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March 12, 2010

Via US Mail and e-mail dheinrich@waterboards.ca.gov

Ms. Dana Heinrich
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

Re: Gallo Vineyards, Mark and Valla Dunkel, Rudy Mussi et al., and
Yong Pak and Sun Young Cease and Desist Order Hearings

Dear Ms. Heinrich:

I represent three of the parties (Mussi, Pak, and Dunkel) for whom CDO hearings have been set on May 5, 2010. I have received a copy of Mr. Petruzzelli's letter of March 10, 2010, wherein he asks for all materials related to the ongoing investigations of water rights in the southern Delta. He also asks for you or the Board to allow him additional time to submit "testimony, exhibits, and lists of exhibits" beyond the current deadline of April 1, 2010.

Mr. Petruzzelli's letter raises some very serious issues that affect my clients' ability to adequately defend themselves and to get a fair hearing before the Board.

I hereby request that I also receive a copy of all materials you intend to provide to Mr. Petruzzelli, and request that the hearing be indefinitely postponed for the following reasons.

First, Mr. Petruzzelli references communications with Board members on the pending matters. I have previously raised the issue of inappropriate communications by some parties with Board members who will be sitting as judges in these matters. My concern appears to be justified given the statements in his letter. If Board members have had discussions with some of the parties regarding the merits of these issues (which I suspect have occurred), then they should recuse themselves and not take part in any adversarial proceeding.

I am certainly aware of the Board's rules that such communications are not to occur after notices of hearing are sent out. Whether or not the discussions occurred before or after (or both) the notices went out, the "judges" should not be gathering information and entertaining

arguments on the merits of issues they know will come before them. No Board member has ever asked for my input prior to the notices going out, but I suspect Board members have discussed these water right issues with counsel for those requesting intervention. I hereby request that the Board members disclose all communications they have had with parties or counsel in these water right matters, including but not limited to calendars and phone records (both land line and cell) in order that we may determine what level of communications has occurred.

Any communications with Board members are likely for one of two purposes; either to discuss/influence potential Board actions under its quasi-legislative duties, or to discuss/influence potential Board actions under its quasi-judicial duties. My initial investigation reveals that none of the counsel for the parties which seek to intervene is a registered lobbyist, which suggests that direct communications regarding quasi-legislative duties are not being discussed.¹ Discussions regarding potential and known quasi-judicial duties immediately raise the issue of ex parte communications and undue influence. As I have previously stated, since the Board controls when a notice of hearing goes out, it controls when such ex parte communications should end (under their own rules). Such a situation is rife with the potential for abuse. Board members can have detailed, in depth and frequent discussion with one party, and then cut off the possibility of discussion with another by simply having the notice issued.

Consequently, until we can determine the amount, frequency and timing of such communications, we cannot determine the need for, or extent of motions to recuse some or all of the Board members from participation in these water right matters. The investigation will likely include subpoenas and depositions which certainly cannot be concluded before either the April 1 or May 5 deadlines. Therefore, the hearings must be continued.

Second, Mr. Petruzzelli seeks the ability to submit information after the April 1 deadline, after he has been allowed to review all materials in the Board's possession relating to these matters. In light of this, and my request to also receive copies of such materials, there is no way we can adequately prepare for our testimony. Further, and contrary to Mr. Petruzzelli's assertion, we cannot be given two weeks to review their materials before the hearing while they have four weeks to review ours. Even Mr. Petruzzelli would have to agree to this, the barest of fairness.

Third, it is clear that the basic information regarding the facts and law of these cases has yet to be discussed with staff. Once we all get all the relevant information staff and I can jointly examine it and likely resolve most if not all of the cases now being considered. We have moved

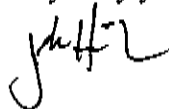
¹ Briefly, the California Government Code (Section 82039) defines a lobbyist as one who receives a certain amount of compensation to communicate directly with any elected official or agency official for the purpose of influencing administrative action.

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beyond the sparse, inadequate and misleading information previously submitted by Mr. Petruzzelli's office; now knowing that rather than there being "illegal irrigations" on "thousands of acres" most of the area's water rights are clear. As such we should be able to move forward and actually accomplish something. Only after such a process can we decide if hearings are necessary to resolve the few issues on which we cannot agree.

Please feel free to contact me if you have any questions.

Very truly yours,



JOHN HERRICK

JH/dd

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