

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

DIVISION OF WATER RIGHTS

ORDER WR 2009-0079-DWR

CEASE AND DESIST ORDER

In the Matter of Unauthorized Diversion of Water by

Rudy Mussi, Toni Mussi and Lory C. Mussi Investment LP

SOURCE: Middle River

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 requiring Rudy Mussi, Toni Mussi and Lory C. Mussi Investment LP (Mussi) to cease and desist their unauthorized diversion, collection and use of water in violation of section 1052 of the Water Code.

Mussi is alleged to have violated or is 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 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 CDO 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 Plan 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 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 Rudy and Toni Mussi, as owners of Assessor Parcel 131-170-03. Lory C. Mussi filed a Statement of Water Diversion and Use on April 20, 2009 for parcel 131-170-03 on behalf of Lory C. Mussi Investment, LP. The Statement claims riparian and pre-1914 appropriative rights from Middle River to irrigate various crops on the subject property. The Statement identifies year-round diversion 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 annual amount diverted is unknown.
4. On September 23, 2009, the Division mailed a second letter by Certified Mail (Certification # 7001 0320 0001 1831 6337) to Mussi at 3580 Muller Road, CA 95206. U.S. Postal Service confirms delivery of the letter on September 24, 2009. The letter advised that existing evidence available to the Division supports Mussi has diverted water during recent years to irrigate crops on parcel 131-170-03 located on Roberts Island. The San Joaquin County Assessor's Parcel maps and aerial photographs both show that the parcel does not have continuity to a surface stream. This lack of continuity indicates that a riparian basis of right typically would not exist. The letter also requested that Mussi provide additional evidence to support the riparian claim for the non-contiguous parcel 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.
5. Crop data published by the San Joaquin County Agricultural Commission indicate 64.8 acres of alfalfa and corn were grown in 2006 and 2007 on the parcel. According to the 1980 California Department of Water Resources publication "*Crop Water Use in California*," corn has an estimated annual water consumption use of 3.2 acre-feet per acre. Alfalfa demand is greater. Conservatively, the minimum annual consumptive use of water for irrigation by Mussi for the 64.8 acres would be approximately 207 acre-feet.

6. As of December 10, 2009, the Division has not received a response to the September 23, 2009 letter, nor any new evidence in support of a basis of right for Mussi's diversions. 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 shall immediately cease and desist diverting water to parcel 131-170-03 until the following are satisfied:

1. Mussi shall submit to the Division sufficient evidence establishing a valid basis of right or an existing water supply contract to serve the property. No diversions shall be made to this parcel until Mussi 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 rights can be established, Mussi shall submit a plan showing how and when it will permanently remove the diversion works serving parcel 131-170-03. Upon approval of the plan by the Assistant Deputy Director for Water Rights, Mussi shall diligently take the actions identified in the approved plan.

In the event that Mussi fails to comply with the above requirements, Mussi shall be in violation of this CDO and subject to monetary penalties and further enforcement actions as described below:

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

Date: