster jointly asked the AHO to cancel the hearing on the Amended Draft CDO. The AHO issued a notice cancelling the hearing on December 15, 2020.

The general terms of the Settlement Agreement are:

- (1) Roncone waives its right to hearing on the Amended Draft CDO, waives its right to petition the Board for reconsideration of this Order, and agrees to the terms and conditions of the Settlement Agreement.
- (2) The Delta Watermaster agrees, for purposes of settlement, that the evidence submitted by Respondent and Roncone is sufficient to support the riparian right claim for the Ohm Property.
- (3) Roncone will report diversions of water to be used on the Ohm Property pursuant to its riparian right claim. Roncone will not report diversions pursuant to its pre-1914 appropriative right claim unless Roncone first presents 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 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 Delta Watermaster and Roncone is approved.

STATE WATER RESOURCES CONTROL BOARD

January 27, 2021

Date



Eileen Sobeck
Executive Director

SETTLEMENT AGREEMENT

RONCONE PROPERTIES LLC (FORMALLY LOREN AND DOLORES OHM)

This Settlement Agreement is made this 14 day of December 2020, by and between Roncone Properties LLC, a California Limited Liability Company, as successor to Loren and Dolores Ohm (Ohm), and the State Water Resources Control Board (State Water Board) acting by and through the Delta Watermaster (Watermaster).

RECITALS

AUTHORITY

1. 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 Ohm on or about May 11, 2011 (Draft CDO).

2. 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 Draft CDO alleged that Ohm had 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.”

3. 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.”

4. 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.

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5. Water Code section 1110 established the Administrative Hearings Office (AHO) within the State Water Board. Water Code section 1112, subdivision (a)(2), provides that AHO hearing officers shall preside over hearings involving notices of proposed cease and desist orders under Water Code section 1831.

6. On January 3, 2020, the Deputy Director of the State Water Board's Division of Water Rights (Division), sent a memorandum to the State Water Board's Executive Director, proposing to transfer proceedings regarding the Draft CDO to the AHO. On February 7, 2020, the Executive Director issued a memorandum assigning these proceedings to the AHO.

7. On June 12, 2020, the Division of Water Rights/Office of the Delta Watermaster Prosecution Team (Prosecution Team) issued a revised draft Cease and Desist Order (Revised CDO) to Ohm.

BACKGROUND

8. 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.

9. Pursuant to the Workplan, and based on reviews of U.S. Geological Survey maps, aerial photographs, and San Joaquin County Assessors Maps, on or about February 18, 2009, the Division sent a letter to Ohm as owner of San Joaquin County Assessor Parcel Numbers (APNs) 162-100-01 and 162-120-09 requesting that Ohm file a Statement of Water Diversion and Use or otherwise substantiate the lawful basis for diversion of water to the these properties.

10. On or about April 15, 2009 Ohm filed Initial Statements of Water Diversion and Use for APN 162-100-01 and 162-120-09 (approximately 112 acres) (Initial Statements) claiming

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both riparian and pre-1914 water rights. The Division subsequently assigned identification number S016193 to the Initial Statement related to APN 162-120-09.

11. On September 23, 2009, following review of the Initial Statements, the Division mailed a certified letter to Ohm advising that the San Joaquin County Assessor's Parcel maps show that APN 162-100-01 appeared to have contiguity to the San Joaquin River. The letter of September 23, 2009 also noted, however, that APN 162-120-09 did not have contiguity to a surface stream. APN 162-120-09 is hereinafter referred to as the Ohm Property. The September 23rd letter stated that the lack of contiguity of the Ohm Property to a natural watercourse indicates that a riparian basis of right typically would not exist and requested that Ohm provide additional evidence to support the riparian claims for the Ohm Property and/or documentation supporting initiation and continuous use of water under the pre-1914 claim of right. The September 23 letter warned of potential enforcement if an adequate response were not received.

12. Ohm requested additional time to submit materials in response to the September 23, 2009 letter. On March 1, 2010, Ohm submitted materials purporting to support riparian and pre-1914 claims for diversion and use of water on the Ohm Property, including chain of title documents and historic maps.

13. On May 11, 2011, the Division issued the Draft CDO against Ohm. Thereafter, Ohm timely requested a hearing on the Draft CDO.

14. Following review of the materials submitted by Ohm in 2010, the Division had remaining questions about whether or not the submitted information supported a riparian right for the Ohm Property but did not request additional information from Ohm. Thus, the Draft CDO remained outstanding pending the requested hearing.

15. On March 11, 2020, the AHO issued a Notice of Status Conference for the Draft CDO. Thereafter, the Prosecution Team reviewed all available materials relating to the Draft CDO and concluded that it was unable to locate at least some of the materials submitted by Ohm in 2010.

16. Based on the review of the record of proceedings at the time (including the materials resubmitted by Ohm), the Prosecution Team was unable to identify evidence that adequately defeated the Prosecution Team's contention that severing the Ohm Property from a

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natural watercourse would have ordinarily destroyed the riparian right. Therefore, the Prosecution Team issued a revised Draft CDO (Revised CDO) against Ohm on June 12, 2020.

17. The Revised CDO proposed that Ohm submit to the Watermaster sufficient evidence establishing a basis of right or a water supply contract to serve the Ohm Property, and that no diversions be made by Ohm until approval to exercise the water rights or contracts that substantiate lawful bases for such diversions was received from the Watermaster.

