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VIA ELECTRONIC MAIL AND U.S. MAIL

Holly Geneva Stout, Esq.
California Water Commission
P.O. Box 942836
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cwc@water.ca.gov

RE: Notice of Department of Water Resources' Intention to Condemn, DWR Parcel Nos.
YBSH-148, YBSH-150

Dear Ms. Stout:

I am an attorney for the United States Department of Agriculture, and I represent the Natural Resources Conservation Service (NRCS) in the above-referenced matter. We are in receipt of the California Water Commission's August 22, 2022 communication to Dean Kwasny, notifying NRCS of the Department of Water Resources' (DWR) intention to pursue condemnation of the NRCS's real property interests in Assessor Parcel Numbers 033-220-052 and -054 (Lucky Five Farm property), and 033-220-007, -008, and -009 (EIP California LLP property). By this letter, the United States of America, as record owner of perpetual conservation easements over the aforementioned parcels and other parcels in the Yolo Bypass, objects to the DWR's efforts to condemn a federally held property interest.

The fee title to the properties at issue are currently held by Lucky Five Farm, a Co-Partnership, and EIP California LLC, respectively. The United States of America, by and through the NRCS, acquired a perpetual conservation easement over the Lucky Five Farm property in 2006 under the Wetlands Reserve Program (WRP), Title XII of the Food Security Act of 1985, as amended (16 U.S.C. § 3837), and through this acquisition holds the vast majority of the rights to the property. Similarly, the United States of America, by and through the Agricultural Stabilization and Conservation Service, a predecessor of NRCS, acquired a perpetual conservation easement over the EIP California LLC property from Laurel G. Ranch Corporation in 1993 under the same program, and thus holds the vast majority of the rights to that property as well. While the WRP has since been replaced by the Agricultural Conservation Easement Program (ACEP) under the Agricultural Act of 2014, Pub.L. 113-79, pursuant to the ACEP Interim Rule, easement lands previously enrolled under the Wetlands Reserve Program, including the subject conservation easements, are considered enrolled in ACEP and are subject to the same long-term stewardship and management policies and implementation funding sources as current ACEP easement acquisitions. 7 CFR 1468. Under the subject WRP easements, the NRCS has restored the lands

on both properties and actively works with the private landowners to manage and maintain the properties as wetlands and wildlife habitat.

As a preliminary matter, the Commission's August 23, 2022 notice asserts that DWR has mailed written offers to the landowners to purchase easements for the Yolo Bypass Salmonid Habitat and Fish Passage Project on the subject properties. While DWR has been in regular discussions with NRCS related to its desire to acquire flowage easements over the subject properties, no offer of purchase has been made specifically to NRCS, and in any event, NRCS policy governing Agricultural Conservation Easement Programs, including WRP easements, as outlined in Title 440 of its Conservation Program Manual (CPM), Part 528 ("ACEP Manual") does not allow for the sale of property rights encumbered by an NRCS conservation easement for monetary value, and therefore no offer of purchase would have been entertained.

While DWR has suggested that it intends to acquire, through condemnation or otherwise, flowage easements on the subject properties *from the underlying fee title owners*, those efforts will fail because the flowage rights that DWR seeks are owned by the United States of America under the WRP easements, and not by the underlying fee title owners. As the granting clause in the WRP easement deed on the Lucky Five Farm property, attached hereto as Exhibit 1, clearly demonstrates, the Grantor granted and conveyed to the United States "all rights, title and interest in the lands comprising the easement area ... reserving to the Landowner only those rights, title and interest expressly enumerated in Part II. *It is the intention of the Landowner to convey and relinquish any and all other property rights not so reserved*" (emphasis added).