18. After issuance of the Revised CDO, the Prosecution Team met and conferred with Ohm to identify and review the specific deeds in the chain of title that separated the Ohm Property from the main watercourses, the relevant language in those deeds, and relevant extrinsic evidence surrounding the deeds.

19. On May 7, 2020, the Third District Court of Appeal (Court) handed down a 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 the *Tanaka* case.

20. The *Tanaka* case has significant parallel facts and circumstances to this case in that the Ohm Property is located in a similar area of Roberts Island, 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 current Ohm Property from the original larger patented tract of land, which was riparian to several Delta channels.

21. On or about September 1, 2020, the Ohm Property was purchased by Roncone Properties LLC, a California Limited Liabilities Company (Roncone). The members of Roncone are Nicholas Mussi and Nathan Mussi. In order to avoid confusion and maintain the consistency of the administrative record, this Settlement Agreement continues to refer to the Ohm Property, though Roncone is the settling owner of the subject property.

[THIS SECTION INTENTIONALLY LEFT BLANK]

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals and in consideration of the mutual covenants set forth in this Settlement Agreement, Roncone and the Prosecution Team (together, Settling Parties) hereby agree to settle the Revised CDO.

22. Recitals Incorporated. The preceding Recitals are incorporated herein.

23. 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 Ohm Property.

24. Request to Vacate Hearing and Issue Proposed Order. The Prosecution Team and Ohm agree to jointly request that the AHO cancel all future hearing dates and document submittal and appearance requirements, and submit a proposed Settlement Order to the State Water Board to effectuate this Settlement Agreement and finally resolve all issues raised by the Revised CDO.

25. Ohm Property Riparian Connection. It is undisputed between the Settling Parties that (i) the Ohm Property was once part of a much larger parcel of land in San Joaquin County acquired by Stewart, Burton and King in 1878, and (ii) this larger parcel was contiguous to several natural watercourses of the Sacramento-San Joaquin Delta, including the San Joaquin River, Burns Cutoff, Middle River, and Duck Slough.

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26. Ohm Property Separation from Natural Watercourses. The Settling Parties have mutually identified the transaction which separated the land which is now the Ohm Property from surface connection to the natural watercourses. Stewart, Burton and King transferred a 112 acre parcel (eventually the Ohm Property) to Andrea Lagomarsino and Giovanni Queirolo via a deed dated September 24, 1888 and a correcting deed dated September 26, 1888. The 1888 transfer was part of a larger plan to sell off the large landholdings for continued agricultural use as subdivided parcels. Each of the two deeds to Lagomarsino and Queirolo contain the standard language used at the time to convey real property. The deeds include the descriptive words, "...together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining...." Although the deeds do not explicitly specify or contain the words "riparian rights," the quoted language is the same language in the deeds analyzed in the *Tanaka* decision.

27. Extrinsic Evidence of Intent to Convey Riparian Rights. The Prosecution Team agrees that the extrinsic evidence proffered by Ohm supports the contention that the parties to the 1888 deeds intended that the separated parcels would retain proportional and undivided riparian rights which had attached to Stewart, Burton and King's larger parcel under common law.

28. No Determination of Pre-1914 Claim. The Prosecution Team agrees for purposes of this Settlement Agreement that the evidence submitted by Ohm is sufficient to support the riparian claim for the Ohm Property, but contends that Ohm's claim of pre-1914 appropriative rights is inconsistent with the riparian claim and unnecessary in light of the conclusion regarding the riparian claim. Ohm 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 Ohm Property. With regard to the pre-1914 claim, the Settling Parties agree that (i) Roncone 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 Ohm Property 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 Roncone does not, either generally or by this Settlement Agreement, waive or forego its claim of pre-1914 rights to serve the Ohm Property or any other colorable claim to divert and use water on the Ohm Property that may be allowed by law. Roncone's agreement not to assert a claim of a pre-1914 right on any Statement of Diversion and Use for the Ohm Property shall not be construed by the State Water Resources Control Board, or any reviewing court, as a prejudice, forfeiture, waiver or relinquishment, nor shall it be considered evidence of non-use of that right.

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29. 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.

30. 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.

31. Roncone Property Successors Bound. This Settlement Agreement is binding on the successors or assigns of Roncone's ownership of the Ohm Property.

32. 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, Roncone has engaged qualified counsel to represent it in the confidential settlement negotiations leading to this Settlement Agreement.

33. 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.

34. 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.

35. 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

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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.

36. 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.

37. 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.

38. 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.

39. 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.

40. Effective Date. This Settlement Agreement shall become effective immediately upon issuance of the State Water Board's Settlement Order.

41. Choice of Law. This Settlement Agreement shall be interpreted and governed by the law of the State of California.

42. Authorization. Each Settling Party warrants that the individual executing this Settlement Agreement on behalf of such party is duly authorized to do so.

43. No Waiver of Other Requirements. Nothing in this Settlement Agreement or the Settlement Order approving it shall excuse Roncone from applicable legislation, regulation, order or any other requirements or restrictions imposed by the State Water Board.

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[SIGNATURES ON FOLLOWING PAGE]

Dated: 12/14/2020

Signature on File
Michael Patrick George
Delta Watermaster

Ronccone Properties, LLC

Dated: 12/10/2020

Signature on File
Nicholas Mussi
Member

Dated: 12/10/2020

Signature on File
Nathan Mussi
Member