Part II of the WRP deed enumerates all the rights reserved by the Grantor under the conservation easement, including record title, quiet enjoyment, control of access, recreational uses, and subsurface resources. There is no reservation to the Grantor for flooding or flowage rights, or for any application of water to the property, and in fact, the WRP deed at Part III, A, expressly conveys those rights to the United States:

A. Prohibitions. *Without otherwise limiting the rights of the United States acquired hereunder*, it is expressly understood that the rights to the following activities and uses have been acquired by the United States and unless authorized by the United States under Part IV, are prohibited of the Landowner on the easement area:

6. diverting or causing or permitting the diversion of surface of underground water into, within, or out of the easement area by any means.

Further, in Part V., A. of the WRP deed, the United States has acquired the explicit right to undertake "any activities to restore, protect, manage, maintain, enhance, and monitor the wetland and other natural values of the easement area," and to "apply to or impound additional waters on the easement area in order to maintain or improve wetland and other natural values." Similar provisions appear in the 1993 WRP deed on the EIP California LLC property, attached as Exhibit 2. *See, e.g.*, Granting Clause ("the Landowner does hereby grant and convey to ASCS all right, title and interest in the property described in Part II, Paragraph A, including appurtenant rights of access.... Those rights specified in Part III, Paragraph D are reserved to the landowner...."); Part III, D ("The Landowner shall have the right to quiet enjoyment of the

easement area and to control access by the general public consistent with the terms of this easement and the WRP regulations”); Part III, F. Prohibitions, at Paragraphs 3 (“No alteration of the hydrology on the easement area may be done”) and 4 (“No alteration of the wildlife habitat or other natural land features of the easement area may be done”).

Given that on both properties the underlying fee title owners have not retained any rights to flood the property, DWR would not be able to acquire or condemn flowage easement rights from those landowners. All flowage rights on the properties, except those held by the Sacramento-San Joaquin Drainage District through historic easements, are currently held by the United States of America by and through the NRCS, and therefore DWR lacks any legal basis to condemn those property rights.

Because it is a federal agency, NRCS’s interests in the conservation easement are not subject to purchase or condemnation. *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 404 (1917) (“state laws, including those relating to the exercise of the power of eminent domain, have no bearing upon” federal lands); *see also City of Sacramento v. Sec’y of Hous. & Urban Dev. Of Washington, D.C.*, 363 F. Supp. 736, 737 (E.D. Cal. 1972) (noting “the fundamental proposition that property belonging to the United States, whether used for “governmental” or “non-governmental” purposes, cannot be condemned without Congress’ consent”); *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009) (“A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. Moreover, a waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.”). Because the United States has not waived its sovereign immunity with respect to actions brought to condemn property held by the NRCS under the WRP or ACEP, the property interests at issue cannot be acquired by DWR via condemnation, and any condemnation action the State or DWR may file against the NRCS in state court would be removed to federal court, where it would in turn likely be dismissed for lack of subject matter jurisdiction.

Rather than improperly attempting to pursue condemnation of the federally-owned interests in the subject properties, DWR would need to work with NRCS and the underlying landowners if its flowage easement objectives are going to be achieved. As holder of the flowage rights over the properties, the NRCS would need to determine that the proposed use is compatible with the WRP deeds, and then issue a compatible use authorization *to the landowner* under the terms of the deeds and applicable regulations. *See, e.g.*, Exhibit 1, Lucky Five Farm WRP deed at Part IV; *see also* 7 CFR 1468.38(d) (“NRCS may, in its sole discretion, authorize the landowner to conduct compatible uses as defined in this part on the easement or contract area. Compatible use authorizations are time-limited and may be modified or rescinded at any time by NRCS”); ACEP Manual at 440 CPM 528.152(A)(2)). If the proposed use could not be authorized under the terms of the WRP deeds, NRCS would need pursue an easement administrative action to modify the existing WRP deeds and/or subordinate its easement rights to allow the conveyance of flowage rights to DWR, once it has determined that the statutory and regulatory requirements for modifications and/or subordinations are met. *See* 16 USC § 3865d(c); 7 CFR 1468.6. In both cases, however, Landowner participation and consent is required, and for easement administrative actions, it is statutorily required. *See* 16 USC § 3865d(c)(4) (“Consent. The Secretary shall obtain consent from the landowner and eligible entity, if applicable, for any

subordination, exchange, modification, or termination of interest in land, or portion of such interest, under this subsection”); *see also* 7 CFR 1468.6(a)(6); ACEP Manual at 440 CPM 528.170 (B)(3)(ii).

NRCS is currently reviewing DWR’s site specific hydrologic data to assess the compatibility of the flowage practices DWR seeks to implement with NRCS’s respective WRP easements and we have a number of concerns. Under DWR’s proposed flowage easements, a perpetual right-of-way would be acquired for the purposes of seasonal floodplain fish rearing habitat and fish passage in the Yolo Bypass. While not mentioned in the proposed easement, this proposal appears to be based on Alternative 1 – environmentally preferable alternative – presented in the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project (Project) Environmental Impact Statement/Environmental Impact Report (EIS/EIR). Alternative 1 would allow flows up to 6,000 cfs, depending on Sacramento River elevation, through the gated notch in the Fremont Weir.

Our first concern with the language in the proposed flowage easement is that it would provide DWR the right for the flowage of water as may be required for the present *and future* permitted construction and operation of fish passage and floodplain restoration projects. NRCS cannot make a compatibility determination on future permitted construction and operation of the fish passage and floodplain restoration project that amounts to a change in the Project not previously analyzed. Any future changes to operation of the Project, including an increase in flow through the Fremont Weir from the proposed 6,000 cfs, would require additional environmental analyses. Such a future Project would also require an additional compatibility determination by NRCS, but this cannot occur until such an alternative has been sufficiently analyzed in a future environmental analysis, which would allow NRCS to ensure that proposed future modifications do not impact our conservation interests in the easement properties. For this reason alone, the proposed flowage uses as currently described in the DWR easements are overbroad and overly burdensome, and could not be deemed compatible with the WRP easements.

Our second concern is the overly burdensome language of the flowage easement that includes the right to flow water and materials and *by said flow erode; or place or deposit earth, debris, sediment, or other material*. This language places the responsibility for remediation of any environmental damage caused by DWR flowage operations upon the underlying landowner when trash is deposited or when earth, debris, sediment or erosion damages the wetland infrastructure needed to manage and maintain wetland habitat on the conservation easement properties. While NRCS understands that the Yolo Bypass floods under current operations and has the potential to already erode, place or deposit earth, debris, sediment and other material under existing flood flowage easements, DWR’s proposed use will incrementally increase the frequency and volume of flooding from current baseline conditions without any consideration of the potential impacts to the underlying landowner’s management and use of the property, nor to the NRCS’s investment in the seasonal wetland and upland habitat restored on the conservation easements.

Given these significant concerns with the flowage practices described in DWR’s proposed flowage easements, we request that DWR reinitiate discussions with NRCS and the affected fee title owners to seek agreement on reasonable compensatory measures to ensure that flood flows

are managed to produce the desired fish benefits while not unreasonably interfering with the purposes, habitat, and infrastructure of the NRCS conservation easements and the landowners' use and enjoyment of the properties.

The NRCS has been engaged in discussions with DWR for nearly two years to find a mutually agreeable and beneficial solution that addresses DWR's need to utilize the properties while still protecting the WRP easements and involving the underlying fee title owners, as their participation and consent in any solution would be required under the WRP deeds and the ACEP statute, regulation and policy. NRCS is interested in continuing to explore all possible solutions which would meet these requirements and allow DWR to obtain the requisite authorizations to effectuate its salmonid habitat restoration and fish passage project.

Please let Dean Kwasny, NRCS Easement Programs Specialist, know if you have any questions related to this letter or the status of the ongoing discussions with DWR. Mr. Kwasny can be reached at Dean.Kwasny@usda.gov or by phone at (530) 304-2355.

Regards,



Ritu Ahuja
Attorney

cc: Dean Kwasny, NRCS